

Families of Backsliding Democracies: Unhappy in their own way?

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The paper, which is part of a broader project studying the mechanics and root causes of democratic backsliding and their possible relevance for Israeli democracy, explores similarities and differences between specific legislative and administrative measures taken or contemplated in three clusters of states, which could conceivably be presented on a spectrum of backsliding from liberal democracy – (1) Poland and Hungary – two EU member states that retain democratic institutions, but whose governments have been able to change significantly the balance of power between branches of government and to decrease the space available to criticism and opposition to government policies and to certain conservative values supported by the government (such countries are sometime regarded as illiberal or anti-liberal democracies); (2) Israel - a state which retains democratic institutions, but where elements in government have been attempting, with partial success, to change the balance of power between the branches of government and to curb criticism and opposition; and (3) Turkey, Russia and Venezuela – states that preserve some democratic institutions but no longer allow meaningfully competitive elections, practice open repression against political opponents and have left very little civic space for criticism and dissent. The present paper focuses only on comparing certain measures taken in the first two clusters of countries and presents some tentative conclusions about democratic backsliding in the three states.

Our concern in this paper is not with the overall assessment of the situation in backsliding democracies, or on studying the populist ideology inspiring and, at times, facilitating the backsliding. Instead, we focus on some of the mechanics of potential backsliding – i.e., on three sets of seemingly illiberal measures adopted or contemplated in what appear to be backsliding democracies: Measures directed at limiting the power of the judiciary, measures for restricting the operation of civil society organization, and measures directed at curbing dissent to governmental policies in the media and the academia. While these measures are not the only illiberal measures adopted or contemplated by backsliding democracies, or which characterize the process of backsliding, they do appear to be intimately tied to key populist tenets and impulses that underlie the process of backsliding – the empowerment of a political majority which allegedly fully captures the sentiment of ‘the people’, at the expense of counter-majoritarian institutions as courts and other elite institutions and sources of public criticism. Given the profound impact such measures have on human rights, political pluralism

and the robustness of democratic institutions, their adoption constitutes, in itself, an important part of the process of backsliding. In other words, the three sets of measures reviewed are both symptomatic and constitutive of democratic backsliding.

Our hypothesis is that some degree of similarity can be identified in measures taken or contemplated by the three countries, despite the many differences between their legal systems, historical contexts, political cultures, and stages of backsliding. This begs the question of whether political elements in these countries share a worldview with one another, or operate in accordance with a similar political logic (and if so, what are the key features of such an alternative philosophy or logic)? Another question raised is whether the pathologies of democratic backsliding share common features, thus enabling us to make predictions about their progression, and perhaps identify timely methods of political and legal intervention in order to slow down backsliding or reverse its course. The answers to such questions may help liberal forces at the international level develop strategies to address the challenges posed by global democratic backsliding trends.

I. Hungary, Poland and Democratic Backsliding

Much has been written in recent times about democratic backsliding in Hungary and Poland. One may recall in this connection Andrew Moravcsik's explanation of international human rights law as a 'lock-in' mechanism designed to prevent the backsliding of new democracies back to tyranny,¹ and his claim that in the 1990s new democracies in Central and Eastern Europe used international commitment to lock-in their transition to democracy.² Still, both Hungary and Poland appear to have embraced in recent years legal and political measures

¹ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *International Organization* (2000) 217, 228 ("From this perspective, human rights norms are expressions of the self-interest of democratic governments in "locking in" democratic rule through the enforcement of human rights. By placing interpretation in the hands of independent authorities, managed in part by foreign governments—in other words, by alienating sovereignty to an international body—governments seek to establish reliable judicial constraints on future nondemocratic governments or on democratically elected governments that may seek (as in interwar Italy and Germany) to subvert democracy from within. In the language of international relations theory, this "two-level" commitment "ties the hands" of future governments, thereby enhancing the credibility of current domestic policies and institutions.⁴¹ Salient and symbolic international constraints serve as signals to trigger domestic, and perhaps also transnational and international, opposition to any breach of the democratic order. Thus, democratic regimes seek to prevent political retrogression or "backsliding" into tyranny").

² *Ibid.*, at 245-246.

calling into question their level of commitment to liberal democracy, and leading in both cases to the initiation of voting suspension proceedings under article 7 of the EU Treaty for seriously breaching EU values – the only two cases in history in which this procedure has been invoked.³ The democratic backsliding of Hungary and Poland is also reflected in international democracy indexes – Between 2010 (the year of Orban’s return to power) to 2018, Hungary has dropped in the Freedom House Political Liberties Index from category 1 to category 3 (out of 7); Poland also dropped in the Freedom House Civil Liberties index from category 1 to 2, between 2014 (the return to power of the Law and Justice Party) and 2018. In the 2017 Economist Democracy Index, Hungary dropped to 56th place in the world from 43rd place in 2010, and is designated as ‘flawed democracy’ with largely unfree press. Poland is ranked in the same index in 53rd place (down from 40th place in 2014), and is similarly designated as a ‘flawed democracy’ with largely unfree press.

This trend of decline appears to correlated to a deluge of legal and administrative measures adopted by the Fidesz government in Hungary after 2010 and the Law and Justice government in Poland in 2014. These measures, often highly technical and nuanced in their contents and mode of application, result, inter alia, in weakening of the judiciary and other counter-majoritarian institutional ‘gatekeepers’, restricting the operations of civil society organizations and curbing free speech in the media and academia. The sub-section below provides rudimentary details on key measures taken in this respect in Hungary and Poland during the relevant periods of time against the judiciary, CSOs and media and academia. Other measures, relating to curbing non-judicial gate keepers, limits on immigration,⁴ the fight against corruption,⁵ restriction of reproductive rights,⁶ regulation of culture and minority

³ See European Parliament Press Release, Rule of law in Hungary: Parliament calls on the EU to act, 12.9.18, <http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act>; European Parliament Press Release, Rule of law in Poland: Parliament supports EU action, 1.3.18, <http://www.europarl.europa.eu/news/en/press-room/20180226IPR98615/rule-of-law-in-poland-parliament-supports-eu-action>.

⁴ Elżbieta M. Goździak , Péter Márton Where the Wild Things Are: Fear of Islam and the Anti-Refugee Rhetoric in Hungary and in Poland, Central and Eastern European Migration Review (2018)

⁵ See “Decision No. 1104/2012 (IV. 6) on the Hungarian government actions against corruption and the adoption of the Corruption Prevention Programme of the Public Administration

⁶ Human Rights Watch, Eroding Checks and Balances: Rule of Law and Human Rights Under Attack in Poland (2017)

rights, and other illiberal agendas exceed the scope of the present paper. We believe, however, that they all stem from the populist⁷ and illiberal impulses, recently described by Matthias Kumm⁸ as involving the following four features: (1) Anti-pluralism;⁹ (2) rejection of the legitimacy of procedures and institutions that come between the will of the people and political decision making; (3) rejection of the influence on the political process of non-citizens and international institutions; and (4) re-imagination of the people as an homogeneous group excluding minorities.

1.1. Measures designed to weaken the power of the judiciary

Both Hungary and in Poland feature judicial systems comprised of several important bodies: Constitutional Court, Supreme Court, and other courts. Since the fall of communism, Hungarian and Polish courts have played a significant role in cultivating the culture of democracy in the two post-communist states. They have enjoyed a reputation for independence and professionalism and have not hesitated to criticize the government's actions and to protect human rights. In recent years, it seems that measures have been taken in both countries to clip the wings of the said apex courts by: (a) limiting their authority, (b) increasing political influence over the appointment and dismissal of judges; (c) publically censuring courts and judges. These measure have dealt a blow, separately and jointly, to the independence and public standing of the judicial systems in Hungary and Poland.

Measures adopted in Hungary

- Courts barred from relying on decisions adopted under the pre-2011 Constitution;
- Courts instructed to start the interpretation of statutes from the reasoning notes appended by parliament to legislation.

⁷ The meaning of the term 'populism' has been subject to considerable controversy. It is often understood as a 'thin ideology' that focuses on the contrast between common peoples and elites. Stanley, Ben, "The Thin Ideology of Populism", 13 *Journal of Political Ideologies* (2008) 95, 107; Cas Mudde and Cristóbal Rovira Kaltwasser *Populism: A Very Short Introduction* (2017, Oxford: Oxford University Press) 5. The term has used however also to describe demagoguery, opportunism, broad political participation and adulation of charismatic leaders.

Among the most oft cited definitions of the term one can find -

⁸ Matthias Kumm, How Populist Authoritarian Nationalism Threatens Constitutionalism, or: Why Constitutional Resilience is a Key Issue of our Time, *Verfassungsblog on Matters Constitutional*, 6.12.18, <https://verfassungsblog.de/>.

⁹ See also Jan-Werner Mueller, *What is Populism?* (2016) 3.

- Constitutional Court barred from reviewing certain fiscal-budgetary legislation.
- *Actio popularis* review abolished, substituted by a narrower procedure of constitutional complaints.
- Judicial appointments made by Parliament (by a two third majority) without meaningful involvement of the political opposition.
- Election of President of the Constitutional Court transferred from the Court to Parliament (by a two thirds majority).
- New Administrative National Judicial Office established with critical influence on judicial appointments, promotions and dismissal of judges. The President of the National Judicial Office, who is elected by Parliament (by a two thirds majority), has the power to reassign cases submitted to one court to a different court.
- Increase in the number of judges.
- Retirement age lowered from 70 to 62.
- President of Supreme Court removed after new legislation introduced a five-year judicial experience in Hungary requirement.
- The mandate of judges “unworthy of their office” may be terminated by the plenary of the Constitutional Court.
- Decisions of the Constitutional Court to strike down legislation routinely overturned through constitutional amendments.

Measures adopted in Poland

- The addition of two Supreme Court chambers for disciplinary affairs and “Extraordinary Control and Public Affairs” (to hear election cases), whose judges will be new appointees and lay jurors (appointed by parliament).
- The President of the country is given the power to set the judicial procedure of the Supreme Court, and the Minister of Justice is given the authority to set judicial procedure for lower courts and make temporary regulations for a two-year period.
- Legislation passed requiring that the constitutional court would hear cases in the order in which they were received.
- Legislation passed leading to a change in the composition of panels that reviews the constitutionality of parliamentary legislation from nine out of 15 to 11 out of 15. In addition, legislation stating that the number of judges required to annul laws shall be

raised to a two-thirds majority of the expanded panel (this was cancelled and a regular majority rule was restored after the Venice Commission intervened).

- Legislation passed allowing for deferral of the hearing of an appeal for half a year at the request of four judges.
- Refusal to publish the Constitutional Court's ruling regarding the unconstitutionality of the parliament's decision regarding judicial appointments, and promoting legislation allowing the Prime Minister to prevent the publication of constitutional rulings.
- A change in the appointment process of judges serving on the judicial appointments committee (Whereas in the past, the committee was comprised of 15 judges appointed by their peers, the amendment to the law stipulates that judges are to be appointed to the committee by parliament).
- Legislation passed requiring that that at least three candidates would be presented to the President of the State when appointing the President of the Constitutional Court (before that only two candidates were presented), and gives Court Presidents the power to determine the distribution of cases among the judges.
- Legislation passed shifting the power to appoint Presidents of the lower courts from the judicial system to the Minister of Justice.
- Legislation passed giving the Minister of Justice extensive authority to dismiss and appoint presidents of courts, and stipulating that the judicial appointments council has the power to veto the decision by a two-thirds majority only. The Minister of Justice was also given 'punitive authority', including the authority to cut the allowance of a court president by up to 50 percent for a period of up to six months.
- Legislation adopted, lowering the retirement age from 70 to 65. (In November, the Polish parliament approved a law allowing judges who had been forced to leave to return to their positions).
- A judge that publically criticized the government was ousted by being forced to use his vacation days.
- Refusal to swear in judges who were appointed by the previous government, towards the end of its term, and the appointment of other judges in their place.

- Legislation passed giving the President of the state and the Minister of Justice the authority to submit a complaint against a judge of the Constitutional Court — which can, in some cases, lead to his or her dismissal by parliament.

1.2. Measures designed to weaken civil society organizations

Before the Fidesz party rose to power in Hungary, and before the Law and Justice party rose to power in Poland, vibrant civil society organizations existed in both countries. A series of measures taken in recent years both in Hungary and in Poland proved detrimental to the work of these organizations. First, Hungarian organizations pursuing certain agendas opposed to by the government were financially harmed due to the taking away of their tax benefits, imposing a tax on donations made to them, or imposing other restrictions and so called “transparency requirements” on donations from “foreign entities.” Second, efforts were made in both countries through legislation and public stigmatization to label activists in civil society organizations as serving the interests of foreign states. Such labeling was used to further justify legislative measures taken against them, and to nurture public opinion that equates criticism by these organizations of the government’s actions with an intent to harm the state.

Measures taken in Hungary

- In 2014, certain organizations were required to publish their internal financial documents. That same year, the government asked the police to begin an investigation against several organizations on suspicion of tax fraud. In 2015, the government launched an “anti-corruption” program that included among other things, a transparency requirement for civil society organizations and demanded that their directors submit an affidavit on their personal assets.
- In 2017, a law was passed with several provisions regarding civil society organizations (making exceptions for political, sports, and religious organizations, among others): Organizations receiving foreign funding would be registered as such, and this would be noted upon every official document they issue. Such organizations would provide personal information about donors, including private donors. They are also required to report their income on an ongoing basis. Organizations refusing to do so would be subject to sanctions.

- In 2018, a series of amendments to the law known as the “Stop Soros package” were passed. Among other things, the new regulations imposed a special tax on human-rights organizations aiding asylum-seekers, and designated certain acts of physical assistance to migrants as felonies in Hungary.

Measures taken in Poland

- Following an amendment to a 2003 law and the creation of a new law, two bodies were created to supervise the work of civil society organizations: The Committee for the Public Benefit and the Center for the Development of Civil Society. These two bodies are responsible for government funding of civil society organizations and for cooperation between such organizations and government agencies. The law stipulates that government support shall be given to non-profit associations that promote Christian or traditional values. Since these two bodies were establishment, civil society organizations that are defined by the government as “not sufficiently Polish” are discriminated against.
- Demonstrations against the Polish government were organized following the passing of legislation on CSOs. The government, in turn, criticized the demonstrators very harshly. High-ranking politicians called the demonstrators names such as “scum,” “traitors,” and “Poles of the worst sort.” They asserted that the demonstrations were part of a conspiracy of Europeans, foreign agents who had been sent by George Soros.
- A law was passed forbidding demonstrations from being held in a place commemorating any important event in Polish history.

1.3. Measures designed to limit Freedom of Expression in the Media and Academia

Several restrictions on media operations intended to control freedom of expression in Hungary and Poland occurred after 2010 and 2014, respectively, in a systematic way: First, by controlling public broadcasting corporations and through large-scale dismissals of journalists who did not adhere to the “correct” ideology, and second by appointing a National Media Council that could impose fines and other penalties, on the basis of the extensive powers that it was granted. The third method of control consisted of severe criticism and threats by government officials against journalists, and the fourth involved using laws outlawing any criticism or the questioning of certain national narratives. Additional examples of limiting speech can be found with regard to academic institutions, where funding,

licensing and public criticism were used by governmental authorities to discourage critical attitudes.

Measures taken in Hungary

- The fourth amendment to the Constitution supported by the Hungarian government requires, among other things, that freedom of expression shall not be used in order to dishonor the Hungarian people.
- The Hungarian parliament passed two laws in 2010: The Media Law and the Media Package Law. An additional series of laws was passed in 2015. According to the new legislation, media outlets are required to provide “balanced” coverage and make a clear distinction between “opinion” and “fact.” Journalists are now required to reveal their sources in certain circumstances without giving them the legal protection they used to have. They must also show the interviewee — in advance, and at his or her request — the interview in which he or she participated. The interviewees may stop the publishing of the article in the media by claiming that their statements were taken out of context.
- A government news agency has been established, which provides news services to media companies, who heavily rely on government press releases in their broadcasting.
- The new laws give far-reaching powers to the government body known as the National Media Council. According to the law, Council members are appointed by parliament for a nine-year term, and the head of the council is directly appointed by the Prime Minister. The head of the Council has the authority to propose the appointments of all heads of public broadcasting in Hungary.
- The Council has the power to impose fines and sanctions upon media outlets (including bloggers) that are considered “biased” or “unbalanced.” The power given to the government body also allows it to close media outlets that disobey the law.
- A legislative amendment to the Higher Education Law was introduced with the aim of preventing the Central European University – a leading academic institution in Europe - from operating in Hungary, by setting new requirements for universities supported by foreign funds that operate in Hungary— i.e., a requirement that a university supported by “foreign funds” propose a curriculum as part of a campus that would operate in the country where the funding came from. Recently, the university

announced that in the face of the failure by the authorities to ascertain that all requirements demanded from it were actually met, it was stopping admitting new students for studies in Hungary and opened a branch in Vienna instead.

- In August 2018, it was reported that Orban had ordered the closing down of gender studies departments in public universities on the claim, made by a government spokesperson, that “We have no financial need for such studies.”

Measures taken in Poland

- Legislation passed making it a criminal offense and a civil tort to claim that Poland was responsible for the Nazis’ crimes (the legislation was subsequently amended and criminal liability removed) and legislation forbidding any damage to the Polish nation’s reputation
- With the rise of the Law and Justice party to power, hundreds of journalists were dismissed from government television and radio stations
- A law passed in 2016 gave the Minister of Finance the authority to appoint the director of public broadcasting
- Private media outlets supporting the ruling party enjoy funding via government advertisements
- A new reform led by the Minister of Higher Education in Poland seeks to change the method by which high-ranking university officials are appointed. It has been proposed that the power to appoint deans and other academic officials be placed in the hands of the Council of Universities, a body to be established and which will be comprised mainly of non-academics, and subordinated to the Minister of Higher Education.

II. Similarities and Differences between Hungary and Poland, and Israel

Israel has also encountered in recent years a wave of anti-liberal bills, seeking to weaken the powers and independence of courts and other gatekeepers, to clip the wings of civil society and to limit media and academic freedom of independence. Whereas most of the bills are private bills, with limited chances of being adopted (note that Israel is the world’s leader in proposed private legislation),¹⁰ some of the bills have been supported by influential

¹⁰ Need cite

politicians, some have attracted considerable public attention, and some even succeeded in passing into binding laws. And the trend is increasing – the IDI has coded 35 illiberal bills in the 18th Knesset – which appear to weaken gatekeepers, weaken freedom of expression and infringe on basic rights, 18 in the 19th Knesset and 60 in the 20th Knesset.¹¹ It should also be noted that the few that do pass – e.g., the Nation State Law, the Police Recommendations Law, the Removal from Knesset Law, and the ‘Breaking the Silence’ Schools Law– pass in a diluted form. Still, it looks as if the growing presence on the political agenda of anti-liberal legislative initiatives creates a public discourse, which serves to strengthen illiberal and populist tendencies in Israel.

Interestingly enough, one can identify among the bills proposed in Israel similar approaches and anti-liberal methods to those found in Hungary and Poland, suggesting that illiberal agendas exist in Israel too, and that such anti-liberal agendas may entail similar promotion strategies or stem for similar ideological positions to those found in Hungary and Poland. To be sure, even if the motives of some proponents of the proposed Israeli measures are different from those of their Hungarian and Polish counterparts – e.g., they may be aimed at weakening institutions whose position is viewed as hostile to governmental policies regarding the Israeli-Palestinian conflict, or institutions fighting political corruptions – the outcome may still be the transformation of Israeli liberal democracy.

2.1 Measures designed to weaken the power of the judiciary

In Israel, considerable political efforts were invested by senior members of government and the governing right-wing coalition to limit the powers of the Supreme Court to strike down legislation incompatible with Israel’s Basic Laws,¹² to change the composition of the Court and to create special decision-making rules in constitutional review cases. Thus, for example, one bill sought to remove altogether the power of the Supreme Court to strike down Knesset legislation, replacing it with the power to draw the attention of the legislature to any

¹¹ One should note that the IDI coding of bills is not comprehensive and covers only certain areas viewed as democratic challenges. Media regulation bills are, for example, not included in the list.

¹² On this matter, see Ori Aronson, “Why Hasn’t the Knesset Repealed Basic Law: Human Dignity and Liberty? On the Status Quo as Counter Majoritarian Difficulty.” *Iyunei Mishpat* 37 (509): 219 (2016).

contradiction between a Knesset law and a Basic Law.¹³ A number of draft bills, including a draft bill supported by the Minister of Justice, introduced the option of an override clause, allowing the majority in Knesset (61 MKs out of 120) to reintroduce legislation which the Court annulled for failing to meet the conditions set forth in the Basic Laws.¹⁴ The draft bill supported by the Minister of Justice also sought to introduce a super-majority requirement on the Supreme Court when annulling Knesset legislation: “The judicial authority shall not determine that a law is invalid, except by the Supreme Court, in a panel of at least nine justices, and with the agreement of a majority of two-thirds or more of the justices sitting on the panel.”¹⁵ There have also been bills seeking a restriction of the power of the Court to review ‘unreasonable’ government measures¹⁶ and to restrict the right of standing before the Court when sitting as a High Court of Justice’.¹⁷

One can also mention a cluster of draft bills proposing changes in the process of judicial appointments. These include proposals to change the composition of the judicial appointments committee (a change in the number or identities of committee members),¹⁸ the majority required to appoint a judge to the Supreme Court,¹⁹ and a change in the method by

¹³ Proposed Basic Law: The Judiciary (amendment: Judicial Critique of Legislation). The bill is loosely modelled on the UK Human Rights Act. It was reported that Prime Minister Netanyahu expressed an interest in promoting the bill. see Chaim Levinson, Jonathan Lis " Severe political crisis: Netanyahu wishes to deny Judicial Critique of Legislation, Kahlon against" Haaretz, December 4, 2018

¹⁴ Proposed Basic Law: Human Dignity and Liberty (Amendment — The Validity of an Exceptional Law) (according to the explanatory notes, identical bills were proposed in the Eighteenth Knesset by MKs Moshe Gafni and Uri Maklev (P/18/1891), in the Nineteenth Knesset by MK Moshe Gafni and a group of Knesset members (P/19/1406), and by MK Ayelet Shaked and a group of Knesset members (P/19/1944), and in the Twentieth Knesset by MKs Moshe Gafni and Uri Maklev (P/20/1347); see also Proposed Basic Law: Legislation.

¹⁵ Tova Tzimuki and Moran Azulay, “The Shaked and Bennett Plan: A Law Will Be Disqualified only by a Panel of Nine Judges.” Ynet, December 19, 2017.

¹⁶ Proposed Basic Law: Adjudication (Amendment – Separation of powers), (P/2863)

¹⁷ Proposed Basic Law: Adjudication (Amendment – Restriction of Standing), (P/4123)

¹⁸ See the Proposed Basic Law: The Judiciary (Amendment: Composition of the Judicial Election Committee); the Courts Bill (Amendment: Transparency in the Process of Appointing Judges to the Supreme Court and in Appointing the President of the Supreme Court and Vice President of the Supreme Court), 2011.

¹⁹ The Courts Bill (Amendment: A Majority in the Judicial Appointments Committee), 2012; the Courts Bill (Amendment: A Regular Majority for Appointing a Supreme Court Justice), 2016.

which the President of the Supreme Court was appointed.²⁰ Some draft bills have sought to limit the term of service of Justices on the Supreme Court.²¹

While it is clear that the Israeli judiciary has not suffered (yet) from the same fate of its counterparts in Hungary and Poland, it is still impossible to ignore the degree and extent to which it been made the target of illiberal forces within Israeli society who see its constitutional jurisprudence as incompatible with the “Jewish Character of the State”.²² Basic Law: Israel as the Nation State of the Jewish People has indeed been presented as a response to the liberal bias of the Court, which are allegedly out of touch with popular (if not, populist) sentiments.²³ It is therefore possible to see the fierce attacks against the Court, after virtually any loss by the government in Court, and the practical measures taken by key politicians to change its composition (pursuant to the Minister of Justice stated policy of appointing conservative judges),²⁴ as part of a calculated political agenda, designed to marginalize the Court. As noted above, the weakening of the Court may be primarily motivated by separate agendas from political populism, such as preventing it from interfering with the expansion of West Bank settlements,²⁵ or undercutting its ability to effectively fight political corruption.²⁶

While none of the bills targeting the judiciary had progressed to First Reading in the Knesset (partly due to the opposition to many of them by the centrist Kulanu party that comprises part of the ruling coalition), some of them, especially the override bill, have been the topic of considerable public debate for long periods of time, and occupied much of the attention of the political system. It appears that only a failure by the coalition partners to agree on whether

²⁰ See the proposed Basic Law: The Judiciary (Amendment: The Election of the President of the Supreme Court by the Knesset), 2017; the proposed Basic Law: The Judiciary (Amendment: The Election of the President of the Supreme Court and the Vice President of the Supreme Court by the Knesset).

²¹ Proposed Basic Law: Adjudication (Amendment – High Court of Justice term of service limitation), (P/4009)

²² Nadiv Mordechay and Yaniv Roznai, ‘A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel’ (2018) 77(1) *Maryland Law Review* 244-270

²³ *Ibid*, 253.

²⁴ NEED CITE.

²⁵ One particularly controversial law whose constitutionality is currently being challenged before the Supreme Court is the 2017 Regularization Law, which facilitates the confiscation of private Palestinian land on which illegal settlement ‘outposts’ have been constructed.

²⁶ Mordechai Kremnitzer “The Struggle against Government Corruption”, *Haaretz* April 13, 2014. In this connection, one may mention legislative initiatives and political attacks directed against other anti-corruption ‘gate keepers’, including the Police, the State Comptroller, the Attorney-General Office and Senior Appointments Committee.

61, 65 or 70 MKs would be needed for overriding the Supreme Court, prevented the passing of the bill. Furthermore, a narrow version of the bill allowing for override in matters relating to measures designed to curb illegal immigration is still being actively considered by certain elements in the coalition.²⁷ The intense debate over the need to restrict the powers of the Supreme Court may have already generated a certain chilling effect on the Court, and renders it highly unlikely that the Court would, for example, strike down the new Basic Law: Israel as the Nation State of the Jewish People, notwithstanding the legal tension between it and other constitutional norms (e.g., Basic Law: Human Dignity and Liberty and Israel's unwritten core constitutional principles). In an era of constant political assault on the Court for its alleged excess of power, a decision by the Court to strike down a basic law could very well result in retaliatory legislation. It is worth noting in this connection that the Israeli constitutional system offers limited procedural protections against legal changes, that a simple majority in Knesset may suffice for restricting the powers of the judiciary or intervening in its structure or composition, and that in Israeli's political culture changes to Basic Laws are a frequent occurrence.²⁸

One area where change has already occurred in practice involves the composition of the judicial appointments committee. Traditionally, one of the four 'political' seats on the committee was reserved to a member of the political opposition (the three others to representatives of the coalition). This was seen as an important element in ensuring the non-partisan nature of judicial appointments (the other element being the majority held by members of the legal profession – representatives of the judiciary and the legal bar – on the committee). However, from the 19th Knesset (2013) onwards, members of small right wing opposition parties were elected by the votes of coalition to so-called represent the opposition, excluding in effect the left-wing opposition from the appointment process. In the 20th Knesset, the situation further exacerbated as the so-called opposition representative remained on the committee even after his party joined the coalition, thus leaving the political opposition without any representative on the committee. Furthermore, a more politicized legal bar has formed an "alliance" with the Minister of Justice, paving the way for the political coalition to effectively control the appointment process for lower courts, and to have much greater influence than before over appointments to the Supreme Court (appointments to

²⁷ Proposed Basic Law: Human Dignity and Liberty (Amendment – Infiltrators law validity), (P/5497)

²⁸ Amir Fuchs, "Basic Law amendment madness" *Haaretz*, December 12, 2018.

the Supreme Court require a super-majority of 7 out of 9 members of the Committee; although the 3 representatives of the judiciary may block appointments to the Supreme Court they cannot advance candidates for any judicial instance without the support of coalition-bar “alliance”). The upshot is the appointment of large number of judges acceptable to ruling coalition to all judicial instances, including the Supreme Court. Although such judges enjoy full independence, the vetting process they were subject to by the Minister of Justice (who chairs the appointment committee),²⁹ could result in a court that is less critical of the legislative and executive branches than before.

2.2 Measures designed to weaken civil society

A number of legal measures has been taken or contemplated in recent years against certain Israeli CSOs. One set of measures seemingly aimed at labeling civil society groups supported by foreign states as unpatriotic and curbing their ability to operate dates back to 2008, when a bill has been proposed in order to “increase transparency” among non-profit organizations by setting criteria in the Non-Profit Organizations Law that would prohibit them from receiving donations from foreign entities.³⁰ Such a bill was reintroduced in 2011,³¹ in parallel to attempts to convene a parliamentary commission of inquiry into their sources of funding.³² Other bills sought to render them ineligible to obtain from the State alternative civic service positions,³³ to designate non-profit associations supported by foreign states or entities as ‘foreign agents’,³⁴ and to require them to reveal that they were supported by foreign entities in official documents and in public discussions, and to wear special identification tags.³⁵ A relatively “slender” version of the latter bill (which might have nonetheless some

²⁹ Revital Hovel, "Justice Minister Shaked: If My Candidate Isn't Selected for Supreme Court, No One Will Be" *Haaretz*, February 12, 2018

³⁰ The Non-Profit Organizations Bill (Amendment No. 11) (Reporting Donations from Foreign Countries), 2008. This obligation is currently anchored in Paragraph 36A (a) of the Non-Profit Organizations Law, 1980.

³¹ The Non-Profit Organizations Bill (Amendment: The Prohibition against Support by a Foreign Political Entity of Political Organizations in Israel), 2011.

³² NEED CITEY

³³ The Civil Service Law, 2017.

³⁴ Law Requiring Disclosure by NGOs Supported by Foreign Governmental Entities - 2016

³⁵ Mordechai Kremnitzer and Amir Fuchs (position paper on the Israel Democracy Institute website, November 19, 2015).

stigmatizing effect) was passed in 2016, requiring non-profit associations supported by foreign governments to indicate so in their official stationary.³⁶

Another set of bills targeted human rights organizations viewed as operating against the interests of the state of Israel (by alleging the commission of war crimes or advocating boycotts), with a view to hindering their operations. One can mention in this regard unsuccessful bills seeking to annul the tax benefits of organizations “that sometimes referred to themselves as ‘human rights organizations’” that was proposed in 2011;³⁷ a 2017 bill aimed at removing their exemption from payment of the municipal tax;³⁸ a 2017 bill aimed at removing their exemption from the Freedom of Information fee;³⁹ a bill limiting their right to have access to the court system⁴⁰; and a bill making the photography of IDF soldiers on duty a criminal offense.⁴¹

Another set of bills was designed to limit official cooperation between the State and CSOs that engage in ‘anti-Israeli’ activities. One bill sought to bar “cooperation between non-profit organizations and government ministries and the Israel Defense Forces, except for in cases to be determined by the Justice Minister,”⁴² and another bill, which had passed in 2018, authorized the Minister of Education to bar the entry into schools of organizations that engage in activities that may result in foreign criminal prosecution of IDF soldiers. The same law also authorizes the Minister of Education to bar entry if the activities of the relevant organization run contrary to the vaguely defined aims of the Public Education Law. In a reality in which religious organizations often participate in educational activities in secular schools, the enactment of the law can be regarded as another attempt to politicize the school

³⁶ Duty of Disclosure Regarding Organizations that Receive Support from a Foreign Political Entity (Amendment), 2016.

³⁷ Bill for amending the Income Tax Ordinance (Taxation of Income of Public Institutions that Receive a Donation from a Foreign Political Entity), 2011. See also Bill to amend the Income Tax Ordinance (An Institution that Acts for the Benefit of the State of Israel), 2017.

³⁸ Bill to Amend the Municipal Tax and Government Taxes Ordinance (Exemptions) (Conditions for Exemption from Municipal Tax — Volunteer), 2017.

³⁹ Bill to Amend the Freedom of Information Law (Amendment: Abolition of the Exemption for Organizations Whose Main Support Comes from Foreign Political Entities), 2017.

⁴⁰ Proposed Basic Law: The Judiciary (Amendment: Limiting the Right to Go to Court), of MK Makhoul Miki Zohar et al. (P/4123)

⁴¹ See Mordechai Kremnitzer, “With Breaking the Silence and B’Tselem, despite Bennett,” *Haaretz*, July 1, 2018.

⁴² Non-Profit Organizations Abroad Bill, 2015.

system, by promoting the exposure of Israeli children to conservative worldviews and blocking more critical voices from reaching them.

Finally, one may mention a 2013 bill that sought to prevent non-profit organizations “that rejected the State of Israel’s existence as a Jewish and democratic state” from being registered.⁴³

Like with the attacks against the Court system, the vast majority of legislative bills aimed at curbing the operation of CSOs has not passed, and even those bills that had passed are of little practical significance. Still, a discourse designating human rights all organizations as ‘political’ or anti-Israel, groups exposing human rights violations by the IDF as treacherous and CSOs supported by foreign government as unpatriotic ‘foreign agents’ has taken hold in wide segments of the political system and the broader public. This discourse was further fed by attempts by government ministers to prevent the use of publically funded venues for events organized by NGOs critical of the government’s policies in the Occupied Territories,⁴⁴ and by statements by the Prime Minister and other senior politicians linking the activities of certain organizations and social activists to allegedly ultra-left wing funders, such as the New Israel Fund and George Soros.⁴⁵

Such an atmosphere, which is illiberal and anti-pluralistic in itself, greatly complicates the ability of CSOs to effectively promote liberal causes in society and has led to increased hostility against them in public opinion.⁴⁶ Such designation of certain CSOs as ‘enemies of the people’ resembles tactics adopted in Hungary and Poland (especially in relation to organizations supported by George Soros, challenging certain historical narratives and supporting immigration), as well as in even less liberal regimes.⁴⁷

Finally, it may be noted that some of the measures directed against CSOs appear to respond to a broadly held populist ‘us v. them’ sentiment (which seeks to exclude from the imagined community of ‘we the people’ cosmopolitan elements that downplay the significance of the nation as an organizing political framework), whose political significance has been increased

⁴³ The Non-Profit Organizations Bill (Amendment: Limitation on Registering a Non-Profit Organization), 2013.

⁴⁴ NEED CITE.

⁴⁵ NEED CITE.

⁴⁶ CITE RECENT IDI DEMOCRACY INDEXY

⁴⁷ See Russian Foreign agents law: Law on Non-Commercial Organizations, as amended on 13 July 2012

in the present age of social media. Still, these measures can also be explained by less abstract interest-based politics. Since the major political debate in Israel since 1967 revolves around the fate of the occupied territories, organizations whose work is designed to underscore the moral and legal costs of occupation are an anathema to a government seeking to further consolidate the control by Israel of the territories.

2.3 Measures designed to limit Freedom of Expression in the Media and Academia

Since Prime Minister Benjamin Netanyahu was elected for a consecutive third term in 2015, he and his political allies have been acting openly against several media outlets, such as Channel 10, Army Radio, the Israel Public Broadcasting Corporation, and Israeli Educational Television.⁴⁸ The Prime Minister, who initially appointed himself as Minister of Communication,⁴⁹ and signed his coalition partners on an agreement to support his policies in the media sector,⁵⁰ interfered very aggressively in media affairs. His long-standing close relationship with Sheldon Adelson, the owners of the *Israel Hayom* newspaper – a mass circulation freely distributed newspaper, is well-known, and it appears that given its heavy financial losses, the newspaper's only *raison d'être* is to beef up political support for Netanyahu. Moreover, Netanyahu is currently facing a criminal investigation for allegedly negotiating in secret with Arnon Moses, the owner of Israel's other mass-circulation daily newspaper – *Yedioth Ahronot*, a deal involving reduction in the circulation of *Israel Hayom* in exchange for more favorable coverage in *Yedioth*. He is facing another criminal investigation in connection with allegedly trading regulatory concessions in the media business for favorable coverage on a popular website (*Walla*, owned by *Bezeq* – Israel's largest telecommunication company).

Other examples of blunt attempts by the government to interfere in the media market are the attempt to delay or cancel the establishment of the Public Broadcasting Corporation,⁵¹ and to

⁴⁸ See Gide Weitz and Nati Tucker, "I Have Already Dealt with the Press... Now the Time Has Come to Change Television": Netanyahu's Campaign to Take Control of the Media." *Haaretz*, November 3, 2016; Raviv Drucker, "Suicide on Live Broadcast," *Haaretz*, October 30, 2017.

⁴⁹ And later on, when he appointed a replacement for himself after he was compelled to do so.

⁵⁰ Jonathan Lis, "Netanyahu Planning Media Crackdown in Coalition Agreement" *Haaretz*, April 29, 2015

⁵¹ Eliran Malki, "Miri Regev: What Good Is the Corporation If We Do Not Control It?" *Calcalist*, July 31, 2016.

carve out the news section from the Public Broadcasting Corporation,⁵² because of the alleged leftist tilt of the Corporation management,⁵³ and the political connections of its main news anchorwoman (who is married to one of Netanyahu's potential challenges in the Likud);⁵⁴ the retroactive change of the terms of licensing of a right-wing broadcasting outlet - Channel 20;⁵⁵ and the attempt to block the merger of Channel Ten with the Reshet broadcasting company, because of the former's alleged anti-government bent.⁵⁶ In addition, high-ranking political officials have also lashed out personally against media personnel on a number of occasions accusing them of promoting political agendas and violating journalistic ethical principles, and there have been a number of attempts by politicians to interfere with programming and hiring policies.⁵⁷

It is important to note that Israeli media remains independent and powerful, enjoys free expression, and that the 2014 Public Broadcast Law (as amended in 2015) contains some important safeguards for media independence. Still, the ongoing assault by government officials and pro-government media on the 'leftist media', which is allegedly detached from public sentiment,⁵⁸ appears to have taken its toll: The 2018 Democracy Index indicates that the Israeli public has a low level of confidence in the media.⁵⁹ Furthermore, the economic precariousness of the Israeli media market does put in question its long-term ability to

⁵²Nati Tucker, "High Court Extends Ban on Splitting Israel's New Public News Unit" *Haaretz*, may 16, 2017. Although a Law had been passed to that effect, the government had eventually withdrawn from legal proceedings challenging its constitutionality, resulting in its automatic revocation. This U-turn in government policy has been attributed to a threat by the European Association of Public Broadcasting Corporations to revoke the membership of the Israeli Public Broadcasting Corporation in the Association, since having a news division is one of the membership criteria. This would have led to revocation of the Corporation's eligibility to host the 2019 Eurovision Song Contest.

⁵³ Lahav Harkov, Greer Fay Cashman "Coalition Chairman Tracking IBC Journalists' Facebook Posts" *The Jerusalem Post* November 5, 2016

⁵⁴ Ariana Melamed, "The Anchorwoman Who's Terrifying Benjamin Netanyahu" *Haaretz*, March 22, 2017

⁵⁵ Lahav Harkov "Law saving channel 20 passes final vote" *The Jerusalem Post* February 20, 2018

⁵⁶ Haaretz Editorial, "Approve the Merger of TV Broadcasters Channel 10 and Reshet" *Haaretz*, October 11, 2018

⁵⁷ Yaniv Kubovich, Revital Hovel, Jonathan Lis, "Liberman: I Ordered Army Radio to Stop Playing Yehonatan Geffen; Attorney General: He Has No Authority to Do So." *Haaretz*, January 23, 2018; Itay Stern, "Khen Elmaleh Fired for Writing 'I Would Also Have Run Over the Police Officer if I Had Been Removed from My Home.'" *Haaretz*, January 18, 2017.

⁵⁸ Chaim Levinson, Hagar Shezaf and Roy Arad "Netanyahu Tells Thousands: Media, Israeli Left Mobilizing Against My Family to Commit a Coup" *Haaretz*, August 9, 2017.

⁵⁹ NEED CITE.

withstand governmental pressure to change its editorial policies. Indeed, some efforts to introduce more ‘balanced’ programming to radio and TV shows, by adding known right-wing journalists to existing programs presented by left-leaning journalists, can already be noted. It is difficult to ascertain whether such measures are driven by concerns about ratings, a keen interest in increasing media pluralism, political pressures or all of the above.

With respect to academia – another traditional bastion of liberalism in Israel – the most significant measure attempted to restrict freedom of expression taken recently has been the attempt to impose a code of conduct on all academic institutions designed to curb so-called ‘political activity’ in academia.⁶⁰ The draft code, prepared by a Tel Aviv University Professor, Asa Kasher at the request of Education Minister Naftali Bennett, included many proposals that if adopted, would be detrimental to academic freedom.⁶¹ These include a requirement that “[a]n institution of higher education shall distance itself from identifying with political activity”; that “[a]n academic department shall publish an academic publication in order to further research and educating students and the general public, only in a manner that cannot be construed as political activity”; and that “Members of the academic staff... shall be mindful of the possibility that their statements in class might be interpreted by students as political activity.” Israeli universities were able to resist the initiative, but agreed to review their internal codes and make any needed changes to prevent abuse of position of authority to improperly advance political views.⁶²

In addition, one may note bills that sought to limit academic freedom: For example, one bill proposed to cut the budget of any academic institution in which a member of the teaching staff called for a boycott of Israel.⁶³ Another bill sought to require academic institutions to prohibit certain anti-Israel political activities, including commemoration of the Palestinian

⁶⁰ Asa Kasher, “A Code of Ethics of Proper Conduct in the Overlapping Areas between Academic Activity and Political Activity” (letter to the Education Minister, July 5, 2017). The Code defines political activity as activity of direct support of a party or politician or activity which directly supports a specific position in well-known public disagreement, which manifests itself in Parliament and public discourse, with clear linkage to parties in or outside the Knesset, or direct and explicit opposition to such a position.

⁶¹ See Orna Ben-Naftali and Amos Laor, “Re: An Accounting in Academia for the Embarrassment of the Student K.” *Ma’asei Mishpat* 9 (61, 72): 2017.

⁶² Yarden Zur, “The Universities Will Not Be Required to Adopt the Code of Ethics, but Agreed to Softened Prohibitions,” *Haaretz*, May 23, 2018.

⁶³ Bill for the Prevention of Damage to the State of Israel via Boycott (Amendment: Stopping the Funding of Institutions of Higher Education), 2016.

Naqba (disaster). These bills were not adopted and do not seem to have had much practical significance, although they may have fed in negative perceptions of the academia as a leftist, detached elite.

Finally, two practical developments designed to curb or likely to curb freedom of expression in academia are the decision of the Minister of Science to remove from an academic grant committee a Ben Gurion University Professor who signed 13 years before that a petition supporting conscientious objectors who refused to serve in the Occupied Territories,⁶⁴ and the decision of the High Education Council – at the urging of the Minister of Education – to encourage universities to ‘balance’ clinical legal education programs by requiring them to provide information on decisions not to accept offers to open new clinics (potentially serving right wing causes).⁶⁵

Conclusion

A survey of various measures perceived as anti-liberal, which have been proposed or adopted in Israel, reveals some similarities between political tendencies in Israel and in Hungary and Poland. All three countries appear to revert to nationalism and to adopt, at least in part, a populist discourse to justify new illiberal measures adopted, which limit free speech and weaken traditional democratic checks and balances. Yet the context is somewhat different. In Hungary and Poland, the turn to nationalism constitute a reaction to globalization and nostalgia for the pre-1939 nation-state past, whereas in Israel it appears related the Israeli-Palestinian conflict and to the political interest of the certain elements in government to prevent concessions by demonizing the Palestinians. Some elements in government may also wish to undercut attempts to fight political corruption.

Still, in all cases, the resort to illiberal measures appears to be encouraged by comparable populist notions (whose hold on society varies across time and place): That certain political movements – especially the political majority - speak on behalf of a people with specific historic, ethnic or religious features, in connection with a ‘us v. them’ discourse (Members of the dominant Ethnic group v. migrants; holders of Christian values v. others, Jews v. Arabs). The discourse of identifying certain political positions with ‘national honor’ and with the voice of the people, allows those in power to portray minorities as ‘others’ (and foreigners, as

⁶⁴ NEED CITE.

⁶⁵ NEED CITE.

inferior ‘others’), and designate the opposition as unpatriotic or anti-patriotic. It also allows them to legitimate through alluding to their representation of the authentic wishes of the people the long-term consolidation of political power at the expense on non-authentic elites and opposition forces.

Another key difference between the two sets of countries appears to be the limited ability of Israel’s ruling coalition to pass anti-liberal bills – either because of strong push back by liberal segments in society and counter-majoritarian institutions, or because many of the bills were never really intended for passage. Rather, it may be the case that they were designed to merely draw attention to what has been regarded by their initiators as a shortcoming or grievance of the existing legal and political order. Indeed, the main effect of such measures is on the increasingly negative perception of liberal institutions in the eyes of large segments of the Israeli public and on the strengthening of populist tendencies. Indeed, it is possible to view in Israel (as in other places) a conscious effort by governmental actors to occupy public space and dominate public discourse, with a view to shape the ideological direction of civil society organizations, media and academia.

Finally, it is interesting in this connection to compare Israel’s ranking in international democracy indices with those of Poland and Hungary.⁶⁶ At first glance, there are marked differences between Israel on the one hand, and Hungary and Poland on the other, when they are examined in the general rankings, such as the Economist Democracy Index (Israel is ranked 30th globally, some 20 places before Hungary and Poland). However, when one examines the specific categories most relevant to the study, we see a greater degree of similarity:

1. In the political rights category, Israel ranks close to Poland — in the 20th -29th percentile as compared with the OECD countries.
2. In the civil rights index, Israel has been defined for the first time as a country with “partial protection of civil rights,” and is ranked beneath Hungary and Poland as compared with the OECD countries, and is ranked only above Turkey and Mexico.

⁶⁶ See Tamar Hermann, Or Anabi, Ella Heller, and Fadi Omar, “Israeli Democracy Index 50 (2018).”

3. Israel ranks lower than Hungary and Poland in the Freedom of Press Index, in comparison with OECD countries, and is ranked only above Turkey and Mexico.
4. In the Democratic Equal Rights Index, Israel is at the bottom as compared with OECD countries, below Hungary and Poland and above only the United States, Chile, Mexico, and Turkey.

So, although Israel is a country with a strong democratic tradition and functioning democratic institutions, the wide range of anti-liberal measures contemplated, and the few measures actually adopted may already started to erode Israel's democratic characteristics. Individually and collectively, such measures constitute a warning sign of the possibility that Israel could find itself before not too long on the path of Hungary, Poland and other backsliding democracies. The fact that it has relatively weaker constitutional structures, locked in a long-lasting armed conflict raising real security problems, and that, unlike Hungary and Poland, it is not part of a regional political order, which exerts pressures to conform to liberal values, suggest that complacency about such warnings is misplaced.