



May 26, 2019

Antidemocratic Legislation: Ramifications for Human Rights and the Work of NGOs

Atty. Debbie Gild-Hayo, Policy Advocacy Director

The discussions surrounding the formation of the new government included reports of a long list of acts of legislation and policy plans the emerging coalition hopes to advance during its period of office. It is expected that many of these initiatives will be mentioned in the coalition agreements, reflecting an undertaking to implement them without objections.

An examination of these initiatives as a whole reveals damage to all the existing mechanisms of checks and balances in the democratic system in Israel. This is combined with an attack on diverse gatekeepers whose function is not only to defend the rule of law, but also to prevent governmental and personal corruption.

List of Relevant Initiatives (according to recent media reports)

Initiatives against the Supreme Court and the legal system: The **Override Clause** as an amendment to the Basic Law: Human Dignity and Liberty, or as clauses in specific laws (the Prevention of Infiltration Law, the Draft Law, etc.) – preventing judicial review of acts of legislation; **“Expanded Override Clause”** – preventing judicial review both of legislation and of administrative and governmental decisions; **changing the method for the appointment of Supreme Court justices** – including adding a hearing for justices in the Knesset and establishing that the government will appoint justices, as well as expanding the panel of justices and limiting their period of service; **restricting the right of standing** so that only specifically injured parties can petition the Court, rather than public petitioners; **the Attorney General’s role will be confined to advising the government**, and his opinion will not be binding; **law to circumvent the Attorney General** – allowing for the appointment of a private attorney to represent the government in Court proceedings, and possibly even prohibiting the Attorney General from expressing a position in Court contrary to the government’s position; **changing the method of appointment of legal advisors in the government ministries** – to allow political rather than professional appointments.

“Governance” laws: **Amending the Immunity Law** so that Members of Knesset will enjoy automatic immunity against prosecution, which must then be removed (rather than vice versa); **expanding the “Norwegian Law”** so that two ministers can resign and be replaced by new Members of Knesset; **abolishing the restriction on the number of ministers**; **abolishing the committee responsible for approving appointments** to senior positions and restoring the situation whereby the government makes the appointments; **restricting the authority of the State Comptroller** and establishing a body to audit the Comptroller; **amending/abolishing section 7A of the Basic Law: The Knesset** (removing the prohibition against participation on

the grounds of incitement to racism and/or terror – depending whether the implementation will be discriminatory).

Additional initiatives: **Loyalty in Culture Law; Draft Law, including an Override Clause; Prevention of Infiltration Law, including an Override Clause;** law imposing the **death penalty** for terrorists; **cutting the budget** of the public broadcasting corporation.

Shabbat and religious arrangements: **Western Wall and Kashrut** – controlled by the Rabbinate; **vital works on Shabbat** – a professional committee will decide; the United Right is demanding **gender segregation in the military**; the United Right is also demanding **action to prevent divorce**.

Ramifications of These Initiatives for Democracy

The enactment or implementation (as the case may be) of even part of these initiatives will have far-reaching ramifications for Israeli democracy, the protection of human and minority rights, and the work of civil society organizations:

1. **Damage to the system of checks and balances:** The existence of democracy requires an elaborate system of checks and balances ensuring not only majority rule, but also protecting human rights, including the rights of minorities (of all kinds). In Israel, the most fundamental system of checks and balances is based on the classic separation of powers between the legislative, executive, and judicial branches. In practice, however, there is no real separation between the Knesset and the government of Israel, due to the structure of our parliamentary system. The government has an inbuilt majority in the Knesset, which cannot truly scrutinize the government. Accordingly, the Court plays a critical role in the balance between the three powers. In addition, Israel also has several additional gatekeepers that are vital to ensure checks and balances between the branches of government: the law enforcement system, with all its components, ensures the rule of law and equality before the law; the State Comptroller; the media; and civil society. All these are bodies that audit and scrutinize the government and the Knesset and ensure a struggle against the tyranny of the majority.

The current initiatives, and particularly the Override Clauses – which are intended to prevent judicial review of the actions of the Knesset (legislation) and of the government (administrative and governmental decisions) – mortally injure the network of checks and balances in the Israeli governmental system.

2. **Damage to the protection of human rights** – protection of human rights is undertaken in diverse ways, but a key component is the court system, and particularly the Supreme Court. For decades, the Supreme Court has ensured the realization of human rights in every area of life; in particular, it has protected the rights of minority groups.

It is important to emphasize that there is widespread criticism of the courts in general, and of the Supreme Court in particular, regarding their protection of human rights and

the advancement of social justice. Many observers argue that the Supreme Court has failed to perform its function in these contexts in an optimal manner. Nevertheless, and despite its weaknesses, the Supreme Court continues to serve as a key arena for the protection and advancement of human rights, as one of the pillars of the system of the separation of powers.

The following examples illustrate the Court's important role in protecting human rights:

- A. **LGBT+ rights:** The right of a same-sex partner to enjoy benefits for partners provided by the workplace; mutual adoption of children by same-sex couples; registration as "married" for same-sex partners; the possibility of overseas surrogacy and registration of the child in Israel; budgets supporting the activities of the LGBT+ community; heightened penalization of violence against LGBT+ individuals; same-sex couples can register as parents; disqualifying an order by the Education Minister not to broadcast a program about LGBT+ youth.
- B. **Violation of equality:** Draft Law; disqualifying a supplementary income benefit paid solely to ultra-Orthodox religious students; prohibition of discrimination in the admission of Mizrahi or Ethiopian students to the education system.
- C. **People living in poverty:** Supplementary income for single mothers, even if they own a vehicle; allowing welfare recipients to begin studies without losing benefits; allowing welfare recipients to receive help from their family without losing benefits.
- D. **People with disabilities:** ensuring access to public buildings; integration of children with disabilities;
- E. **Women:** Enhancing integration and equality in the military (the Alice Miller petition); appointing women to religious councils; equal representation of women in numerous public committees and positions;
- F. **Rights of prisoners, detainees, and suspects:** Preventing the privatization of prisons; restricting the period of detention of soldiers; establishing a minimum space per prisoner; improving conditions of imprisonment and detention; prevention of torture;
- G. **Distributive justice and the allocation of resources:** Compensation for young people negatively affected by the Disengagement and the possibility to file civil claims; Mizrahi Rainbow petition for the just allocation of state land resources; protection of schools and buildings in the area around the Gaza Strip;
- H. **Environmental protection:** Halting the establishment of vacation villages and other construction on beaches (Palmachim, Hacarmel); stopping the pollution of the Kishon Stream by Haifa Chemicals and rehabilitating the stream; prohibiting the collection of payment at the entrance to beaches; prohibiting the use of asbestos, which is

damaging to health, and removing it; protecting unique areas of the country; rehabilitating polluted soil.

3. **Damage to the work of civil society organizations:** Civil society organizations, including human rights and social change organizations, play an important and vital social role in the advancement and realization of human rights, in ensuring social justice, and in protecting the public interest in diverse fields and issues. The initiatives detailed above will significantly, and perhaps even mortally, damage the practical capacity and effectiveness of these organizations:

- A. **The Override Clause and the Expanded Override Clause:** The Override Clause the government seeks to enact will allow 61 Members of Knesset to pass a law that the Supreme Court has rejected as unconstitutional, thereby stripping the Court of its power to intervene in acts of legislation by the Knesset. The expanded version of the clause that the government seeks to advance will mean that the Supreme Court will not be able to consider the rationality of administrative decisions. In other words, it will not be able to intervene in decisions of the government and the Knesset in any field, including security, budgets, appointments, public interest, equality, etc.

If these initiatives become law, they will prevent civil society organizations from securing the disqualification of legislation or government policy liable to violate human rights, since the decisions of the Knesset and the government will not be subject to the judicial review of the Supreme Court.

To give an example, it will not be possible to petition the Court against discriminatory legislation in the allocation of housing, benefits, military service, prioritization in work, the allocation of public budgets, and so forth; collective punishment; preventing demonstrators from reaching a protest or preventing minorities from participating in public events; or removing the immunity of the prime minister or other Members of Knesset against criminal prosecution; the disqualification of artistic works; the prohibition of political activity or denial of entry to Israel; denial of liberty or citizenship; the imprisonment of asylum seekers by way of deterrent or other violation of their fundamental rights, and so forth.

In effect, the government and Knesset will be able to decide at any moment on any policy or law that their political majority wishes to advance. The remainder of the public, including civil society organizations devoted to this purpose, will have no way of preventing the advancement or realization of these initiatives, no matter how damaging they may be.

- B. **The restriction of the right of standing:** The government intends to curtail the right of standing at the Supreme Court, so that only a private petitioner who was personally injured by a governmental action or by legislation will be permitted to

submit a petition. Organizations representing a broad public interest will not be entitled to petition the Court on their own behalf.

This change will impede the possibility of submitting petitions in cases when it is difficult to find a private petitioner, often because those affected are afraid to be exposed. Examples of this may include women from weakened groups (such as Ultra-Orthodox women or Bedouin women seeking to challenge exclusion or discrimination within their community); Jews who have left the Ultra-Orthodox community; members of the LGBT+ community (including trans individuals), members of the Arab minority in Israel; weakened workers and all those afraid that they may face problems with their employer; people living with stigmatized diseases (such as AIDS or mental illness); people with disabilities; and whistleblowers.

The proposed change will also impede petitions that relate to a broad public interest – i.e. when the public as a whole is injured, rather than a specific individual. In such cases, the Court is likely to find that the fact that a random individual was injured by policy does not amount to “personal injury by a governmental action.” The following are some examples of entire areas liable to be endangered: petitions regarding environmental protection; petitions regarding corruption and proper governance, including improper appointments to public positions or punishing those who harmed the public through corruption (such as the bank managers in the 1983 stock crisis); petitions in the field of religion and state, including freedom from religion and religious pluralism.

- C. **Direct damage to NGOs:** If the above-mentioned proposals are approved and the legal system is weakened, including the Attorney General and the legal advisors in the government ministries, this will impair the ability of NGOs to defend themselves against direct attacks against their employees and/or activities.

It will no longer be possible to submit a petition or secure legal support from the Attorney General or the legal advisors in the government ministries and the Knesset in response to the harassment of NGOs, including discrimination against organizations and the violation of their freedom of association and expression due to political persecution. To give just a few of the numerous examples: It will not be possible to challenge laws restricting the receipt of state funds or other resources by NGOs (including tax exemption, reductions on municipal tax, exemption from levies on freedom of information requests, and the allocation of national service positions); it will not be possible to challenge restrictions on freedom of association; it will not be possible to combat targeted, exceptional demands for transparency imposed on NGOs and their employees; it will not be possible to combat the formation of official committees of inquiry against NGOs or the summoning of the organizations to Knesset committees for interrogation – events that will be turned into political kangaroo courts.

It is important to bear in mind that a growing number of civil society organizations have been targeted in recent years. The more legitimate and widespread this becomes, the more issues and organizations will be subjected to attacks. Organizations in a wide range of fields already face harassment to varying degrees, including organizations defending the rights of the Arab minority in Israel, Jewish pluralism, the rights of migrant workers and refugees, human rights in the Occupied Territories, rights in legal proceedings for marginalized populations, environmental organizations, organizations promoting the rights of women (including religious women), and so forth.