

THE ISRAEL ACADEMY OF SCIENCES AND HUMANITIES



# The Challenges of Liberal Democracy

Conference held in Jerusalem, December 16–17, 2019

## Lecture Summaries

*edited by* **Prof. Nili Cohen**

President, The Israel Academy of Sciences and Humanities

**Organizing Committee:**

Prof. Shlomo Avineri, Prof. Nili Cohen, Prof. Ruth Gavison, Prof. Daniel Friedmann, Prof. Avishai Margalit, Prof. Billie Melman, Prof. Guy Stroumsa, Prof. Shulamit Volkov

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Editing and preparation: Deborah Greniman | Design: Idan Vaaknin



# About the Israel Academy of Sciences and Humanities

Chartered by law in 1961, the Israel Academy of Sciences and Humanities acts as a national focal point for Israeli scholarship in both the natural sciences and the humanities. The Academy membership consists of 132 of Israel's most distinguished scientists and scholars, who, with the help of the Academy's staff and committees, monitor and promote Israeli intellectual excellence, advise the government on scientific planning, fund and publish research of lasting merit, and maintain active contact with the broader international scientific and scholarly community.

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# Introduction: The Challenges of Liberal Democracy



**Nili Cohen**

President, The Israel Academy of  
Sciences and Humanities

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The conference on “The Challenges of Liberal Democracy” held by The Israel Academy of Sciences and Humanities in December 2019 came about after a long and lively discussion at the Academy about whether the Academy has or should have a role to play, as an institution, in political affairs.

There was a plethora of opinions, from those favoring complete abstention to those advocating involvement in political matters that might touch directly or indirectly upon our life as scholars. An intermediate opinion that was eventually endorsed, thoughtfully presented by Prof. Shlomo Avineri, suggested that the activities undertaken by the Academy be focused on our academic expertise.

Our scholarly qualifications, Prof. Avineri pointed out, do not make us experts in politics; we are not and should not position ourselves as moral arbiters of political life. If we want to be politically involved, let us express our opinions or be active as individuals. Institutional involvement on the part of the Academy would be justified only in cases of political interference striking at the heart of academic values, particularly the value of academic freedom – for example, by trying to silence us when dealing with controversial issues, or by disqualifying qualified and outstanding scholars from serving on scientific committees because of their political opinions. Indeed, the Academy’s Council did issue public statements in two such cases.

Prof. Avineri added that the Western world is now facing critical challenges that are worth examining from historical, legal, philosophical and social sciences perspectives. We, as an Academy bringing together the entire range of scholarly fields, would do well to organize a scholarly discussion relating to the political crisis that many of us feel is surrounding us. →



# Introduction: The Challenges of Liberal Democracy



**Nili Cohen**

President, The Israel Academy of  
Sciences and Humanities

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The conference on “The Challenges of Liberal Democracy” was the first fruit of that discussion. Believing that the issues it addressed and the insights brought to them ought to be made public, we asked the participants to submit summaries of their talks. These are collected and presented herewith.

Immediately after Academy Member and world-renowned researcher of fascism Prof. Zeev Sternhell submitted his summary, we were deeply sorrowed to learn of his passing. And then, in the final stages of editing this booklet, we were deeply sorrowed as well to learn of the passing of Academy Member Prof. Ruth Gavison, renowned for her expertise in the fields of human rights and constitutional law, who was an active member of the conference’s organizing committee. We cherish their blessed memory as profound scholars and friends.

The conference took place shortly before the emergence of the COVID-19 crisis, which has posed challenges to our very existence and way of life, as individuals, groups, and nations.

These touch upon the issues that gave rise to this conference: the challenges facing liberal democracies and the involvement of academies in affairs of state. In particular, dealing with the crisis raises issues relating to the proper balance between protecting life and preserving liberal democratic values, such as freedom of movement and privacy. The academic community and some national academies have been recruited not only to find immunological solutions to the virus, but also to →

“ *Dealing with the crisis raises issues relating to the proper balance between protecting life and preserving liberal democratic values, such as freedom of movement and privacy. The academic community and some national academies have been recruited not only to find immunological solutions to the virus, but also to address the economic, social, and psychological challenges it has elicited. ”*



# Introduction: The Challenges of Liberal Democracy



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address the economic, social, and psychological challenges it has elicited.

Collaboration between academies and decision-makers is somewhat different from reliance on scientific expertise by decision-makers. It is rooted in tradition and a willingness to work together institutionally. In the wake of the crisis, we at the Israel Academy have established two new committees, one dealing with balancing needs and values in times of crisis, and the other charged with shaping efficient ways by which the Academy's scientific expertise might have a stronger impact on society in general and in times of crisis in particular.

Holding fast to the hope that scientific efforts to find cures and treatments for this worldly scourge will enable us to resume holding fruitful scholarly and personal encounters, I would like to conclude with words of gratitude.

I am grateful to the conference participants and to my friends at the Academy, the members of the conference's organizing committee – Professors Shlomo Avineri, Daniel Friedmann, Avishai Margalit, Billie Melman, Guy Stroumsa, Shulamit Volkov and the late Professor Ruth Gavison – for their excellent contributions. Special thanks go to Galia Finzi, the Academy's Director, to Sima Daniel, Secretary of the Humanities Division, and to Ziva Dekel, Administrative Coordinator of the Humanities Division, for their invaluable assistance in organizing the conference and the publication of this conference booklet. The smooth unfolding of the event rested on the unfailingly reliable support of Riki Bitton, Michal Cohen, Orly Drihem, Cochi Maimaran, Yaakov Rothman and Michael Zagoury. Thanks go as well to Deborah Greniman for her astute editing.

# Introductory Notes to the First Session



**Avishai Margalit**

Member, The Israel Academy of  
Sciences and Humanities  
Professor Emeritus of Philosophy, The  
Hebrew University of Jerusalem

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This is the first session in a conference entitled “The Challenges of Liberal Democracy.” I don’t have a clear idea of when the word “challenges” started replacing “difficulties.” Perhaps the American tradition of positive thinking – the belief that where there is a problem, there is a solution – is responsible for this change. But the two notions have different connotations, if not different senses.

The model of challenges connotes the obstacles faced in extreme sports, whose overcoming is a cause for triumphant celebration.

Dreary difficulties are devoid of glamor; they have neither the glamor of success nor that of gallant failure. Obstacles to survival are dreary difficulties, and the reward in overcoming them is survival itself. Difficulties are part of life, whereas challenges are part of the good life.

“ *Does liberal democracy face invigorating challenges, or bleak, threatening difficulties? We have two conference days to sort this out.*”

Well, then: Does liberal democracy face invigorating challenges, or bleak, threatening difficulties? We have two conference days to sort this out.

In our session we have a cast of three illustrious theorists of liberal democracy: Prof. Ruth Gavison, Prof. Dominique Moisi and Prof. Shlomo Avineri. They will address the vast and rather vague heading of our session: Democracy, Liberalism and Rights.

All of the speakers in this session are justly well known as academic thinkers and forceful public intellectuals, to the extent that rehearsing their achievements →



# Introductory Notes to the First Session



## **Avishai Margalit**

Member, The Israel Academy of  
Sciences and Humanities  
Professor Emeritus of Philosophy, The  
Hebrew University of Jerusalem

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in detail seems unnecessary: Look at their Wikipedia entries, and you will get all the information you need.

We come, however, from a long tradition of calling scholars by their books, and so I will make a nod to that tradition by mentioning a representative book by each of our speakers. Prof. Moisi is the author of *The Geopolitics of Emotion*; Prof. Gavison is the author of *Constitutional Entrenchment of the Vision of the State*; and Prof. Avineri's most recent book is *Karl Marx: Philosophy and Revolution*.

I promise that you are in for a treat.

# Liberal Democracy: Values and Institutions



## Shlomo Avineri

Member, The Israel Academy of  
Sciences and Humanities  
Emeritus Professor of Political Science,  
The Hebrew University of Jerusalem

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In assessing the current crisis of the liberal democratic system, one has to realize that traditional liberalism did not necessarily go hand in hand with democracy: Classical liberal thinkers like John Stuart Mill and Alexis de Tocqueville had their reservations about universal suffrage. In their view, the tyranny of the majority posed a serious threat to liberal values. We may note, too, that the introduction of universal male suffrage was promulgated by conservative statesmen (Disraeli in Britain, Bismarck in Germany), while plebiscitarian democracy brought Louis Napoleon to the imperial throne in France.

Mill's *On Representative Government* tried to address these issues in suggesting that mediating institutions – representative assemblies, civil society organizations and the judiciary – should be the bulwark defending liberal values. Absent such mediating institutions, universal suffrage can very easily slide into unbridled mob rule. This is of course the main difference between classical – Athenian or Roman – popular democracy and modern representative democracy, where majoritarianism is mitigated and limited by the mediating institutions that classical democracy lacked. Separation of powers is another mechanism aimed at the same goal.

Some of the current challenges posed to liberal democracy by populist and authoritarian leaders and movements stem from the weakening of these mediating institutions. The spread of social media has created a new virtual direct democracy, in which leaders can address the people directly, obviating or circumventing mediating institutions: The political parties, trade unions and professional associations, the press and the judiciary are pushed aside by the volume and force of Facebook and Twitter, which have become the modern equivalent of the agora or the forum. One does not have to stand in the rain or →



# Liberal Democracy: Values and Institutions



## Shlomo Avineri

Member, The Israel Academy of  
Sciences and Humanities  
Emeritus Professor of Political Science,  
The Hebrew University of Jerusalem

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sun to be part of the populus: A smartphone will do. The traditional institutional vehicles of representative democracy have to develop new and effective modes, through social media, to confront this virtual direct democracy.

“Of the three fundamental principles proclaimed by the French Revolution – Liberty, Equality, Fraternity – the last has never successfully been institutionalized.”

Furthermore, of the three fundamental principles proclaimed by the French Revolution – Liberty, Equality, Fraternity – the last has never successfully been institutionalized. While the first two principles have been anchored in powerful institutional structures that have guaranteed their impact on political and social life, Fraternity has remained a somewhat abstract principle, sometimes linked to nebulous family-like associations. In essence, it is the principle of Solidarity, which suggests that citizens are not merely atomized individuals looking to their own security and comfort, but also members of a community, bearing obligations to other members of the body politic and expecting reciprocal support from their co-citizens.

The deficit of institutionalized solidarity, anchored in education and behavior, has left the field open to nationalistic, religious or ethnically based feelings of solidarity to substitute for universal norms of citizenship. Historically, socialist movements tried to forge a sense of solidarity based on class, with mixed results. To counter ethnically based feelings of solidarity, liberal democracies must strengthen this third pillar of republican democracy, linked as it is to the other pillars of liberty and equality.

# Representative Democracy: Vulnerabilities and Resilience



**Dominique Moïsi**  
Institut Français des Relations  
Internationales

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Thirty years ago, in the joyful mood that followed the fall of the Berlin Wall, there were those, like Francis Fukuyama, who were set to proclaim “the end of history.” In 2019, many, by contrast, are predicting “the end of democracy.” Both visions were and are premature. Classical, liberal, representative democracies are much more resilient, and illiberal democracies, not to mention authoritarian regimes, are much more fragile than the doom-sayers think.

Of course, the relative or absolute geopolitical decline of the West and the crisis of democracy are largely interconnected. The triumph of liberal democracy was closely linked to the preeminence of the West. Now, for the first time since at least the end of the eighteenth century, the West is not alone and has lost its monopoly on the presentation of models. What we are witnessing is the geopolitical equivalent of a tectonic shift. Could we go so far as to say that the retreat of the West and the return of the East mean that liberal democracy is down, and authoritarian models are up? Could it be that simple?

“ *Classical, liberal, representative democracy is not dead. It can thrive if Western elites replace arrogance toward others and complacency toward themselves with a combination of modesty toward others and ambition for themselves.*”

Socio-economic factors do seem to reinforce that evolution. The rise of populism and nationalism translate into a combination of anger, fear, humiliation and nostalgia, and at the same time reflect an explosion of inequalities and a distrust of the elites. →



# Representative Democracy: Vulnerabilities and Resilience



**Dominique Moïsi**  
Institut Français des Relations  
Internationales

Yet authoritarian regimes are much more vulnerable than they think. In Hong Kong, China is faced with strong resistance in the name of freedom and the rule of law.

Classical, liberal, representative democracy is not dead. It can thrive if Western elites replace arrogance toward others and complacency toward themselves with a combination of modesty toward others and ambition for themselves.

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# Is Democracy Without Rights Possible?



## Ruth Gavison\*

Member, The Israel Academy of Sciences and Humanities  
Professor of Law, The Hebrew University of Jerusalem

\* Professor Gavison passed away after submitting her lecture summary, before the publication of this booklet.

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Some say that democracy and human rights are two distinct ideals.

Democracy signifies the self-determination of the political community, the *demos*. Democracy, according to this definition, says nothing about the *content* of the norms and the political arrangements in the specific community. Consequently, at least in principle, there can be democracy without rights.

Others argue that the protection of rights is the essence of democracy – that democracy is the political arrangement that ensues from a humanistic vision of persons enjoying equal dignity and freedom. A political regime that does not fully protect human rights and the rights of minorities is to that extent a lesser democracy.

Neither of these statements does justice to the complexity of each of these idea(l)s and to the relationships between them.

*Democracy is the political arrangement that bases the legitimacy of government on the consent and authorization of the political community, the demos.* Political communities are not universal. They have populations and histories. The ideal is government *by* the people, *of* the people and *for* the people. And the “people” here is all and only the members of that political community – its citizens.

*The core idea of human rights* is a set of moral normative constraints. Its distinct power lies in its combination of *the idea of rights* as a specific deontic concept (as distinguished from wishes, interests or needs, for example), and *the idea of human dignity as the supreme, universal and timeless value* of human societies.

Democracy is much more than majority rule, while human rights are universal →



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and should apply to and be protected by all regimes, not just democracies. Moreover, there is an important mutual reinforcement between the ideas and aspirations of human rights and of democracy. Both presuppose a shared conception of individuals having equal freedom and human dignity.

In addition, even democracy in the narrowest sense requires a *demos* that has equal rights to vote and be elected, freedom of expression, and the right to obtain information about the performance of the ruler.

However, those who see the protection of human rights as a constitutive element of democracy disregard the fact that democracy is centered on the particular *demos* of the relevant community, whereas human rights, by definition, presuppose moral commitments to all persons, *qua* persons. Their relevant community is humanity at large.

There is another strong and critical affinity between democracy and human rights.

*They are both part of the shared framework of societies, as distinguished from decisions of policies and arrangements enacted and implemented by specific governments, which may be quite controversial.*

“*The tendency to expand democracy and human rights to suit our own political convictions is theoretically unfortunate and practically pernicious.*”

As such, they are supposed to provide the solidarity and inclusiveness that may permit political negotiation and compromise between different ideologies, visions of the good and interests in particular civic societies. →



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This is an affinity often ignored both by those who advocate democracy as majority rule and by those who equate democracy and human rights.

The tendency to expand democracy and human rights to suit our own political convictions is theoretically unfortunate and practically pernicious.

Our conceptions of democracy and human rights will have to be thin to perform their critical task – but they are necessary for a stable and free society.

# The Crisis of Liberal Democracy: An Overview



## Zeev Sternhell\*

Member, The Israel Academy of Sciences and Humanities  
Emeritus Professor of Political Science,  
The Hebrew University of Jerusalem

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The word “liberty” can mean either the capacity to accomplish certain actions or not accomplish them, without being prevented from doing so by others – society or the state – or else the capacity to obey only laws one has given oneself. The first sense pertains to classic liberal teaching, the second to democratic doctrine. For that reason, liberalism can exist without democracy, but it will always be incomplete; it will remain what I have elsewhere called a “blocked” liberalism. However, the converse is not true: Democracy cannot survive without liberalism, in the absence of which it would lose all real significance and become a meaningless word.

The liberalism of the Cold War matters, not only because it is interesting in itself, but because of its legacy, which is a rejection of the Franco-Kantian Enlightenment and of

rationalism in general, and that rejection is a basic element in the anti-liberalism of our time. Modernized and adapted to the political and historical conditions of the beginning of the twenty-first century, the intellectual form of this campaign has evolved, but, up to the middle of the last century, and in many ways up to our own time, it has demonstrated a surprising continuity.

Thus, from the 1950s until our own time, we are faced with the questions not only of what liberty is, which is relatively easy to answer, but also of what liberalism is. Is the anti-liberalism of our time – which prevails in Hungary, Poland and Israel, not to speak of Donald Trump’s America, and is trying to come →

“*Is the anti-liberalism of our time – which prevails in Hungary, Poland and Israel, not to speak of Donald Trump’s America, and is trying to come to power in Western Europe – not, to some extent, the heir of the anti-rationalism, the war against the rights of man in the name of history, as perceived by the critics of Enlightenment rationalism?”*



# The Crisis of Liberal Democracy: An Overview



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to power in Western Europe – not, to some extent, the heir of the anti-rationalism, the war against the rights of man in the name of history, as perceived by the critics of Enlightenment rationalism?

I do not think that most of the arguments against liberalism put forward from the eighteenth century through the Cold War hold water. I do not believe that all values are equal. On the contrary: I believe that it is not only possible but necessary for the protection of liberty and democracy to establish a clear hierarchy of values. A country with an exemplary liberal regime, where there is negative liberty but where poverty increases from one year to the next, as in some countries of the European Union and in the United States, is not the ideal, in my opinion. I believe that universal, humanist values are superior to particular, national or ethnic values, or to class values, in the bad sense of the term. Social inequality, beyond a certain point, falsifies the meaning of liberty, if it does not completely destroy it.

Which brings us to the question of illiberalism and the political realities of our time. I do not know who invented the term “illiberalism,” but, to my understanding, the very concept is fallacious. So-called illiberal democracy, as practiced in our time in Eastern Europe, and as the Israeli right seeks to introduce in our country, is a wholly anti-liberal democracy, which really means that it is not democracy at all. A democracy that denies the universal values of the Enlightenment – and liberty, as Chateaubriand remarked, is the daughter of the Enlightenment – is a democracy in name only. A political system that denies or disregards the values of equality, a regime elected by universal suffrage and enjoying a parliamentary majority that allows itself, legitimately, by its own lights, to waive the usual constitutional restrictions on the power of →



# The Crisis of Liberal Democracy: An Overview



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the executive – to mutilate if not destroy the checks and balances between the powers, the independence of the judiciary and the rights of man – such a system is self-destructive. Illiberalism is thus a fallacious term: A democracy in which all that remains is universal suffrage, without any guarantee of human rights or equality, a democracy in which the community of citizens is regarded as inferior to the national community, is not a democracy in the true sense of the word. If a democracy is not based on universal and rational values, if it is rooted in a tribal nationalism, as is the case at present, “democracy” is a misnomer.

# Democracy: In Search of a Strategic Perspective



**Werner Weidenfeld**

Emeritus Professor of Political Systems  
and European Unification, Ludwig-  
Maximilians-University Munich

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All liberal democracies are facing great challenges – from without as well as from within. Take the changing power architecture of world politics:

The USA,  
China, India, Russia,  
the Arab world.

Take the populist movements in almost every democracy, and see the tendency towards autocratic states.

See, for example, Eastern Europe:

They celebrated the birth of their democracy 30 years ago, and now they are distancing themselves from it, in Hungary, in Poland.

The status quo is: Cultural erosion –

Trust erodes.

Distrust grows.

Alienation dominates.

Structural Problems:

globalization,  
internationalization,  
cyber-developments,  
digitalization.

I call it “the Era of Complexity”

Cultural developments:

With the development of a growing division of labor,  
you need people to trust in the competence of others, but, in reality, more than  
70% of the people say that they don't understand anything. →

“ So the Era of Complexity is combined with the Era of  
Confusion. The consequence is: Liberal democracy  
has big problems.”





# Democracy: In Search of a Strategic Perspective



**Werner Weidenfeld**

Emeritus Professor of Political Systems  
and European Unification, Ludwig-  
Maximilians-University Munich

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I call this cultural development “the Era of Confusion.”

So the Era of Complexity is combined with the Era of Confusion.

The consequence is: Liberal democracy has big problems.

What might the strategic answer be?

One answer that worked for many decades is no longer available:

During the East–West conflict

the western democracies,

when they were challenged, could answer:

Look to the east.

Go to the east.

So, in order to overcome this historic crisis, there must be a reorientation!

This reorientation will require several steps:

## **(1) Develop a "culture of democracy."**

This is more than knowing the legal framework: It is a spirit.

Develop this culture on different levels:

- in schools and educational frameworks,
- at universities,
- in mass media,
- in the social sciences.

## **(2) Develop the “culture of democracy” wherever power decisions are happening:**

- on the village level,
- on the level of the nation state,
- on the international level. →



# Democracy: In Search of a Strategic Perspective



## **Werner Weidenfeld**

Emeritus Professor of Political Systems  
and European Unification, Ludwig-  
Maximilians-University Munich

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### **(3) To develop democracy, a common perspective is needed.**

For example: new representative elements or repressible elements; new direct democracy, to learn from the Swiss example of popular referenda.

### **(4) Develop a practical strategy:**

We must overcome our strategic speechlessness.

# The Tension between Majority Rule and Equal Human Rights in Contemporary Democracy



## Moshe Halbertal

Member, The Israel Academy of Sciences and Humanities  
 Professor of Jewish Thought and Philosophy, The Hebrew University of Jerusalem  
 Gruss Professor, New York University Law School

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The current political tension and crisis have been framed as the tension between democracy, narrowly conceived, and liberalism; that is, between strict majoritarianism and minority and individual rights.

I wish to redefine the problem while engaging with the ways in which democracy is conceived. I believe that the gap between these two poles – Democracy and Liberalism – is artificially constructed, and that a closer look at what democracy is reveals that, inherently in its conception, deeply liberal commitments are assumed. This is meant not as a historical analysis of the way in which democracy developed, but rather as a conceptual reconstruction of its values and what it ideally stands for.

Democracy, I claim, is based on three values. The *first* value is implied in the principle of “one person, one vote”: Everyone whose fate is defined and decided by the political body should have the same weight in impacting its decision-making. Each person has the same one vote, and each can be elected for office as much as anyone else. This is the basic commitment of democracy, which implies both equality and autonomy: equality in the equal weight that is granted to everyone in impacting political decisions, and autonomy in the way each can share in the decisions that would define their fate.

“*The limitations on majority rule are essential if minorities are to accept the decisions made, and that includes their knowing that democratic decisions are essentially reversible and that minorities are not crushed by losing an election.*”

The *second* value is grounded in the principle of rule by argument. The party or person elected to office has gained that power and responsibility →





# The Tension between Majority Rule and Equal Human Rights in Contemporary Democracy



## Moshe Halbertal

Member, The Israel Academy of Sciences and Humanities  
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 Gruss Professor, New York University Law School

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because they have convinced us that they have the best policy (compared with other available options), and they are the best people to implement it. The person who has gained power didn't seize it by violence, nor did he or she inherit it; they have managed to convince a majority of us through argument. For that value of democracy to be maintained, freedom of speech and transparency of information must be preserved, and an ongoing, thriving opposition has to be guaranteed. Without these minimal conditions, the very idea of argument is undermined, and the very notion of convincing is emptied.

The *third* value of democracy resides in its establishment of a non-violent procedure for adjudicating differences. It is a form of government that allows people to live together with deep differences, while maintaining a peaceful procedure for decision-making. To preserve this non-violent feature of democracy, it is important to set limits to what the “winner” can do. The limitations on majority rule are essential if minorities are to accept the decisions made, and that includes their knowing that democratic decisions are essentially reversible and that minorities are not crushed by losing an election.

These three values are the features that make democracy both morally and politically attractive. In analyzing them, we realize – I hope – that what are viewed as liberal values are already embedded within the very idea of democracy. It is for these reasons that we need to rethink and redefine the way in which the contemporary crisis should be addressed.

# The Transformation of Israeli Democracy through the Judiciary



**Yoav Dotan**

Edwin A. Goodman Professor of Law,  
The Hebrew University of Jerusalem

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The process of democratic decay (or “backsliding”) and the phenomenon of “constitutional regression” in democracies around the world have been subjects of much discussion among political scientists and constitutional lawyers alike during the last decade. In the current paper, I do not purport to provide a general overview of the causes and elements of these complicated and diverse processes in different systems, nor do I wish to make arguments that aim to encompass all aspects of democratic decay. Rather, I wish to examine the role and status of judicial institutions (namely, high courts) within the general phenomenon of democratic decay. In particular, I would like to study the relationship between two seemingly divergent processes: *the rise of judicial power* in liberal democracies, and *democratic backsliding* in the same constitutional systems. I focus, for this purpose, on the case of Israel (though I do not necessarily argue that it is a representative case of democratic backsliding).

In Israel, as elsewhere, the rise of judicial power began long before the last decade. Beginning in the early 1980s, the Israel Supreme Court initiated major reforms in most doctrines of judicial review of administrative actions. Those included expanding the doctrines of *standing* to bring actions against the state, *justiciability* of almost all governmental decisions and subjecting any governmental decision to expanded review under the standard of reasonableness. During the 1990s the Court also introduced the “constitutional revolution” and began reviewing the constitutionality of legislation passed by the Knesset, on the basis of Basic Laws enacted in 1992. Most importantly, the Court also developed a doctrine of “impeachment by judicial review,” enabling anyone →

“ *The intensive involvement of the Supreme Court in politics led to a process of politicization of the judiciary and the judicial process.*”



# The Transformation of Israeli Democracy through the Judiciary



**Yoav Dotan**

Edwin A. Goodman Professor of Law,  
The Hebrew University of Jerusalem

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who so wished to initiate court processes seeking to remove office-holders once they were indicted for (suspected) corruption or other kinds of misbehavior. Under this doctrine, the Court ordered the removal of several high-ranking officials, military officers and even ministers and deputy ministers.

The intensive involvement of the Supreme Court in politics led to a process of politicization of the judiciary and the judicial process. The initiation of court action to remove political opponents became commonplace in the Israeli polity, as did attacks on the Court by politicians. As a result, public trust in the judiciary declined, and the question of the jurisdiction and powers of the Supreme Court became a central political question, subject to heated debate between the opposing political powers. For Israeli right-wingers, the Court became a symbol of liberal despotism. For Israeli liberals, the Court currently is seen as the principal institution of representative democracy, in the expectation that it will curtail the powers of the political branches.

# Illiberal Populism's Challenge to Constitutional Justice



**Michel Rosenfeld**

University Professor of Law and  
Comparative Democracy and Justice  
Sydney L. Robins Professor of Human  
Rights, Yeshiva University

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In recent years, illiberal populism with authoritarian tendencies has gained a foothold in many parts of the world, posing vexing challenges to traditional liberal constitutional democracy. One of the most alarming aspects of this new trend is that it uses constitutional and democratic means to achieve ends that liberals consider stacked against the very essence of modern constitutional rule. However, some of the staunchest proponents of illiberal populism, such as Viktor Orbán, the prime minister of Hungary, have argued that they adhere to constitutional rule and its associated norms. The pillars of liberal constitutionalism consist in limitations on the powers of government, adherence to the rule of law, protection of fundamental rights, and securing the fundamentals of democracy. Arguably, illiberal populists can comply with the letter if not the spirit of these principles. In Orbán's view, rather than deviating from European constitutional democracy, he is engaged in a *Kulturkampf*, countering liberalism's "ruthless capitalism and selfish individualism" with the promotion of national pride, Christianity and family values.

As I understand it, the best way to determine whether illiberal populist democracy represents a cultural clash within the bounds of constitutionalism or an attempt to overthrow constitutionalism from within is to evaluate the two contending positions from the standpoint of constitutional justice. All democratic constitutions, rooted in the Enlightenment's commitment to individual liberty and equality, implicitly or explicitly address the question of justice, and predominantly that of distributive justice. Constitutional justice thus calls for justice through the constitution. However, this is not full justice, but rather what may be called, with reference to John Rawls, the "justice essentials" of democratic constitutionalism. →





# Illiberal Populism's Challenge to Constitutional Justice



**Michel Rosenfeld**

University Professor of Law and  
Comparative Democracy and Justice  
Sydney L. Robins Professor of Human  
Rights, Yeshiva University

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For Rawls, the realization of his theory of justice as fairness requires adherence to certain “constitutional essentials.” Analogously, the fulfilment of democratic constitutionalism depends on the provision of certain “justice essentials.” These essentials are mostly distributive and twofold: material and identitarian. All modern constitutional democracies are three-dimensional, in that they comprise a universal (the polity as a unified whole), the individual (every person as free and equal), and a plural (as manifested through diversities in culture, religion and linguistic origin). The relevant minimum of justice must address all three dimensions and seek a fair equilibrium between them. On the material side, constitutional justice essentials must guarantee the means to achieve fair and livable welfare conditions for all concerned. On the identitarian side, constitutional justice must institute an equitable and proportional accommodation among competing claims for recognition by a plurality of diverse groups, respectively espousing a range of different and at times clashing conceptions of the good.

Liberal constitutionalism can satisfy the justice essentials requirement through a mutual reinforcement of *ethnos* and *demos* on the identitarian side of the scale and through constitutional provisions designed to guarantee an acceptable level of basic individual and social welfare on the material side of the scale. The amenability of liberal constitutionalism to the achievement of the justice essentials seems to be maximized within the context of the Westphalian nation-state. By contrast, illiberal populist constitutionalism is bound to fail in meeting the justice essentials, at least on the identitarian side of the scale, given that it always ends up designating only part of those within the polity as “*The People*.”

Indeed, illiberal populists – or at least those on the right – typically reserve →



# Illiberal Populism's Challenge to Constitutional Justice



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University Professor of Law and Comparative Democracy and Justice  
Sydney L. Robins Professor of Human Rights, Yeshiva University

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peoplehood for a specific ethnic, religious, cultural or linguistic group, to the exclusion and detriment of long-established and newly arrived counterparts within the same constitutional unit. If “the people” of India is meant to include the Hindu majority, to the exclusion of the country’s 170 million Muslims, then the latter would patently be deprived of identitarian justice essentials. The identitarian injustice at stake may be supplemented by a material one, if the illiberal populists’ divide between those included and those excluded from the attributes of peoplehood extends to the apportionment of basic, constitutionally required welfare benefits.

At least in theory, illiberal populism on the left need not deny any group within the polity access to peoplehood, but it nonetheless seems highly unlikely for that brand of populism to meet the justice essentials as they regard the individual or the plural.

In the course of establishing that liberal constitutionalism can provide the justice essentials within the nation-state, whereas its illiberal counterpart cannot,

“Globalization makes it increasingly difficult for liberal constitutionalism to meet either the identitarian or the material requirements of the justice essentials.”

another key insight emerges: Globalization, with its exacerbation of the free flow of capital and of the mass migration of labor, poses a major problem for liberal constitutionalism itself. Specifically, globalization makes it increasingly difficult for liberal constitutionalism to meet either the identitarian or the material requirements of the justice essentials. The free transnational flow of capital allows for systematic avoidance of domestic, constitutionally enshrined material constraints. The advent of new religious and cultural groups through →



# Illiberal Populism's Challenge to Constitutional Justice



## **Michel Rosenfeld**

University Professor of Law and  
Comparative Democracy and Justice  
Sydney L. Robins Professor of Human  
Rights, Yeshiva University

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mass migration disrupts the identitarian equilibrium that had assured harmony among the preexisting plurality of ideological perspectives. The external “other” – such as Muslims in a constitutional order that had fairly encompassed Catholics and Protestants – is perceived as a threat that may be more likely to lead to exclusion than to a renegotiation of constitutional justice essentials.

In the last analysis, illiberal populism emerges as a resistance and a response to liberal constitutionalism's paving the path toward globalization. Will the conflict between liberal and illiberal populist constitutionalism reach a stalemate? Or will this conflict eventually figure as a dialectical moment in a continuing struggle to achieve justice essentials? The answers to these questions are uncertain, but they will depend to an important extent on whether or not transnational constitutionalism may be susceptible to becoming a major contributor to the achievement of the justice essentials.

# Implanting Liberal Democracy: The Arab Spring



## Uzi Rabi

Professor Rabi is Director of the Moshe Dayan Center for Middle Eastern and African Studies, Tel-Aviv University

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The downfall of autocratic rulers in Arab states was accompanied by feelings of euphoria and hopes for a “new dawn,” imbued with expectations for the establishment of a pluralistic and open society. When the Arab Spring unfolded, and Western pundits and public intellectuals were asked to comment on the news of the day, their analysis and advice both to news outlets and to governments was based on the idea that the Arab peoples were throwing off the yoke of neo-colonialism and Western involvement in their affairs while pushing toward a new liberal-democratic Middle East. It seems that an overarching theme that must be reckoned with was not considered.

**Culture matters.** One cannot understand the political developments in the Arab world without understanding the inherent differences between the political culture in the region and that in the West. Yet, in the West, there was a startling tendency to take a universal view, particularly about the implementation of democracy in the Arab world. This came from both sides of the political spectrum: from the so-called Neo-Conservatives, who favored exporting democracy at gunpoint, and from those on the left, who believed in the universalism of democracy, ignoring the particularistic aspects of Arab politics and minimizing the influence of Islam in those countries’ political life.

“Hopes for a new ‘fourth wave of democracy’ blooming in the Arab world were met with civil war, religious extremism and state breakdown, capped by the rise of the Islamic State.”

The events of the Arab Spring and the political upheavals that followed reordered and remade the politics of the Middle East. However, hopes for a new “fourth wave of democracy” blooming in the Arab world were met with civil war, religious extremism and state breakdown, capped by the rise of the Islamic State. →





# Implanting Liberal Democracy: The Arab Spring



## **Uzi Rabi**

Professor Rabi is Director of the Moshe Dayan Center for Middle Eastern and African Studies, Tel-Aviv University

The Arab Spring underscored the foreign powers' lack of influence in seeking to imprint their own ideologies and political culture on the region. Their dreams of spreading universalist maxims of freedom, democracy and liberal institutions, while admirable, have been shown to be foolhardy at best. In the end, the goal should be to analyze the Middle East, warts and all, as it is, not as it should be or as we wish it to be. That means appreciating the Middle East for its “otherness” and seeing its unique factors – particularly the impact of religion and tribal solidarity – not as essentialist caricatures, but as significant features of the socio-political map.

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# Liberal Democracy and Challenges of Religion

**Joseph Weiler**

University Professor, Joseph Straus  
Professor of Law and European Union  
Jean Monnet Chaired Professor, New  
York University

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(1) State and Religion: It is common to talk about the relationship between state and religion as if all religions, especially the Abrahamic ones, are cut from the same cloth. In fact, there are some fundamental differences among them, so that solutions and arrangements suitable for one might not necessarily be suitable for others. The most important difference in this context relates to the issue of freedom from religion. Under liberal theory, freedom of religion, which is a fundamental right, is the obverse side of freedom from religion. To discriminate against someone because of his or her religion is no more odious than to coerce a non-believer into religious practice.

Although it is usual to speak of the Judeo-Christian tradition, in relation to this parameter we should speak of the Judeo-Islamic tradition. Christianity, since the Second Vatican Council, has taken the principled view that religious coercion is against the will of God, and so freedom from religion is conceived as a religious proposition. By contrast, Judaism and Islam have no compunctions, when it lies in their power to do so, about coercing those under their sway – at least those who “belong,” by descent or otherwise, to these respective religions – to abide by religious law and norms. In Israel there are countless examples of this nature, the most egregious being the absence of civil marriage, so that in order to exercise the fundamental right to marry, a person is coerced to contract the marriage religiously or do so outside the jurisdiction. Obviously, in thinking about the relationship between the state and the church/synagogue/mosque, this difference of principle has major ramifications. →

# Liberal Democracy and Challenges of Religion

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(2) Neutrality. It is almost an article of faith in liberal doctrine that secularism is a position of neutrality, and hence the state, which is supposed to be neutral in relation to matters of religion, must be secular. Thus, if it funds public education, this cannot be a religious education, and so on. This is simply wrong. The secularism of the state as practiced in France or the United States may be a noble position, but neutral it is not. If, today, the major cleavage in society is not, say, between Catholics and Protestants or between Jews and Christians, but rather between the religious and the secular, for the state to adopt a secular stance is not neutral. Hence, the position adopted by, say, the Netherlands or the UK, whereby, in the interest of (true) neutrality, the state is willing to fund both secular public schools and Protestant, Catholic, Jewish and Muslim schools.

“ *The secularism of the state as practiced in France or the United States may be a noble position, but neutral it is not.*”

# The Challenges of Liberal Democracies: The Role of Academies



**Nili Cohen**

President, The Israel Academy of Sciences and Humanities

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Universities are natural carriers of the globalization process. However, the conditions that transformed the university into a global entity a thousand years ago have changed dramatically. Globalization means having a common denominator. We do not mourn the passing of the monolithic academic world of the past, which was accessible only to European, white, Catholic, single men. The current model is compatible with the basic values of liberal democracy – freedom and equality – and is far more accessible than the earlier one. However, it is fraught with cultural conflicts and harbors some threats. The tensions are reflected in the subjects both of instruction and of research, mainly, but not only, in the disciplines of the humanities and the social sciences.

As scholars, we are not the moral arbiters of our political life. Our expertise does not make us experts in politics, and involvement of the Academy as a whole would be justified only in cases where political interference takes aim at the heart of academic values.

Under law, the Israel Academy serves as a scientific advisor to the Israeli government. We have counseled the government, inter alia, on how to develop medical research in Israel, how to maintain the study of nuclear physics, and, in a quite different context, how to develop Holocaust and genocide studies in Israeli universities. Now we are working on welfare indicators.

One of our main challenges is how to disseminate trust in science. Scientific knowledge is generally based on assumptions that require verification and on questions relating to the technique or methods of verification. The quest for truth, which describes both the creative drive and the obligation entailed in the fulfillment of that drive, unites the entire scientific world and the scientists themselves. It involves constant uncertainty. →



# The Challenges of Liberal Democracies: The Role of Academies



**Nili Cohen**

President, The Israel Academy of Sciences and Humanities

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Inherent in this process is the freedom to cast doubt on every assumption and to offer a conflicting view.

“How can a system founded on casting doubts ask for the trust of those who operate outside this system?”

That culture of casting doubts, of not bending to authority, is the essence of a free intellectual life that leads to innovation in theory and in practice. Indeed, the history of science is replete with examples of paradigms that collapsed and were replaced by other paradigms. Hence the paradox: How can a system founded on casting doubts ask for the trust of those who operate outside this system?

While knowledge can always be subject to doubt, some of its products, reflected in modern technology, can hardly be questioned. Here the issue of trust acquires a different dimension. There is no lack of trust in the achievements of technology, but there are serious concerns relating to its risks, inherent in destructive weapons, climate change and artificial intelligence. It is therefore crucial for scientists to present to the political and financial echelons, as well as the general public, not only their findings and conclusions – but also the doubts and the risks involved.

To address these concerns and others, such as ethical misconduct in science, we must turn to the fields of the humanities, social science and law. The question then relates to the degree of trust available to these fields and their ability to address the risks described above.

Following C.P. Snow, we used to speak of two cultures: of the sciences and of the humanities. The differences are still there. A debate on vaccination, though emanating from different viewpoints, might be more scientifically based than the debate on the relationship between the judiciary and the legislature, which is →



# The Challenges of Liberal Democracies: The Role of Academies



**Nili Cohen**

President, The Israel Academy of  
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heavily burdened with political views.

We all take pride in the fantastic successes of science and technology – but we all know that the humanities all over the world are facing a crisis. We believe liberal education contributes to the individual and to society at large. A report by the Academy relating to the crisis in the humanities proposed, inter alia, a program whereby mandatory courses in the humanities would be taught to all students. This recommendation has been adopted by some universities.

Following in the path of Martin Buber, the first president of the Israel Academy, we want to deepen society's knowledge of the realms of culture and the spirit, and its understanding of our past, in order to build our future. That challenge remains before us.

# The Role of Learned Academies in Preserving the Humanistic Tradition



**Linda Greenhouse**

President, American Philosophical Society

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One complication in discussing the role of learned academies is that the world's roughly 120 learned academies have different structures and missions. Some focus purely on science and technology. Some advise their country's government. Some engage in policy studies and issue recommendations. And some, such as my own American Philosophical Society, support scholarship (through some 200 grants a year to young and mid-career scholars) and make their library resources available to the public. The mission, in the words of our founder, Benjamin Franklin (in 1743), is to "promote useful knowledge."

Yet, no matter their differences, learned academies share challenges in what many are calling the "post-truth age" – an era when any institution that suggests elitism is suspect, and when the very notion of knowledge as a good has become elusive – when a disturbing proportion of the public can be persuaded that real news is fake, and that fake news is real. What to do in a climate that no longer appears to prize the very attributes and goals that inspired the founders of these societies to create them in the first place? Learned academies today are the inheritors of the Enlightenment in a dark time – a time when technology is outstripping our ability to use it wisely and when the mass public suffers not from a *lack* of information, as in the past, but from purveyors of affirmative *misinformation*.

In this sense, the state of learned academies today corresponds perfectly

with the topic of this conference. In fact, what we might call the challenge to learned academies can be said to stand in microcosm for the challenge to liberal democracy writ large. It's just possible that learned academies may →

“What we might call the challenge to learned academies can be said to stand in microcosm for the challenge to liberal democracy writ large.”





# The Role of Learned Academies in Preserving the Humanistic Tradition



**Linda Greenhouse**

President, American Philosophical Society

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have something to teach society as a whole as they try to understand and find strategies for dealing with the common issues that confront them.

So the question is: How can learned academies, born in another era, contribute to today's world? I think the answer has to be: by finding new ways to adhere to timeless values – by joining forces and lending their voices to problems, like the climate crisis, that know no national boundaries; by finding new ways to tell old stories, through digitizing precious archives of knowledge that until recently were accessible only to the lucky few; by offering safe spaces where scholars and policymakers can interact; and by applying their expertise to the task of understanding why the world at this point in human history is spinning off its axis. For example, the American Academy of Arts and Sciences has had a long-running project called The Public Face of Science, which seeks to understand the sources of public skepticism in order to help scientists communicate more effectively with a skeptical public.

One thing that learned academies have in their favor is history – lots of history. They have seen dark times before – dark moments, dark eras – and the ones that are still with us are those that have held true to what they stood for at their founding. That's what they still have to do, even as they find new ways of doing it – to celebrate human creativity, exploration and discovery. Learned academies must continue to be keepers of knowledge, but they cannot be *gate*-keepers. They must invite the public in. At their best, the humanities can instill a sense of wonder, a conviction that humanity's story has not yet run its course. This is the “useful knowledge” that learned academies are uniquely situated to share with a world that seems to have lost faith in the human potential to make it better.

# Inequality in Historical Perspective



**Shulamit Volkov**

Member, The Israel Academy of  
Sciences and Humanities

Professor of History, Tel Aviv University

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I wish to point, firstly, to the changing meaning of equality in the context of modernity, as against the constancy of *economic inequality* everywhere in this changing world. Secondly, I argue that the gap thereby opened between the dominant *ideal* of equality and the *reality* of extreme income and property inequality, having reached “titanic proportions,” now threatens to break down our system of government and is behind much of the political upheaval shaking our world.

In pre-modern Europe, societies were unequal not only in *practice* but also in *theory*. Inequality was perceived as just, since the rich and powerful were expected to provide not only protection to “their” peasants, so to speak, but also a multitude of costly administrative and social services. Of course, our data for the past is far from accurate, but some figures are available even for as early as the last quarter of the seventeenth century. For the early nineteenth century we are surely safe in stating that a worker’s income, regardless of geography or of inner-labor differentiations, was immeasurably smaller than that of the rich local aristocrats, on the order of three to four thousand times.

But by then, the principles dictating life in the old regime were quickly losing their legitimacy. The rights now deemed necessary for individual freedom included liberty of the person, his right to move and settle, to own property and conclude valid contracts, and then also freedom of speech, of thought and of faith. Strict equality was not inevitably linked to all of these, but it was implicit in the process. It was now also demanded by governments, which wanted to abolish privilege in order to garner more taxes; by aristocrats, who protested against monarchical “despotism” – as it was now suddenly called – and by the proponents of the so-called Enlightenment of the age. Finally, it was a bourgeois →



# Inequality in Historical Perspective



**Shulamit Volkov**

Member, The Israel Academy of  
Sciences and Humanities

Professor of History, Tel Aviv University

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requirement, emerging out of the economic interests of the bourgeoisie within the early capitalist system. Nevertheless, economic inequality remained the norm. It was generally accepted even by such prophets of equality as Thomas Paine, who wrote: “I care not how affluent some may be, so long as none be miserable in consequence of it.” Thus, the gap between the widespread *ideal* of equality in all spheres and the persistent *reality* of stark economic *inequality* began to open, stretching through the nineteenth and twentieth centuries, up to our own days.

Clearly, during the two centuries that followed the French Revolution, *everything changed*. The notion of equal *civil* and sometimes also equal *political* rights played an important role in shaping the new world, and the achievement of some of these rights had clear egalitarian consequences. Nevertheless, inequality has remained the norm in the economic sphere. The failure of Communist regimes to uphold an economy that depended upon a measure of such equality has been amply demonstrated, and so, as we are finding, has the inability and unwillingness of Capitalism, especially in its neo-liberal guise, to reduce economic inequality.

“*In a society that has learned to expect equality in all things large and small, the persistence of stark economic inequality cannot but cause bitterness and unease; in fact, as we see today, under such circumstances the entire edifice begins to shake.*”

What finally remains is a deep sense of injustice felt by millions across the world vis à vis the large and growing gap between the rich and the poor, and with it – the widespread loathing of the entire elite, seen as collaborators in upholding this discrepancy. In a society that has learned to expect equality in all things large and small, the persistence of stark economic inequality *cannot but* cause bitterness and unease; in fact, as we see today, under such circumstances the entire edifice begins to shake.

# Citizens and Subjects: Voice and Representation in a Technological Age



**Sheila Jasanoff**

Pforzheimer Professor of Science and Technology Studies, Harvard University

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Liberal democracy is felt to be in crisis in the very places where this form of government was born. Throughout the Western world, there is a sense that political institutions are losing legitimacy in the face of a new populism that disregards established authority, including the very possibility of common knowledge on which to build the edifices of public reason and collective action. Not only are the forces of skepticism, polarization and individualism on the rise, but the erosion of political institutions seems not to matter to apathetic and disenchanted publics. In the era of the “alt-fact,” it seems that no one can be held to account for once unthinkable offenses against democracy, from stealing elections to claiming absolute executive power. Nor does saving democracy seem to be an effective rallying cry for mass mobilization. Climate change has more power to draw people into the streets than presidential misdeeds that merit impeachment.

Some observers attribute this apathy to the alienating forces of modernization. Writing in *The New York Times*, Ross Douthat traces the problem of American politics to “the distrust of technocracy, the sense that the smartest guys in each political coalition can’t really be trusted, the feeling that the whole model of credentialed meritocracy is corrupt and self-dealing and doesn’t deliver on its promises.”<sup>1</sup> Yet, this story is partial and incomplete. Science still enjoys high social standing and authority. The children leading climate activism in the past few years, along with their adult enablers, have embraced the expert consensus on climate change almost too unquestioningly. →

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1. Ross Douthat, “Exhausted with the Experts,” *New York Times*, December 7, 2019.





# Citizens and Subjects: Voice and Representation in a Technological Age



**Sheila Jasanoff**

Pforzheimer Professor of Science and Technology Studies, Harvard University

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Although a wholesale rejection of technical expertise is not to blame for democracy's present discontents, the role of technology needs to be factored more comprehensively into explanations of our current condition. Some features of the digital revolution are well understood and widely discussed by political analysts: the easy spread of misinformation, the creation of silos of belief, the substitution of online communities for physical, place-based, deliberative ones. These are nontrivial changes, and they have surely affected how politics is done, reviving some forms of grassroots engagement while eroding some sorts of established authority. But those changes should not be our exclusive endpoints in diagnosing the sources of democracy's decline.

Technological change, I argue, affects the creation of political subjectivity and the exercise of voice and agency in ways that must be more completely incorporated into political theory. Technology does not merely alter how and with whom we communicate, or the ways in which we gather evidence and evaluate facts. It changes the conditions of possibility for defining who we are and whom we belong with. In these respects, technology is intimately bound up with the making and unmaking of political subjectivity, and hence also with voice and representation in the processes of politics.

*“Technology does not merely alter how and with whom we communicate, or the ways in which we gather evidence and evaluate facts. It changes the conditions of possibility for defining who we are and whom we belong with.”*

Recent technological advances have dispersed the human subject through multiple, overlapping representations, in effect endowing every physical human being with a genetic and a digital avatar. Technology even mediates how we →



# Citizens and Subjects: Voice and Representation in a Technological Age



**Sheila Jasanoff**

Pforzheimer Professor of Science and Technology Studies, Harvard University

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choose to configure our physical selves, producing, in one observer's words, "the gradual emergence, among professionally beautiful women, of a single, cyborgian face."<sup>2</sup> While such splitting and refashioning of selves raises a host of new questions about human integrity and autonomy, the corporate entities who own much of our digital and genetic information have not been called to account for how they govern our personal information, let alone our self-consciousness and imaginaries of self-realization. As the example of Facebook most dramatically illustrates, it has become possible for the data oligarchs<sup>3</sup> of the information age – global sovereigns with power to shape our self-understandings, our social interactions, and our modes of communication – to endow themselves with the trappings of sovereignty. A massive challenge for democracy in this century is to rein in these runaway transnational rulers by revamping the institutional structures of democratic governance.

This will not be easy. Regulation, the standard means of exercising state control, has been bypassed for too long as restrictive and inconsistent with economic growth. Reliance on the market has proved to be wholly inadequate, as has the idea of tacking on ethics as a corrective module long after practices of extracting and commercially exploiting data were allowed to proliferate unchecked. And political theorists have not begun to tackle the problems of voice and agency when the human self is technologically dispersed, divided and reconstituted through gene sequencing, data science and the unchecked communicative channels of social media. →

2. Jia Tolentino, "The Age of Instagram Face," *New Yorker*, December 12, 2019.

3. See Sheila Jasanoff, *The Ethics of Invention: Technology and the Human Future* (New York: Norton, 2016), Chapter 6.



I argue that we need, in effect, a radical renewal of constitutional thought, on a global scale, if we are to restore agency to today's fragmented, unwittingly subjugated political subjects, and to rethink the foundations for holding the private sovereigns of the technological age to collective, public purposes.

# Citizens and Subjects: Voice and Representation in a Technological Age



## Sheila Jasanoff

Pforzheimer Professor of Science and Technology Studies, Harvard University

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# Democracy in a Digital- Global Society: Technology Giants vs. the Nation State



**Michael Birnhack**

Professor of Law, Tel Aviv University

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The digital environment and global networks have created new speech opportunities, enhanced the exchange of ideas and generated a richer public discourse. As such, they are a celebration for democracies. However, we increasingly realize the challenges that these very same advantages pose to democracy. Some of these challenges have been documented in the literature, such as the digital divides produced by unequal access and participation options, or the “daily me” (as described by Nicholas Negroponte), which enhances speech – but decreases conversation. This talk focuses on the concentration of power by the global media giants, such as social networks, search engines and other data platforms.

“A few internet giants have gained tremendous power, which now affects our public, political sphere in ways that are not always apparent to citizens.”

In a nutshell: A few internet giants have gained tremendous power, which now affects our public, political sphere in ways that are not always apparent to citizens. These are private, commercial entities; and, for those who are not American, they are foreign companies.

I point to three challenges in this regard (and this is a non-exhaustive list). The *first* is the tension between the social interest in maintaining the well-functioning of democracy, on the one hand, and the legitimate commercial interests of the main platforms in this environment, on the other, as well as the public interest in their ability to operate in a free and competitive market; the *second* is the tension between the local and the global; and the *third* is the challenge of participation and identification. →





# Democracy in a Digital- Global Society: Technology Giants vs. the Nation State



**Michael Birnhack**

Professor of Law, Tel Aviv University

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An example of the first challenge is Facebook’s content moderation policies, which resulted, for example, in the removal of Nick Ut’s 1972 photo of a Vietnamese girl escaping her just-bombed burning village, because it depicted a naked girl. Following global protest, Facebook reversed its decision – but we do not know how many other such cases of content removal there are. An example of the second and third challenges may be drawn from the 2019 Israeli elections. A decision by the General Election Committee prohibited anonymous online political ads during the campaign. The reasoning emphasized the integrity of the elections and the need to block foreign interference. This particular form of participation thus was conditioned on identification. In this case, the private foreign platform enabled anonymous participation, but the local law, reflecting local norms and needs, demanded otherwise. Another example is the challenge of fake news. Both legal means, Singapore-style, and technological means, Facebook-style, suffer from over- or under-interference. We have yet to figure this out, in an environment in which we, citizens – now rendered “end users” – have less of a say.

# Between Democracy and Judaism



## Izhak England

Member, The Israel Academy of  
Sciences and Humanities  
Bora Laskin Emeritus Professor of Law,  
The Hebrew University of Jerusalem

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This lecture dealt with the basic question of whether there is a contradiction between the notions of Judaism and of democracy, enshrined in the Basic Law: Human Dignity and Liberty (1992) as Israel's foundational values. Assuming that "democracy" signifies a liberal and secular democracy, what is the meaning of "Judaism" in the context of the state?

Three outstanding Jewish thinkers – Moses Maimonides, Baruch Spinoza and Moses Mendelssohn – gave this question opposing answers, which still exercise a decisive influence upon the conflicting political theories and practices that hold sway in present-day Israel.

According to Maimonides, the task and mission of the Jewish state are to ensure that its citizens observe the religious precepts, since these are the only means to reach corporal and spiritual perfection. This conception of the essence and function of the Jewish state is still the dominant one in contemporary Orthodox Judaism. It is blatantly at variance with the modern conception of a liberal and secular state, in general, and with the reality of the State of Israel, in particular.

*“Rabbinic Judaism must find a way to cope with modernity and with the reality of a modern Jewish state, which recognizes and respects the principles of democracy.”*

In Spinoza's view, the characteristic features of the Jewish state are of a national-cultural nature. The function of religion is to inculcate obedience to the government and to the laws of the state. Religion should be impressed into the service of the democratic secular state and of furthering people's loyalty toward the political authorities.→





# Between Democracy and Judaism



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Member, The Israel Academy of  
Sciences and Humanities  
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The Hebrew University of Jerusalem

Mendelssohn, on his part, demands complete freedom of religion in relation to the state, insisting on freedom from any kind of coercion in religious matters.

In view of these conflicting views, Rabbinic Judaism must find a way to cope with modernity and with the reality of a modern Jewish state, which recognizes and respects the principles of democracy and whose population includes a large proportion of non-believers, as well as members of other faiths. At the same time, the secular elements, too, must deal with Judaism as a religious concept and with the pursuits and ambitions of the state's Orthodox citizens. The solution to this dilemma must be of a complementary nature, in the sense offered by Niels Bohr's theory of the harmonious coexistence of contradictions.

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# Open Society and Closed Religion



**Guy G. Stroumsa**

Member, The Israel Academy of  
Sciences and Humanities  
Martin Buber Emeritus Professor of  
Comparative Religion, The Hebrew  
University of Jerusalem

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In the last decades of the twentieth century, it had been anticipated that liberal societies would arrive at full secularization and a complete retreat of religion to the personal sphere, along the lines proposed by the Radical Enlightenment. That this did not happen took many thinkers by surprise. Jürgen Habermas postulated that we were now entering an era of “post-secular societies.” Recognizing the idea of a total separation between church and state as an illusion, he learned to describe their relationship, as reflected, for instance, in the laws and practice of the German Federal Republic, as a “limping separation” (*hinkende Trennung*). Accepting that reality does not precisely reflect abstract models, however, does not entail denying the relevance of those models.

The hermeneutical system of a religion stops functioning properly, I propose, when societal changes are too rapid for it to adapt fast enough. The old hermeneutical system is unable to interpret the new reality, and the religion seems to close itself, refusing to accommodate new aspects of society. In *When Prophecy Fails*, published in 1964, Leon Festinger and his colleagues described what happens to a religious group when an intensively expected prophecy is unfulfilled. The cognitive dissonance among the members of the community soon leads to a major readjustment of expectations. What is less commonly understood is the opposite case: what happens when prophecy succeeds. In such cases, what I propose to call a *cognitive consonance* may also foster a burst of irredentist religion, built on a feeling that the imminent end of times requires totally new rules of behavior, solely according to the putative religious prophecies. In such cases, the *modus vivendi* demanded by the liberal state is cast aside as irrelevant, and conceptions until now more or less neutralized (such as Jewish messianism, as demonstrated long ago by Gershom Scholem) are set in motion. →





# Open Society and Closed Religion



**Guy G. Stroumsa**

Member, The Israel Academy of  
Sciences and Humanities  
Martin Buber Emeritus Professor of  
Comparative Religion, The Hebrew  
University of Jerusalem

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Over twenty years ago, Avishai Margalit, soon echoed by John Rawls, coined the locution “decent society.” For Margalit, a decent society is one whose institutions do not humiliate people. While it may not be liberal, a decent society retains certain features allowing some kind of tolerable life for all. Rawls asserts, for instance, that a decent society will not humiliate women. “A hierarchical society,” he says, “may have an established religion with certain privileges. Still, it is essential to its being well-ordered that no religions are persecuted or denied civic and social conditions that permit their practice in peace and without fear.” In other societies, Rawls goes on to say, the religious and philosophical traditions underlying the

institutions create more serious problems – for instance, “the subjection of women abetted by unreasonable religion.”

“ *Like the institutions of a decent society, those of a decent religion will not humiliate anyone, neither those within, such as women, nor those without, who belong to another religious community (or to none).*”

We could, perhaps, expand this insight to the realm of religion. Like the institutions of a decent society, those of a decent religion will not humiliate anyone, neither those within, such as women, nor those without, who belong to another religious community (or to none).

Liberal societies may expect from religious communities something along these lines. These are minimal demands that ask traditional religions not to give up on their theologies, but only to neutralize those elements that may prove “indecent.” Hermeneutical traditions possess all the tools they need to neutralize such elements. Through a combination of education and legislation, it is at once the right and the duty of a liberal society actively to cultivate such hermeneutical tools.

# Liberalism between Religion and Nationalism



**Menachem Mautner**

Daniel Rubinstein Professor  
of Comparative Civil Law and  
Jurisprudence, Tel Aviv University

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“Big meaning” is a fairly coherent and developed system of propositions aimed at providing a response to the fundamental questions of human existence. There is a long and rich philosophical and literary tradition that sees the essence of humanness in the urge for meaning in this sense.

Religion is the most comprehensive system of big meaning available to us. Religions also create coherence in lives bifurcated between distinct spheres of activity, each governed by a unique logic. Additionally, religions provide the lives of their followers with some overall causal sense. Perhaps even more importantly, religions offer their followers intellectual, emotional and practical (e.g., ritualistic) resources for dealing with losses, failures and disappointments. Finally, one reason for the lasting appeal of religions is that they offer a truly comprehensive anthropology, addressing both the bright and the dark sides of humanness.

Autonomy liberalism suffers a major deficit compared to religion in the realm of meaning. It cannot offer a coherent system of big meaning; it leaves the issue of the good life to individuals. The result, as many commentators have noted, is that such liberalism may seem “empty.” In addition, autonomy liberalism does not have anything to say with regard to the fundamental human questions addressed by religion.

“*For the liberalism of flourishing, the good life is one in which an individual succeeds in developing, to the utmost extent, the human capabilities lying within her.*”

Autonomy liberalism is only one strain of liberalism. Since John Stuart Mill there is a parallel strain, one that I call “the liberalism of flourishing.” For the →





# Liberalism between Religion and Nationalism



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Daniel Rubinstein Professor  
of Comparative Civil Law and  
Jurisprudence, Tel Aviv University

liberalism of flourishing, the good life is one in which an individual succeeds in developing, to the utmost extent, the human capabilities lying within her, first and foremost the intellectual and moral capabilities, but also social capabilities, the capabilities of creating and engaging with art, etc.

Based on a long and rich tradition of Western thought, it may persuasively be argued that engagement with art – literature, poetry, drama, films, plastic art, etc. – may contribute to the intellectual and moral development of individuals, so that a state committed to the liberalism of flourishing should massively support the creation and dissemination of art. This last trait of the liberalism of flourishing is highly important when the competition between liberalism and religion is considered. The contents of art allow individuals, drawing on their own personal intellectual resources, to devise responses to some of the fundamental, perennial human questions usually addressed by religions. Indeed, it has often been claimed that art – emotive meaning – is the closest secular equivalent to religion in the lives of human beings.

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# The Liberal Deficit in Israel's Democracy: A Brief Intellectual History



**Fania Oz-Salzberger**

Professor of History, University of Haifa

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This lecture dwells on a liberal rather than a democratic deficit as a defining feature of present-day Israeli politics. This deficit does not stem from pre-State Zionism; it appeared on the Israeli political landscape post-Independence.

The State of the Jews was conceived in significant measure by educated liberals, notably Theodore Herzl, and “instinctive”

“ *A history of liberal thought and scholarship-based practice in the State of Israel would be short indeed.*”

part-liberals, notably David Ben Gurion. The Zionist Congress upheld liberal-democratic principles from its early years on. However, a history of liberal thought and scholarship-based practice in the State of Israel would be short indeed.

Political/civil liberalism, rooted in the doctrines of Locke, Montesquieu, Madison and J.S. Mill, does not have a strong legacy in the history of the State of Israel. The current indicators of democratic deficit in Israel derive, in part, from this absence. Modern democracy hinges on an earlier modern cluster of liberal political concepts, the most important being the rule of law, the separation of powers – crucially, an independent judiciary – and human and civil rights.

In Israel today, the judiciary, academia and rights-oriented civil society do not suffer from a liberal deficit. Many Israelis carry on an “instinctive liberalism” stemming from both Jewish tradition and modern socialism. The deficit is far more apparent in the political and parliamentary arenas.

Inspired by Weimar republic liberalism and beyond, small liberal/center parties, as well as the higher echelons of the Israeli judiciary, have endeavored to carry →



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forward the legacy of continental European pre-World War II liberalism. A small part of the voting constituency, and a large part of the Supreme Court, have upheld what Isaiah Berlin called a “benign national feeling” (Hebrew: *le’umiyut*), which can dovetail with liberalism, as opposed to Berlin’s “rabid nationalism” (*le’umanut*), which cannot.

Israel has never had a ruling party self-proclaimed as liberal, carrying the “liberal” flag in its name or its core values. Academia has provided few original liberal thinkers, and those who have emerged have not achieved the status of leading public voices. The school system has never adopted liberal thought as part of its curriculum, even less so in recent years, with civics teachers being shamed or even sacked for teaching human rights without a Jewish-nationalist “counterbalance.”

The gradual demographic decline of the (mostly European-born, non-socialist and non-nationalist) liberal center in Israeli society has left the Supreme Court unprotected. During the same period, the populist right has gained power from a majority of voters unacquainted by either culture or education with liberal ideas. This is a major reason for the current shakiness of the Supreme Court’s position vis-à-vis the legislature and the executive branch.

I conclude with a brief mapping of some more positive indicators of the staying power of civil liberalism in Israel. In particular, I suggest that early Israeli (and pre-State) social democracy is still a powerful source of humanist thinking and civil-society consciousness, and its concepts of justice and political liberty overlap with the core ideas of liberalism.

# Separation of Powers and the Role of the Attorney General



**Daniel Friedmann**

Emeritus Professor of Law, Tel Aviv University

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The doctrine of the separation of powers was ardently advocated by Montesquieu, who posited it as a bulwark against the concentration of too much power in the hands of a single person or institution. “There can be no liberty,” declared Montesquieu, “when the legislative and executive powers are united in the same person, or in the same body of magistrates.” And, similarly, “there is no liberty if the judiciary power be not separated from the legislative and executive.” The doctrine of separation of powers was adopted by the American democracy. Other democracies have only partially followed it, but the idea that governmental powers should be subjected to proper and adequate restraints remains the cornerstone of the democratic system.

In Israel, as in England, there is no real separation between the governmental and the legislative powers. In fact, most legislation is initiated by the government, although members of the Knesset have some room to maneuver. Occasionally, they are able to enact private legislation, and they also have some influence in the process of shaping government-sponsored legislation.

However, the coalition system that prevails in Israel exerts considerable restraint on the combined governmental and legislative powers. No party in the history of Israel has ever obtained an absolute majority of over 60 seats in the Knesset, and the dominant party therefore can form a government only by reaching a coalition agreement with a number of other parties. Hence, although in theory the government can use its power in the Knesset to pass almost any legislation it deems fit, the reality is completely different. In order to make dramatic changes or to take any major step, the dominant party needs to obtain the agreement of its coalition partners, which have their own views and ideologies. The need for such broad consensus serves as an important check on the governmental and →





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Emeritus Professor of Law, Tel Aviv University

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legislative powers. The expansion of judicial review to governmental actions and even to legislative acts provides an additional restraint and greatly limits the government's ability to advance its policies.

Over the years, the powers of the political branches of the government – the executive and legislative branches – have been decreased considerably. Correspondingly, another dominant power has arisen in Israel: the legal establishment, which includes the courts, in particular the Supreme Court, and the attorney general, who heads the prosecution and is at the same time the government's legal advisor. The attorney general has acquired immense powers and has become the dominant figure in Israel's public life, a development that I discussed in my book, *The Purse and the Sword: The Trials of Israel's Legal Revolution* (Oxford University Press, 2016).

In theory, the courts and the attorney general are separate bodies. Indeed,

“*In the course of Israel's “legal revolution,” the attorney general has acquired enormous additional powers that have turned him into the most powerful official in the public sphere.*”

the courts are expected to monitor the prosecution and prevent the abuse of its power. However, over the years, numerous attorneys general, state prosecutors and their subordinates have subsequently been appointed to the courts. This has led to a kind of symbiotic relationship between the judiciary and that part of the executive branch that consists of the attorney general and the prosecution. Individuals in these two branches often work together for considerable periods and form strong personal relations, and many of them also share the →



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Emeritus Professor of Law, Tel Aviv University

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ideology of ensuring the supremacy of the legal establishment over that of the democratically elected institutions.

The attorney general is the head of the prosecution, a powerful position in itself, but over the last few decades it has proved insufficient to satisfy the hankering for power of successive attorneys general. In the course of Israel's "legal revolution," the attorney general has acquired enormous additional powers that have turned him into the most powerful official in the public sphere. These powers are not grounded in parliamentary legislation. They have either been granted to him by the Supreme Court or are simply powers he has taken for himself.

In 1993, the Supreme Court ruled that the Minister of the Interior, Aryeh Deri, and the Deputy Minister, Raphael Pinchasi, could no longer serve in the cabinet. In his judgement, Justice Aharon Barak asserted: "The attorney general is the authorized interpreter of the law for the executive branch ... and his interpretation obligates it internally." This ruling was completely unfounded and had no basis in Israel's law or its legal tradition. Effectively, it promoted the attorney general to the position of the government's chief commanding officer: His opinion constitutes an order. This ruling should be understood against the background of Israeli public law, in which everything is justiciable, including the reasonableness of any decision made by the executive branch. As a result, every government decision falls under the purview of the attorney general.

This ruling was reinforced by another extreme ruling regarding the government's representation in legal proceedings. The court ruled that the attorney general is the sole representative of the executive branch. In this →



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Emeritus Professor of Law, Tel Aviv University

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capacity, he is free to take any position he considers fit, even one that opposes that of the government he represents. Hence, if an action is filed against the government, and the attorney general considers it justified, he will not defend the government in court. The government's belief that it has a good case is irrelevant. The attorney general has the incredible power to deprive the prime minister – in fact, the whole government – of its day in court.

The attorney general's advisory opinion was thus turned into a kind of judicial ruling that is binding upon the government and against which the government, in practice, cannot appeal – firstly, because it is unreasonable for the government to apply to the court against its own legal advisor, and secondly, because the attorney general, solely empowered to represent the government in court, obviously will not argue against his own decision.

In addition, there has developed a practice by which the attorney general issues directives that cover a great many areas of public law. These indicate the way that both elected politicians and public officials should act in myriad matters, including appointments, and in making decisions that are within their power. Over the years, these directives have acquired a status of legislation, although the attorney general was never given the authority to legislate.

The attorney general is located within the executive branch, but he operates in a realm of his own. He enjoys executive powers in his position as head of the prosecution. His opinions are considered binding upon the government and thus acquire the status of judicial orders against which the government cannot appeal, and his directives are, in practice, a form of legislation. →



As a result, the attorney general, an unelected official who is not accountable to anyone, has acquired immense powers in Israel that are clearly not in line with the concept of the separation of powers and are incompatible with basic ideas of democracy. How long this situation can continue remains an open question.

# Separation of Powers and the Role of the Attorney General



**Daniel Friedmann**

Emeritus Professor of Law, Tel Aviv University

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# The Fate of Human Rights in Indifferent Societies



**András Sajó**

Professor of Law, Central European University

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Illiberal populist regimes rely on unlimited popular sovereignty, which finds external limitations like human rights incompatible with the very idea of sovereignty. This does not look promising for human and fundamental constitutional rights. However, the

authorities of illiberal European Union member states do not currently rely on a systemic violation of rights; the key to

power in illiberal democracies consists in a biased use of the toolkit of the rule of law and, more importantly, in fear, social dependence and clientelism.

*“The key to power in illiberal democracies consists in a biased use of the toolkit of the rule of law and, more importantly, in fear, social dependence and clientelism.”*

There is *no* systemic individual rights violation as long as people’s political choices remain politically irrelevant. However, where the government is confronted with resistance, rights restrictions will apply. Government propaganda and legislation do not deny the legitimacy of human rights openly. That would be too revolutionary and would run up against the remnants of an international consensus. However, the universalism of human rights is already being challenged as contrary to regained sovereignty; universalism is already called an excess of an elitist doctrine. Human rights that do not ensue from local habits of the dominant segment of the population (that is to say, the nationalist supporters of the regime) are viewed as suspect and sensed as imposed.

Reliance on universal standards is perceived as pertaining to a transnational elite conspiracy against the nation or as a doctrinaire position that fails to understand national realities and people’s genuine wishes. Consequently, it is legitimate for a sovereign, popularly endorsed state to replace international standards of human rights with national rights priorities. Conservative →



nationalist majorities represent themselves as fighting human rights absolutism and the dictatorship of minorities, as they gradually restructure liberal rights into traditional collectivist interests and values.

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**András Sajó**

Professor of Law, Central European University

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