

Part V: Defending the Rule of
Law During Democratic Crises –
*Die Verteidigung des Rechtsstaats in
demokratischen Krisen*

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Affective Propaganda and Liberal Legalism in Israel

Democratic Meltdown

What happens when critique of the legal system escalates into a threat, and what does it take to keep the rule of law alive? Israel's recent democratic crisis points us in unexpected directions: the rule of law needs affective propaganda. If so, liberal legalism's traditional association with reason as distinct from affect, and with the public legal system as distinct from for-profit media systems, is untenable, a conclusion that should send us in new normative, theoretical and historical directions. I am at an early stage of a book on this contemporary history, and provide here initial reflections.

Israel's 37th government came to power on December 29, 2022. On January 4, 2023, Yariv Levin, the Minister of Justice, announced the coalition's plan for constitutional and legal changes in a live broadcast and sent shock waves through the country. Set against Israel's lack of an entrenched constitution or other familiar constraints on the executive, the plan aimed to scale back the power of courts and legal advisers in governmental departments, and thus render governmental power virtually unchecked. It included a restructuring of the judicial nominations committee so as to bring nominations under political control; immunizing Basic Laws from judicial review (with no limitations on what they might include or the process of their enactment) and severely

limiting the review of ordinary legislation; an override power for the coalition to reinstate legislation that has been struck down as unconstitutional; an annulment of the reasonableness review of governmental and ministerial decisions; and a severe weakening of governmental legal advisers. Principles of separation of powers and judicial independence were under threat. Next in line, according to the new coalition's plans, were substantive values of individual liberty and equality. The justifications for the overhaul combined critiques of judicial activism and dissatisfaction with the legal system with populist majoritarian arguments and deep-state discourses. Behind them was a concrete constellation of interests and ideologies that led to the most religious and right-wing coalition in Israel's history, formed with a narrow but secure majority following the country's fifth elections in under four years. The overhaul was on one level generic, familiar globally from autocratic legalist protocols, yet also singularly entangled with Israel's history.

Large sections of the public perceived an authoritarian regime in the making, and suddenly realized how effectively mass persuasion had turned against the liberal rule of law.¹ The media was full of material that represented the legal system, legal expertise and the Supreme Court in particular as a danger to national security, national identity, and as per autocratic protocols, also governmentality. However, as scholarship on mass persuasion and propaganda shows, it typically builds on existing views and sentiments. Discontent with legal institutions and especially with a liberal activism in the Supreme Court had been festering for years, and critique was running wild. With the new coalition it became a practical plan. The depth of the crisis clarified that

1 It bears noting that government speakers, including Levin, argued that their plan aligned with the rule of law. However, the actual measures promoted exceeded arguments for needed reforms in the legal system, and breached not only their opponents' ideas about the rule of law, but standard philosophical accounts of it as well.

if the cultural-industrial media system and the affective field it spins are abandoned by liberal legalism, they remain a level playing field for other agendas. As Kim Lane Scheppele warned in an influential article on autocratic legalism, “[l]iberal and democratic constitutionalism cannot remain an elite ideal that has no resonance in the general public; that leaves this public ripe for autocratic legalists to sweep them away.”² Israel’s Right had been propagating its ideas for years without encountering an alternative popular resonance. However, this changed after the coalition’s plans became clear.

Over the next forty weeks, Israel saw huge numbers of people turning to the virtual and real streets.³ The protests, or as more popularly referred to, “the protest,” for it was a powerful assemblage, relied on mediated mass persuasion to reclaim, reframe, and ultimately forge a commitment to liberal legalism among diverse individuals and groups. Its propaganda addressed a neglect of public sentiment and any *felt* connections to the rule of law that had occurred over years. It discovered and nurtured a liberal affective store, hence the repeated chant: “the liberal bear has awoken.”

Protest campaigns revealed the role of affective propaganda in preserving the liberal rule of law.⁴ What follows explains this phenomenon by examining a type of affective propaganda that centered on Israel’s Declaration of Independence, formally the

2 Scheppele (2018), 545–84.

3 Estimates are that 2–2.5 million (in a population of 9.76 million) participated at least once over the period, across the country.

4 To avoid misunderstanding, it bears emphasis that I examine “propaganda” as mediated mass persuasion connected with ideals, while “affective propaganda” emphasizes the mobilization of affects in that context, but there is no *necessary* element of manipulation or misinformation. I propose that in mediated societies, propaganda is more productively studied as a structural phenomenon than a consequence of manipulative intent. For a discussion of theories of propaganda, see for example, Benkler et al. (2018).

Declaration of the Establishment of the State of Israel, 1948. There is of course a dark irony writing about it in March 2024. The protest halted on October 7, 2023 with the devastating Hamas onslaught on Israel. In the war conditions and deepening political crisis since, the long-term effects of the propaganda I discuss and the future of Israel are all too clouded. Yet, history always bears lessons worth learning.

From Declaration to Scroll

Set against the government's plans, protest propaganda framed the Declaration as a source for the state's commitment to liberal democratic norms, particularly norms of equality that the overhaul threatened. The Declaration does not mention liberal democracy, but it provides that the State of Israel "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex," which became key.⁵

Treating the Declaration as a liberal-democratic text was not new. From its inception, it responded to formal legal needs of the state's establishment alongside aspirational ones that set out a vision of a people. Taken as the basis for Israel's identity as Jewish *and* democratic, the Declaration had been hung in state schools, made its way into Israel's limited bill of rights, and provides a standard reference in constitutional and administrative law. The Supreme Court's jurisprudence includes repeated references to the Declaration as the state's identity document. Yet, until recent history it had not been a popular icon nor key to mundane legal consciousness. Recent events led to a reshaping of the Declaration's status both legally and affectively, and created a profound juris-affective hold.

5 For the full text see The Knesset (n.d.).

We can begin this story backward, a year after the overhaul announcement: On January 1, 2024, the Supreme Court published its decision on the only major constitutional change that Israel's government had managed to pass, which had attempted to annul the reasonableness review. In response to petitions, the court declared that it was authorized to substantively review and strike down constitutional amendments, in a resounding 13/15 majority decision.⁶ The Declaration features prominently in the decision, in which eleven judges drew on it as a normative source. Seven of them, led by the then-president Esther Hayut, viewed it within a bundle of "constitutional data" that defines the state as Jewish and democratic, and thereby limits the legislator's constitutional power. The thesis consolidated a collective memory of the state's identity in which the Declaration is ground zero. Two more judges saw the Declaration as a stand-alone binding text. Two others did not decide between these options. Having grounded the limits of the legislator's power and the court's authority, eight judges stroke down the amendment as an unauthorized attempt to undermine the state's democratic character (while three of the minority adopted a narrow interpretation that would preserve some reasonableness review), and so the amendment failed.⁷

The legal drama cannot, however, be read merely at the level of the court, which was the tip of a normative iceberg with a broad basis in the public sphere. The court has in fact become solidifying for and solidified by a popular if still precarious liberal passion that protest propaganda circulated, a mode of mass normativity that carries independent historical significance.

The protest drew two disparate elements closer together: the status of the Declaration as a normative document, and reveren-

6 This position solidified an earlier obiter statement to this effect.

7 HCJ 5658/23 *Movement for Quality Government v. Knesset*. The amendment passed on July 24, 2023.

tial *feeling*. For example, Figure 1 shows it printed in huge size and hung on a building at Reichman university. Staff and students were invited to add their signatures to the original signatories, and many engaged in this symbolic gesture.

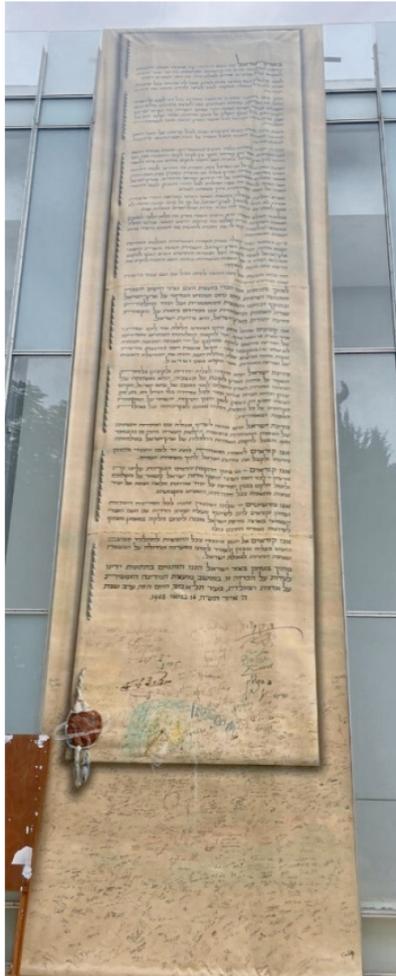


Figure 1: Israel's Declaration of Independence hung on a faculty building at Reichman University, signed by staff and students.

Figure 2 is a capture from a video posted on the protest Facebook page Democracy Now. The video shows a march that took place on the Jewish New Year from *Independence Hall*, the location of the original reading of the Declaration, to the main protest site on Kaplan Street, renamed by the Tel Aviv Municipality “Democracy Square.” Protesters, wearing festive white, also the dress code for men on the Sabbath in religious communities, carried a huge copy of the Declaration above their heads. Its size required a literal mass of people to gather under its wings, while the carrying gesture motioned to the heavens. Like signing rituals, this too had become a familiar gesture in the year’s protests. Other ceremonies of re-commitment and sacralization included an installation of the “Independence Scroll Rock” on the road to Jerusalem by the protest organization *Independence Scroll Loyalists*; mass broadcasts of the original 1948 reading by Israel’s first PM David Ben Gurion with an energetic soundtrack; a printing of the national flag merged with the Declaration (see Figure 3), and more.



Figure 2: Protest march, Tel Aviv, September 17, 2023. Original video by Dov Gazit. Watch video at: <https://fb.watch/pRYkJOFadc/>.



Figure 3: Protesters with state flags on which the Declaration of Independence was printed, circa May 2023. Eran Cohen.

In one sense this would seem a classic case of Robert Cover's *Nomos and Narrative*, whereby decalogue and scripture, percept and narrative merged, and the Declaration moved from forgotten background into a world to be lived in.⁸ Such modes of veneration glossed over historical as well as normative complexities. As a historical document, the Declaration's significance was above all the establishment of the Jewish state, and with no little political maneuvering. In the protest it became sacred scroll of liberal-democratic norms to be cherished beyond historical and historiographical controversy. Similarly, long-standing disagreements about its legal implications and indeed about the contradictions of the Jewish-Democratic duo, were not addressed, hence in effect smoothed in order to submit to a common idea and keywords, if not language, and turn the Declaration into a locus of identity. This open combination of the sacred and the liberal revealed the limits of liberalism's association with reason, and its needs

8 Cover (1983), 4.

for enchantment.⁹ If historian Yoram Shachar is correct that the Declaration has long been iconized and therefore subjected to simplifications and active non-reading, recent history has radicalized these phenomena through popularization.¹⁰

Group reverence was bolstered by rage at what was perceived, or framed, as blasphemous speech. The clearest example was protest responses to the hearing on the reasonableness doctrine. In the oral argument in the Supreme Court on September 12, 2023, the government's private counsel argued that the Declaration was a nonrepresentative and hurried document. The hearing was broadcast live and watched by hundreds of thousands of people. The dismissive attitude, intended to counter the petitioners' position that the Declaration grounded the court's authority to review constitutional amendments, was met outside the court by large-scale propaganda that redoubled on the Declaration's already substantive presence in the protest.

Figure 4 shows an AI-generated image circulated by one of the protest leaders, Moshe Radman. It featured PM Benjamin Netanyahu tearing the national flag, with the text shown below. Beyond the controversial legal history provided in the text, notice the easy movement from "declaration" to the sacred concept of "scroll," and the rhetoric of despair and dismay in the face of an attack on its meaning.

9 This process may be unique to group- as opposed state-wide formation, where, as Sanford Levinson has observed regarding the American constitution, a civil religion implies fragmentation rather than unity. Levinson (2011).

10 Shachar (2022).



The Declaration of Independence's status as a constitutive document had been a consensus since the establishment of the state – starting with the broad agreement upon its signature, continuing with the many actions that followed in consequence (the Declaration of Independence, the Constitutive Assembly and so forth), and culminating in the implications for Basic Laws such as the Basic Law: Human Dignity and Liberty and others.

The Scroll was approved and signed by the founding fathers of Israel – Ben Gurion, Ben Zvi, Golda, Remez, Sharett and others, and has been recognized by the courts from its inception as a constitutive document.

Already in 1948, the President of the Supreme Court Zemora stated that it is "a document expressing the people's vision" and its core beliefs.

This was reiterated in the Kol Ha'am case, as Agranat wrote: "The Declaration... does not consist of any constitutional law laying down in first any rule regarding the maintaining or repeal of any ordinances or laws but insofar as it expresses the vision of the people and its faith... we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State."

And henceforth again and again the importance of the Scroll was recognized by Israel's parliaments, governments, legal advisors, courts etc.

But then the Government of Destruction came, a government that decided to burn all that is good, and argued before the High Court of Justice that the Scroll of Independence is a document signed hastily and is nonbinding on the parliament.

How low will be go? How much more suffering and ruin should be sustained in this country until the last of the hypnotized realize that Netanyahu and his gang of extremists are ruining the country. They have made the army leftists, the police and secret security traitors, the parliament a rag to clean the floor with, and the economy's locomotive [i.e. the high-tech sector – A.R.] a horse-drawn carriage. How much damage in eight months, how much?!

Figure 4: September 12, 2023, Radman WhatsApp communities. Protest image and text responding to an argument in the Supreme Court.¹¹

11 Translation of the original Hebrew WhatsApp message by the author.

Figure 5 shows another image shared in multiple protest groups on the same date. It features Ben Gurion reading the Declaration from the original footage, with the ironic statement: “I am reading some random document we wrote hurriedly.” The canonical event of the state’s establishment in collective memory is contrasted with the government’s dismissive argument in angry ridicule. The juxtaposition of this highly regarded historical image and the state’s disparaging denial of the Declaration’s worth performed a fall from grace for a mass audience.



Figure 5: Protest image responding to an argument in the Supreme Court, September 12, 2023.

Mediation

As the images demonstrate, reverential identification with the historical source of Israel’s liberal legalism was mediated by digital and physical media, and by performative acts of allegiance that united bodies in shared spaces. The Declaration was printed on

cloth in huge sizes, carried, signed, and cherished in ritualistic forms. Attempts to dismiss it were translated into images of ruin and a fall from grace. Mediation has now become second nature, as Nick Couldry and Andreas Hepp argue. Media infrastructures have become the stuff of the social world, and the more intense social life feels, the greater its recursive dependence on technological media of communication.¹² Media includes, alongside the digital, also signs, symbols, and meaningful matter and bodies in the physical world, and the movement between digital and physical gatherings.¹³ Israel's recent history suggests the centrality of these insights for the liberal rule of law. Turning to media, however, also requires a rethinking of Cover's theory, which has been so central to critical legal studies, and which on its face is immediately relevant for this history too. I note briefly key limitations.

First, Cover's distinction between material reality and the imaginations that plot the normative universe is insufficient to account for the mediated nature of propaganda, which reveals the inseparability of the material and the ideational. The physical world of energy and mass was not separate from the imagination that remade the Declaration's normativity, nor parallel to it – they were entangled.

Second, Cover's frequent references to the profundity of cultural content that constitutes a *nomos*, to "history, fiction, tragedy, comedy," must also be revised.¹⁴ Cultural depths were replaced with the immediacy of media messages characterized by textual brevity and a dominance of visual imagery in which the AI black-boxing was involved. This concentration led to one's expecting multiple rather than single messages, and the demand for an

12 Couldry/Hepp (2017). Law and media scholars also attend legal aspects of mediatization. See for example Petersen (2022).

13 E.g., Gerbaudo (2012).

14 Cover (1983), 10.

immediate response: feel, move, protest. A vision was forged in media that Cover's account hardly fathomed. After all, his key example of cultural text was the Bible.

Third, Cover described liberal legalism as “weak” forces intended to ensure the coexistence of particularist worlds of strong normative meaning. However, in the face of a threat to the liberal framework itself, liberalism became a system of strong meaning rising to resist particularist ones it could no longer contain, and that were no longer content themselves with a nomian insularity but rather set to destroy liberalism. Meanwhile, there was also a manifest attempt to keep the liberal framework sufficiently universal for conflicting visions of protest subgroups to coexist. This attempt was full of fissures that I cannot address here. However, I emphasize that the formal features of media propaganda must inform our understanding of the generative power as well as precarity of this mode of sustaining the liberal rule of law.

The last two points reflect the instability of distinctions between the serious and the frivolous, depth and surface, as the lightness of media messages enables a profound affective hold. This leads to a final point. Cover argued that the ultimate responsibility for constitutional vision lay with the courts, and hoped they would legitimize social movements that enrich the *nomos*. Yet, if the affective propaganda of the protest was not just a vision that the judges who ruled on the reasonableness doctrine could choose, but instead the enabling condition of their opinions, we can reverse Cover and consider a media- and affect-based theory of constitutional visions.

The dependence of the rule of law on affect and its inseparability from the propagandist capabilities of commercial media, are not necessarily attractive as a normative conclusion, yet there they were. Affective propaganda injected liberal legalism with value in the face of depreciating forces and temporarily saved it. The tools that made critique into a weapon were turned around and at least

for a while gave the liberal rule of law an affective popularity with which to battle populism. Its future, however, remains to be seen.

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Cases and Legislation

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