In Jerusalem my Heart wanted to Scream out: "I am Polin, too" …

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"In a room where people unanimously maintain a conspiracy of silence,
one word of truth sounds like a pistol shot"

Czesław Miłosz, Nobel Lecture, 8th December 1980

I went to Israel at a moment's notice to share the lessons and cautionary tales of anti-constitutional capture in Poland and to explain the mechanics behind systemic and legalistic dismantling of the liberal foundations of the legal order. However, during my stay in Israel, I realized that as much the Israelis wanted to learn from me, they might as well teach Poles crucial lessons, not less these of civic engagement and mobilization.

How to tell and narrate the incomprehensible?

Having received an invitation from a highly respected think-tank, the Israel Democracy Institute ("IDI"), literally 24 hours later I was on the plane heading to Tel Aviv. For several days I met with politicians in the Knesset, spoke to NGO representatives, the media and took part in an international emergency panel on the proposed changes by the government of Benjamin Netanyahu to the way judges are elected. The panel consisted of former ministers of justice from Ireland (Adv. Alan Shatter) and Canada (Professor Irwin Cotler), former judges of the Constitutional Court of Germany (Professor Andreas L. Paulus) and India (Justice Nageswara Rao), Professor Kalypso Nicolaidis and Professor Gábor Halmai, both from the EUI.

While abroad, I find it more and more difficult to talk about the depths of the destruction of the rule of law in Poland … During the meeting with the Member of the Knesset Mr Tur-paz. He shook his head in disbelief when I said that despite the Polish Constitution's clear language, judgments of the Constitutional Court were not published in Poland, and that the President appointed members of the Court elected in violation of the law under cover of the night. For him and his colleagues, disdain in Poland for the constitutional document and the institutions that stand for it was beyond comprehension.

Here is then the message(s) that I have impromptu reconstructed from my scribbles upon my return, the message(s) which I have shared with the Israelis.

A Polish heart that cries out

What really shook me was one of the marches in Jerusalem, outside President Herzog's residence on Saturday night. There I saw and felt the emotion from people who were clearly aware of what is at stake. It was not just a protest against the judicial overhaul itself, but I had the impression that Israelis were thinking first and foremost about the future of their children. I met a young father who held his tiny baby in his arms wrapped in an Israeli flag. The Israelis made this intuitive assertion that following now the path blazed by Poland or Hungary of dismantling the justice system would deprive them of their rights and undermine the very essence of their democracy. People understood that when there is no Supreme Court, there will be no democracy. The chanted slogan "Democracy is us" and many others reminded me of an intuitive and spontaneous constitutional conversation in civic attitudes and values that must be the inviolable basis of their society. Among the slogans was also this: *"Lavin, Lavin, it's not Polin"*– addressed to the Israeli Minister of Justice, emphatically stating that "Israel is not Poland". At the demonstration, however, I not only felt the encouragement and uplifting and liberating mobilization, but also great regret. In

Poland we had not succeeded in mobilizing citizens in the face of lawlessness and the oppressiveness of the state, far more serious than what the Israelis are now protesting against. On that Saturday night in Jerusalem, I struggled with conflicting feelings. While almost intuitively, my heart wanted to respond by screaming out that "there is also the other and better Polin", it pained me to admit that the face of today's Poland has been passivity and social indifference. The despondency was mixed with sadness and helplessness. I have seen the energy and I have seen it unleashed and grow since Benjamin Netanyahu's decision to dismiss Defence Minister Yoav Gallant, who publicly warned of the dangers of the "reform" being pushed through in terms of state security. The prime minister's decision has only heightened people's anger, with the head of the largest trade union announcing a strike, joined by the universities, high-tech representatives, and hospitals … This could no longer be stopped. Netanyahu seems to have understood that people will not back down.



From Polin to Israel with a warning

On the political power constrained by law

Israel does not have a written constitution, only a set of fundamental laws that are the basis of their democracy. The Supreme Court upholds these rights because it is basically the only institution that has this power. Netanyahu wants to dismantle this sole link of control over the Knesset and over the government. The function of the court in any liberal democracy is not to serve the elected, the political power, but to be its counterweight. This is the essence of democracy and the democratic mandate of judges. In Poland, this understanding that when you defend a court or the Constitutional Court, you are defending democracy, which is much more than this enchanted moment of casting a vote at the ballot box, has never penetrated public consciousness. True democracy is what happens between electoral cycles when it is sustained by institutions independent of government during that time. They are just as much elements of the democratic system as parliament, government, or the president, but they differ in function – they ensure that the elected authorities cannot do whatever they want to please their electorate. A court that is independent of the polls guarantees that the system will be rooted in certain liberal values like the rule of law, and whether the right, left or centre governs, the government will be controlled by institutions independent of that power. Any power in a democracy must be a limited power.

Capture the referee first

I explained to my fellow colleagues, politicians and citizens that this is how it started in Poland too – with the dismantling of the justice system. If you want to rule without limits, you must take over the institution that is set up to control your power. So, you always start with the court, which controls the constitutionality of the law. It is the primary opponent of the autocrats. The destruction of this court affects the operation of the entire legal system. Then come the prosecutor, the ordinary courts, the media. The question often asked by my interlocutors dealt with how the capture of a referee pays off? One must take a long-term perspective here. In Poland, it all started with the Constitutional Court for a reason. What has long been overlooked is the fact that a constitutional court (Supreme Court in Israel) is not seen as a mere obstacle simply to be removed. A constitutional court's role as one of the linchpins of a liberal democratic order is transformed from a counter-majoritarian institution to an ally of the majority and a shameless government enabler. Four interconnected transformations have reshaped the face of what used to be the Polish Constitutional Court and which might as well serve as the warning for Israel when they ponder "what if we say nothing now": i) judicial review has been *weaponised* and used against the opposition; ii) constitutional review has been *intrumentalised* in the process of implementing the political agenda; and finally, iii)

judicial *rubber-stamping* of all unconstitutional schemes placed before it is enacted by the ruling majority; iv) the courtroom is *used* to create what Otto Kirchheimer termed "effective political images" that cast some political actors as villains ("justice has been done to them") and others as political heroes ("their virtuousness has finally been rewarded"). Political justice must be swift and leave public opinion with indelible, black-or-white memories. Judicial review acts as an enforcer of political justice. Quite a change from what we had aspired to back in 1989 and this is what stares at the face of the Israeli people: once your Supreme Court is gone, your democracy will start unravelling. Before you know, you will wake up in the state completely unchecked. Therefore, stopping the capture now takes on existential importance. Stay vigilant and take Poland as a cautionary tale.

There was a feeling of *déjà vu* with what we had in Poland, i. e. personalized legislation being adopted to protect specific individuals. In Israel, Netanyahu has corruption charges pending against him. As his career was hanging in the balance, before the elections he struck a deal with the Attorney General that, should he become prime minister again, he would not interfere with the judicial overhaul because that would create a conflict of interest. The 2020 deal forbade Netanyahu from making senior law enforcement and judicial appointments or getting involved in legislative matters that might impact his ongoing trial on corruption charges. After all, the accused must not influence who is to be his judge. Seen from this perspective, the capture of the court system makes perfect sense: a politician does not need an independent court, but one that will be composed of the judges that will guarantee him the certainty of the result. Today this logic applies to Netanyahu, but in the future, it could as well apply to any politician who will not have to worry about being held criminally accountable.

Understand the mechanics of the anti–constitutional capture

I warned against the strategies of capture. Smart autocrats learn from each other. Indeed, it soon turned out that the Polish government (Ministry of Foreign Affairs) had instructed representatives of the Israeli government on how the independent judiciary has been dismantled in Poland … Did it share, among other things, how to destroy the constitutional court, turning it into a shameless noddy to the authorities, how to install a person in the position of president of this court who obeys all orders of his political principals, how not to publish rulings unwanted by political power, or how to take over and politically incapacitate the constitutional body responsible for selecting judges?

Orban, Kaczyński, and Netanyahu understand the virtue of patience and persistence. The capture strategies are overlapping, interconnected and self-reinforcing. The polished legalistic autocrats know how to stall, wait out the protests, cheat, manipulate, play the long game. Once started, capture has the effect of snowballing unconstitutionality: the initial poisoning of the Polish Constitutional Court tarnished the entire legal system. The capture of the state is a process full of perfidy, manipulation, and bad faith. It can stop for a while, make a small concession, only to return with an intensified attack after a moment's respite and hope that this wait has tired people out and this time it will somehow manage to push through illegal bills. State capture does not know the word "no". We saw this in the case of the Constitutional Court, the Supreme Court or even the defenseless Białowieża Forest.

From the Polish debacle, the manual of the capture would include the following:

1. "If you can't amend, bypass";
2. "Keep repeating and pushing the lies and shenanigans to the point of the emergence of a new doctrine and the unconstitutional change on the ground";
3. "Re-introduce unconstitutional provisions":
4. "Retreat on non-essentials, while pushing on with the essential";
5. "Create unconstitutional facts on the ground that will be impossible to roll back";
6. "Play 'cat and mouse'";
7. "Play 'the waiting game'";
8. "Pre-empt the resistance and create *fait accompli* that can't be undone";

9. "Weather the storm of public outrage, and then come back with a vengeance";
10. "If you get thrown out the window, you sneak right back in by the back door".

This menu of manipulation and tricks is crucial because at some a point a critical point will be reached, and the system will collapse. Again, it reminds us how the capture of the Constitutional Court and then Polish Supreme Court played out. In the latter case it succeeded even despite the mass protests in July 2017. However, these protests never dented the resolve of the autocrats, they only rather slowed them down for a while, only for an even more poisonous legislative package to be adopted once the protests had waned and people had lost interest. Waiting a few weeks during the summer break in 2017 made all the difference. The Supreme Court was eventually captured with only minimal attention and interest from the public.

From captured state to captive mind

I warned that Israel should not repeat our mistakes. There must be a message to the protesting citizens containing three elements: you must remain vigilant, you must always be faithful to the foundations of the constitutional order, and you must understand against whom you are fighting this battle. There is no room for compromise. Netanyahu will not bring out tanks against you, but he will gut the liberal system from within under the guise of formally legal laws. We will not see massive human rights violations, political murders, or mass incarceration. The legalist autocrats will take control of independent institutions by methods that are entirely consistent with the law – with its letter, but not its spirit. And in the end, they will make them, to quote Czesław Miłosz, "captive minds": docile, passive, and deaf to all the wickedness. Minds that accept lawlessness as "business as usual". We in Poland are now moving from the takeover of the state that has already taken place to the enslavement of minds. This is a great tragedy because the damage to the social fabric may be irreversible. Israelis understand that their struggle today is therefore not just about the Supreme Court, but about defending a certain way of life in a mutually respectful community of citizens aspiring to live in a decent and open state. Hence the incredible mobilization.

But for this struggle to be effective, Israelis must think long-term, their participation must not end with one or another protest. Again, Poland must be seen as a cautionary tale: the powerful mobilization after the abortion verdict of the pseudo-court was a great opportunity, but we lacked consistency, patience, a clear message and, crucially, a political opposition that would have displayed at least some constitutional imagination going beyond petty politics of today to make it clear that the survival of the rule of law was at stake. The momentum fizzled out quickly. Only prolonged pressure from citizens can have a lasting effect. For now, at least the protests succeeded exactly because people did not leave the streets after few days of being out on the streets. To the contrary, they have increased their presence in the public sphere, protesting not only against the reform itself, but also against the curtailment of the rights of women and sexual minorities as well as the occupation of the Palestinian territories. Therefore, I have been advising my colleagues, lawyers, experts, to stay the course, not relent in their efforts to make the public aware that silence is no longer an option. It is important for protesters to feel that they are part of a community that relies on being able to compromise with those who think differently. If you want to win long-term, you must be persistent, coordinate and see through the haze of empty promises.

Do you understand that the fight is for your court, not Netanyahu's?

What was striking is the extent to which Israel's citizens share the understanding of the importance of the social legitimacy of the institutions and of the judicial power in particular. This is crucial as the capture has only one enemy: institutions that are socially embedded. Painful lessons from the demise of the independent judiciary in Poland have shown that social legitimacy of courts must be analyzed as a combination of *property*, *process*, and *perception*. Here the relevance of my cautionary tale goes beyond Poland and Israel.

The perspective through *properties* explains us the relationship between the courts and their environment. What matters is the conviction that the legitimacy flows from the institutions that have the attributes (e.g. serve the common good, are reasonably just etc.) which justify our recognition of their authority and explain our continuous and renewed readiness to respect it. The recognition of the institutions as legitimate is not simply driven by their formality, but first and foremost because of the public trust and faith in these institutions. Once the authority of the institutions becomes socially habituated, the institutions and their power become legitimate in the social eyes.

Social legitimacy *as a process* boils down the uneasy process of social legitimacy's emergence. It is not a given but a variable: social legitimacy resides in the heads of the members of the community and is generated over time – as a function of history, context, and culture. While the social legitimacy of courts is built as a result of renewal and practice and earned through performance, it might be lost in a moment.

Finally, social legitimacy *as a perception* touches on the social embeddedness of the judicial power. The courts must strive at building a feeling of common cause and purpose going beyond self-interest. The more the institutions live the practices of the rule of law and translate them for the citizenry, the more difficult the capture and the more social legitimacy will act as a shield against would-be autocrats bent on the constitutional capture.

At the end, you might arrive at a constitutional fidelity where constitutional ideas and principles are turned into practice and lived experience. Embedding the social function of courts takes us on the trajectory from *their* (elites) constitution to *my* (citizens' constitution), from *a* court to *my* court and finally from *a* judge to a *good* judge. With the judicial power socially embedded, the capture knows that before taking on the courts, it will have to face the citizens ready to fight for their courts.

This might be the most important lesson that was not learnt in Poland and one that I wanted to impart to the Israelis.

The embattled Supreme Court must not cave in

Today, a political compromise that would sweeten this planned reform somewhat but maintain the goal of taking control of the appointment of all judges or giving a simple majority in the Knesset the power to reject Supreme Court rulings, must consider that Israel is a different country today than it was just a few weeks ago. Today, its citizens understand clearly what is at stake and are demanding much more than a month ago. The *status quo* has been violated. If Netanyahu maintains the goals and only softens the details, the people will not accept it – the Supreme Court will either be 100 per cent independent of political power or not independent at all. Today, in Israel, we are facing a constitutional revolution that will define the character of the state for decades to come. It will also be important how the Supreme Court, which will also have to face new laws, behaves now. The Supreme Court must not agree to any hasty concocted political deal that compromises judicial independence, the rule of law or the balance of powers. If it accepts undemocratic changes, it will be the end of this institution. The people will no longer only act against the ruling elite but will turn against the court itself. Every institution (courts in particular), as we have painfully seen in Poland, is strong when it has the support of public opinion. The support of the citizens and the social legitimacy of the institution are the institution's most effective weapons in the clash with legalistic autocrats like Netanyahu, Orban or Kaczynski. For this reason, Netanyahu already knows that this battle cannot be won, because the citizens will never allow their Supreme Court to die like our Constitutional Court in darkness and oblivion. So, with time, I began to understand that it is not only me who has come to teach the Israelis, but there are plenty of things that we Poles, and the leaders of our hopelessly lost and helpless opposition can learn from the Israelis.

Epilogue or … a new Prologue? From Polin to Israel with love, admiration and … sadness, too

What next then for Israel? This is an extremely difficult question, because the tension is indeed enormous.

Talking to politicians and being among the protesters, I understood that there is no going back to the situation before the protests. A tremendous social force has been set in motion and a public discussion has now swung towards a more fundamental question of how far the authorities can go to influence the lives of ordinary Israelis. Anticipating "what's next", should the political power not listen to the citizens and concoct a compromise good for the elites but falling short of what the protesters expect, this could lead to a massive escalation. This was evident from Netanyahu's ill-advised and arrogant decision on 26th of March to dismiss the defense minister. This was seen as a slap in the face to the thousands of protesters. All depends now on what happens in the next several weeks, whether the authorities will listen to the citizens. However, no matter what happens at the political level, there is clearly a constitutional moment in the making in Israel. The citizens have already won, and the politicians know it, even if they are still afraid to admit and accept the new situation. A few days ago, the survival of the Supreme Court was at stake, today the defense and survival of democracy and a certain way of life are at stake.

Poland has never seen such a resolve and constitutional fidelity. That explains why my civic heart cried in Israel and kept wondering "*what if*" …

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