A New Deal to the Israeli Judicial System

di Moshe Cohen-Eliya and Iddo Porat

Following the results of the recent elections in Israel, the representatives of the emerging coalition put forward several proposals for a radical change in the Israeli legal system. These proposals include: changing the status of Basic Law: Human Dignity and Liberty to the status of an ordinary law; creating a general notwithstanding clause that will allow the Knesset to override the provisions of the Basic Laws with a majority of 61 out of 120 Knesset members; requiring a majority of 12 out of 15 Supreme Court judges in order to strike down laws conflicting with the Basic Laws; eliminating the reasonableness doctrine in administrative law; and strengthening the relative power of the politicians in the committee for the selection of judges.[1] These proposals, even if only partly adopted and implemented, would constitute a constitutional revolution on a scale comparable to the constitutional revolution of the Basic Laws of 1992 and the *Bank HaMizrachi* (1995) ruling, and may lead to a crisis in the Israeli legal system.[2]

The emerging crisis, and the many proposals to limit the powers of the Court, are also an opportunity to think about a *New Deal* for the Israeli judicial system. Based on a book project on polarization and courts that we are currently working on,[3] we wish to share in this short essay our ideas for proper arrangements in the two main issues that are currently under threat by the fundamental change described above: 1. the method of appointing judges to the Supreme Court; and 2. the level of judicial review exercised by the Supreme Court. We are guided by two principles: 1. the arrangements should ensure stability, so that once adopted there would be no strong incentive for any of the political camps to change them when gaining power; 2. they should preserve the role of the Supreme Court as protector of individual, and especially minority, rights against the government.

We believe that a comparative perspective could be helpful for our endeavor, and we will use a global perspective and comparative examples in our analysis. In particular, the rise in political polarization in many countries is a crucial setting for understanding the current crisis in Israel. We also believe that the Israeli case can be of interest to other countries that share similar processes, because it

[1] Most of these proposals are based on the political platform of the far-right wing political party "Religious Zionism". See Religious Zionism, Reforming the Judiciary to strengthen Governability.

[2] CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* in *Decisions*, 49 P.D. 221 (1996).

[3] M. Cohen-Eliya-I. Porat, *Supreme Courts in the age of Political Polarization* (CUP, forthcoming 2023); M. Cohen-Eliya-I. Porat, *Regaining Courts' Legitimacy in the Age of Polarization: A Comparative Perspective* (on file with authors).

represents an extreme case of a political crisis around the powers of the court in the current age.

1. Polarization and Courts

The rising political divide taking place in recent decades in many countries is termed by some political scientists as a global rise in political polarization.[4] It is manifested in an intensification of differences and divisions between opposing ideologies and political parties and in correlating political ideology with identity.[5] As a result, a challenge to one's ideology becomes a personal attack on one's identity, and compromise is much harder to achieve.[6]

Political polarization has accentuated a process already underway in professional institutions, that are often perceived now as partisan players in the political arena. Polarization enhances a battle for control over centers of power infiltrating even into nonpolitical institutions, so that almost no area of social life is exempt from political division. Thus, in the US, the academy and the media are perceived as partisan players in favor of the Left, while the military and the religious institutions are perceived as political players of the Right.[7] The courts, and especially Supreme and Constitutional courts, are no exception to this trend and, as we will show, they too began being embroiled in a polarizing struggle for control. This is an important background to the current debate over the nomination of judges in the US and in Israel, to which we now turn.

2. Appointing judges - The U.S.

In the United States, judges in all federal courts, including the Supreme Court, are appointed by the President with the approval of the Senate. In recent decades, following general polarization processes in the United States, the Supreme Court in the United States has also become extremely polarized – both in the division between conservative and liberal judges in the court and in the appointment process of judges.[8] Following the Warren Court of the 1960s and decisions such

[4] See e.g., N. Gidron, *American Affective Polarization in Comparative Perspective* (CUP, 2020); T. Caroters, *Democracies Divided: The Global Challenge of Political Polarization* (Brookings, 2019); T. Carothers-A. O'Donohue (Eds.), *Democracies Divided: The Global Challenge of Political Polarization* (2019); T. Carothers-A. O'Donohue, *How to Understand the Global Spread of Political Polarization*, Carnegie Endowment for International Peace (October 1, 2019).

[5] K.S. Larsen, *Ideology and Identity: A National Outlook*, 32(2) *J. of Peace Research* 165 (1995).

[6] F. Fukuyama, *Identity: The Demands for Dignity and the Politics of Resentment* (2018). For a shorter version see F. Fukuyama, *Against Identity Politics: The New Tribalism and the Crisis of Democracy*, 97 *Foreign Affairs* 90 (2018).

[7] In the age of acute political polarization, social institutions suffer from a legitimacy crisis and a partisan level of trust. This is especially apparent in the United States. For a partisan conception of the academia see: *The Growing Partisan Divide in Views of Higher Education*, Pew Research Center (Aug. 19, 2019); for the media, *see* J. Gottfried-J. Liedkem *Partisan Divides in Media Trust Widen, Driven by a Decline among Republicans*, Pew Research Center (Aug. 30, 2021); for the military *see* M.A. Robinson, *Who Follows the Generals? Polarization in Institutional Confidence in the Military*, ASPA Preprints (Sept. 17, 2019).

[8] For a brief overview on the partisan turn of the Supreme Court, see R.L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 *Georgetown L.J. Online* 51 (2020); L. Epstein, *The Supreme Court Compendium: Data, Decisions, and Developments* (CQ Press, 6th ed., 2015). Bartels shows that the Supreme Court is often polarized in highly sensitive political issues such as abortion

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as Roe v. Wade in the 1970s, conservatives began perceiving the Supreme Court as a liberal center of power and embarked on a conscious and concentrated effort to nominate conservative judges to the Supreme Court. As a result a polarizing spiral ensued beginning in the 1980s and intensifying ever since.[9] This situation did not dramatically affect the degree of trust in the American Supreme Court as long as power relations between conservatives and liberals were more or less balanced: 4 conservative judges, 4 liberals and one conservative judge who occasionally crossed over to the liberal side and thus also allowed liberal rulings on important issues, such as constitutional recognition in a same-sex marriage. But when this balance was shattered, following the last three appointments of President Trump which led to the creation of a block of 6 conservative judges against only 3 liberals, trust in the Supreme Court decreased significantly, and above all, became completely partisan - today, only 13% of the voters of the Democratic Party trust the Supreme Court, as against 74% of Republican Party voters.[10]

3. Appointing Judges in Israel

3.1 Background

In recent years the appointment of judges has become an arena for political struggles also in Israel, and polarization can be noticed within the Supreme Court, as differences of views between conservative and liberal judges are more pronounced. The Supreme Court has become a much more dominant social and political player within the Israeli democracy since the 1980s, departing from the previous British model of clear separation of the Court from politics. This reached a certain peak in what was termed the Israeli "constitutional revolution" of 1995, when the Court proclaimed the two Basic Laws of 1992 to be a full-blown constitution.[11] Becoming a center of power, the Court naturally attracted the attention of political factions within Israel. Like what happened in the US, once the political Right realized that the Court promotes mainly liberal and progressive ideals it tried to get a foothold in the Supreme Court by nominating conservative judges. Consequently, this created a division within the Court between conservative judges (still a minority on the court) and liberal judges. Despite these nominations the Right has not yet been able to shift substantially the jurisprudence of the Court, and today the Supreme Court is still very much associated by the Israeli public with the Left: 86% among the voters from the Left support the Court as opposed to only 32% of voters from the Right (almost a mirror image of Supreme Court support in the US).[12] The current proposals coming from the emerging right-wing coalition are therefore a continuation of

and gun control, while tends to issue unanimous decisions in more technical legal questions. See B.L. Barters, *The Sources and Consequences of Polarization in the U.S. Supreme Court*, in *American Gridlock: The Sources, Character, and Impact of Political Polarization*, 171 (CUP, 2015).

[9] N. Feldman-L.J. Kott, *Takeover: How a Conservative Student Club Captured the Supreme Court* (audiobook, 2021).

[10] J.M. Jones, *Supreme Court Trust, Job Approval at Historical Law*, Gallup News (29/8/2022).

[11] *Bank Ha'Mizrachi*, supra note.

[12] See T. Hermann, *Israeli Democracy Index 2021: Democratic Values* (IDI, 2022).

this struggle for domination over the Supreme Court, this time with a much greater chance than before to achieve substantial changes in favor of the Right.

One should note that developments in Israel also resemble those happening in countries that follow the Westminster model such as the UK and Canada, only that in Israel they are manifested in much more extreme terms. The UK and Canada have also departed from the strict separation between courts and politics (in Canada this has happened following the Canadian Charter of 1982, and in the UK more progressively during the 1990s and onwards) and their changes have also been associated with a liberal and progressive agenda. In the UK, especially after the two Brexit decisions of the Supreme Court, the Court was signaled by the Conservative party as being over-activist and progressive, and several reforms were promoted by the Johnson government to reduce its power.[13] In Canada, Prime Minister Harper of the Conservative party increased his party's political involvement in the nomination of judges to the Supreme Court and added conservative judges to the Court and currently one notices a division between more conservative and more liberal judges on the Court.[14]

3.2 The Reform Proposal

In Israel judges are appointed by a committee of 9, consisting of five professionals, including 3 Supreme Court judges, 2 representatives of the Bar Association, and four politicians (2 ministers and 2 Knesset members). Those objecting to current reform suggestions argue that this method provides balance and compromise in the appointment process of judges. As appointments require the support of a majority of 7 of the 9 members of the nomination committee, there is a balance between the three judges and the 4 politicians because each of the two groups can veto the selection. In the last rounds of the nomination of judges there were indeed compromises, or "deals", between the judges and the politicians on the committee, so that the new appointments were more or less numerically balanced between liberals and conservatives. As these "deals" began only about a decade ago, as the Right began nominating its own judges to the Court, the system has not yet managed to change the liberal majority, but it may do so in the next few years. Supporters of the current system also believe that the make-up of the committee, that includes three judges and two lawyers, ensures professionality in the selection and prevents full politicization of the procedure.[15]

However, this structure suffers from two major problems. First, the political balance achieved by the committee positions the judges as belonging to one political camp - the liberal and left-wing camp, whose role is to balance the conservative and right-wing camp. This is extremely detrimental to the perception of judges as non-partisan. The representatives of the Israeli bar are also dragged into the political arena and are mobilized sometimes in favor of the conservatives and sometimes in favor of the liberals. Second, there is no guarantee

[13] O. Bowcott, *Lady Hale Warns UK not to Select Judges on Basis of Political Views*, The Guardian (Dec. 18, 2019) (arguing against the conservative government proposal to have hearings for Supreme Court nominations in the UK).

[14] Justice Writer, *Canada's Supreme Court is off-balance as 'large and liberal' consensus on the Charter falls apart*, The Globe and Mail (Jan 15, 2022).

[15] See e.g., M. Kremnitzer-G. Luria, *Against Political Nomination of Judges*, Haaretz (Nov. 13, 2016); H. Maguen, *Adv. Kaspi calls for Taking the Politicians outside the Judges Appointment Committee*, Globes (April 20, 2003).

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that the current ideological division in the committee will remain the same in the future, namely that on the side of the politicians there will be conservatives and on the side of the judges there will be liberals. Today, the liberal majority in the Supreme Court has significantly eroded, and it is expected to erode even more in future appointments, even if they too will be equally divided between conservatives and liberals. In a few years, it is quite possible that at least two of the three judges in the Judicial Nomination Committee will be conservatives. If both the judges and the government belong to the conservative side of the political map, there will no longer be a balance, and all the appointments of the judges will be biased towards one side - the conservative. One can of course also think of an opposite scenario where the government and the judges are on the liberal side and then again there will be no balance.

The reform suggestions that one hears about from the emerging government does not seem to improve the situation. The platform of the far-right political party "Religious Zionism" suggests increasing the control of politicians in the appointment committee of judges by authorizing the Minister of Justice to choose two of the three representatives of the judges, to be chosen from among the presidents of the district and magistrate courts.[16] Putting aside the question how this move would affect the balance of power within the committee,[17] one should note that under this proposal also the judges will continue to take part in an essentially political struggle over the identity of the judges, and therefore will inevitably be politically colored.

3.3 Our Proposal

We propose that the Knesset elects the judges by a majority of at least two-thirds of its members. The American experience shows that it is not the mere fact that judges are appointed by elected officials that leads to a crisis of confidence in the court. In fact, in many countries, judges in constitutional or supreme courts are appointed by political bodies (this is the case in the United States, in most European countries, in Canada, Australia, New Zealand and so on). The problem lies in the lack of mechanisms that should ensure political balance and prevent one political camp from taking over the composition of the judges, as happened in the US. The main purpose of our suggestion is therefore the maintenance of political balance in the nomination process which is essential for its perception as a non-partisan institution.

In Israel, it is not possible to create a balancing mechanism of the type proposed by Epps and Sirataman, namely that half of the judges be appointed by one party and half by the other.[18] This is so because Israel is a multi-party system. However, a solution that exists in Europe can be imported to the Israeli system, subject to adjustments. In Germany, the judges of the Federal Constitutional Court are nominated by the two houses of parliament in a secret ballot, and a two-thirds majority is required among the members of each of the houses, for the

[16] Supra note 1.
[17] R. Weil, *The Threat to Judicial Independence: Changing the Composition of the Judiciary Appointment Committee*, Globes, Nov. 17, 2022 (arguing that the proposal harms the principle of judiciary independence, since the Minister of Justice will acquire the power to decide which of the presidents of the district and the magistrate courts will sit in the committee).
[18] Epps & Sitaraman, supra note.

nomination of a judge. In one of the houses, the Bundestag, a committee of 12 members composed of representatives of all the big parties (according to the principle of proportionality) selects the candidates for the Court, prior to their approval by the plenary. Its deliberations are confidential, and its decisions are also made by a two thirds majority.[19]

We suggest importing a similar mechanism to Israel. The advantage of this type of solution is that it requires a broad and bi-partisan majority, and thus forces a political balance or consensus in the selection process, but unlike the current situation, it leaves the judges outside of this process. Instead of both the judges and the politicians on the committee having veto power over the selection of judges, the coalition and the opposition would have veto powers, and judges would not need to "fill-in" for the opposition in balancing the coalition.

4. Discussion and Criticism

4.1 Representation and Balance

Our proposal assumes that there should be a degree of political representation and accountability in the selection of judges to the Supreme Court of Israel. We therefore admit a departure from the previous British based model of a professional court, strictly separated from politics. The Court in Israel is indeed clearly involved in hotly debated social and political issues and, as it has also acquired the power of judicial review and adopted purposive and expansive interpretation methods, it has considerable power to impose its decisions on the Israeli polity. In almost all systems that endowed the Court with such a power, there is also a mechanism for political representation, based on the idea of political checks on the substantial power of the Court and of its political accountability to the electorate. In Germany this principle is termed "democratic legitimacy" and it is an essential feature of the appointment of judges.[20]

In addition to representation, our proposal is also based on the idea of a broad consensus in the appointment of judges, that would impose a balance between the major political camps in this process. As mentioned above, currently both in Israel and in the United States the main problem is imbalance in the composition of judges, which may lead to the conception of the Court as a partisan organ favoring one political camp and functioning as another power center for that camp. This is an inherently unstable position, as the opposing political camp would not sit idle and accept such a reality for long and would constantly attempt to undo it and shift the institution in its favor. Moreover, such a situation undermines the legitimacy of the Court as a neutral social arbiter according to the law.

However, this may raise the following objection: does a broad consensus and political balance follow indeed from the logic of representation and accountability? Why not allow the current political majority to appoint judges, thus maintaining

[19] P. Weller, *For the Court, it could be…": Electing Constitutional Judges in the US and Germany*, *VerfBlog*, 2018/10/05.

[20] R. Kiener, *Richterwahlen in der Schweiz* [2002] 71 *Betrifft Justiz* 378 at 378 (translation: "Elections of Judges in Switzerland"). Also see B. Suter, *Appointment, Discipline And Removal Of Judges: A Comparison Of The Swiss And New Zealand Judiciaries* (LL.M. Thesis, University of Victoria).

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democratic legitimacy and accountability and allowing the Court to correspond to the general trends of the electorate?

Our answer is two-fold. First, for a court to provide a meaningful check on the legislature it cannot be appointed in the same way as the legislature; it cannot simply replicate the political power struggle in its composition if it is to provide a meaningful check on politics. This, admittedly, can be achieved even if judges are elected by simple majority through, for example, their judicial independence, their tenure which is not subject to reelection, and the influence of professional ethics and the self-understanding of the judicial role. However, this leads us to our second point.

Our second argument is that, in periods of polarization, a simple majority can often lead to the take-over by one political camp and to political imbalance on the Court, and that in such periods even a short-term imbalance is problematic. The US is a point in mind. In the past it might have been tenable for the Court to have periods in which one political or ideological camp was more dominant than the other. However, in the current polarized atmosphere, any advantage will be used to its fullest potential, compromise would be rare, and consensus forces eroded. Ages of polarization are ages of anxiety and fear - each side fears the worst from the other side, and thus uses whatever tools it has in its arsenal to prevent it from taking control. The Court becomes one of these tools in the political arsenal, and the political anxiety pushes it into an active role in supporting a cause. Thus, any clear majority on the Court becomes a crucial problem, and the need for balance or consensus is especially strong.

What about deadlock, one may ask? Political polarization often creates deadlocks when veto mechanisms are in play. If we put in place a mechanism that allows each political camp a veto power, how would they arrive at a decision? What incentives do they have to agree? This is indeed a challenge, for which our proposal has several answers.

First, one should note that the current situation in Israel is already subject to the threat of deadlock, which materialized a few times in the past decades, substantially prolonging the nomination process in the judicial selection committee. Secondly, we think that the idea of having deliberations carried out in confidentiality, in a small group of Knesset members, as in the selection committee of the German Bundestag, can be conducive to agreements and prevent media-intensive polarized debates. Confidential deliberations would incur costs in terms of political accountability and transparency, since deliberations would be far from the public eye, but it seems to us that this might be inevitable in the face of acute polarization.

Thirdly, also following the German model, we propose having a default mechanism in cases of deadlock which will incentivize the parties to reach agreements, such as a lottery, an arbitration, or mediation process.

4.2 Professional Standards and Constitutional Borrowing

One may object to our proposal by arguing that it would completely politicize the nomination process and would bring about the election of unprofessional judges based on political favor alone. According to this line of reasoning our proposal runs against the grain of modern court reforms which reduced political involvement in nomination such as the U.K. reform that established the Supreme

Court. That reform was inspired partly by the Israeli appointment committee model and rather than enhancing political representation it excluded politicians completely from the process, except by giving the Lord Chancellor a veto power over the recommendations of the committee.

Our answer is that nominations by political bodies, despite the U.K. example, largely remain the norm rather than the exception, and yet there are few contentions that *all* such nominations result in non-professional judges. It really depends on *how* politicians elect judges, rather than on the fact that politicians have the power to elect judges. In Europe, where constitutional judges are invariably elected either solely or partly by politicians the process is in most cases not considered politicized.[21]

Secondly, in a highly polarized system even the professional members of a committee would be recruited either directly or indirectly in favor of a political camp. Since the stakes become so high, as courts gain considerable power and politics becomes polarized, politicians cannot leave any arena of power unattended and all aspects relating to the selection of judges would be politicized. In such a case we have the worst of the two worlds - the committee would not be immune from politicization, and it would not be balanced or representative. In the UK it is still to be seen whether the Court reform has neutralized the suspicion of partisanship in nominations. The last few years have seen attempts by the Conservative Party to insert political accountability into the professional committee by allowing for public hearing for judges. This may attest that anxiety remains in the Conservative Party that the nomination process still favors the liberal side of the political map. [22]

Another possible difficulty with our suggestion is the fact that it aims to import into a Westminster-based model part of an arrangement taken from a European constitutional model, without importing the entire model.[23] We suggest importing the selection method of judges in Germany - by a two third majority in the Parliament - but to apply it in a regular Supreme Court that handles civil and criminal appeals in addition to constitutional cases, does not have term limits for judges, and does not usually sit *en banc*. This departs from the German system where this selection method applies to a European-style constitutional regime, in which the court handles only constitutional cases, there are term limits for judges, and they sit *en banc*. We also do not oversee the fact that the German legal and political culture is very different from the Israeli one. It is based on consensus and on shared values, that can allow more easily the different parties to agree on the selection of judges, whereas the Israeli legal and political culture is more confrontational and pluralistic, to which one must also add the high level of polarization in Israel, thus making the reaching of agreements harder.[24]

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[21] D. Orentlicher, *Unlike US, Europe Picks top Judges with Bipartisan Approval to Create Ideologically Balanced High Courts*, The Conversation (23.9.2020) ("The political parties in Continental Europe negotiate over the nominees, identifying candidates who are acceptable to both the left and right").

[22] Supra note.

[23] On the European model of constitutional courts see. E.g., A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000).

[24] This argument goes hand in hand with our owe warning regarding constitutional transplants and constitutional borrowing. See M. Cohen-Eliya-I. Porat, *Proportionality and Constitutional Culture* (CUP, 2013). For a similar and cautious approach to legal transplants,

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Our answer is, first, that the current situation in Israel, as well as in other Westminster model countries, can already be described as a hybrid system combining a European and a Westminster model. This is so, since the Westminster model, including the way judges are appointed, assumes that there exists a clear separation between the judiciary and politics, parliamentary sovereignty, and no judicial review over primary legislation. Once the Westminster High or Supreme Courts started shifting to the discourse of human rights, activist adjudication, purposive methods of interpretation, and full or partial modes of judicial review, the institutional make-up of these courts became out of step with their mode of operation. Our suggestion handles a central aspect of the current discrepancy - allowing for democratic accountability once the court engages more intensely with political issues and is given more political powers.

Secondly, and following from the first point, in Israel at least, nominations are already politicized to a great degree. The judicial appointment committee, as described above, operates quite directly and explicitly through political deals between liberals and conservatives. Our suggestion would only regulate this factual situation and get the judges out of these political deals.

Finally, we believe that adopting the full model of a constitutional court is a good idea for Israel. However, such a suggestion requires greater changes and is thus less feasible in the short term. Our suggestion is a second-best solution, that also takes into account the difficulty of approving and applying the more far-reaching change of a shift to a constitutional court model.

5. Coda

Our discussion up until now dealt with suggested reforms in Israel on the appointment of judges and the control over the Court, and the approach we recommended was to maintain a regulated political balance in the nomination and adjudication of this center of power. The other types of reforms suggested in the Israeli context regard judicial review and their aim are quite opposite - to disempower the Court and deflate its political power. We call this "disempowerment".[25] These suggestions vary from imposing limitations on the Court's power on judicial review, all the way to a complete abolition of this power. Other suggestions call for different reforms aimed at curtailing or regulating judicial discretion.

To a large extent, finding a solution that will ensure political balance in the selection of judges reduces the need for disempowerment. If it can be ensured that the exercise of judicial review of the Court will be perceived in non-partisan terms, thanks to the political balance, then the anxiety about its excessive constitutional powers will be significantly reduced and each party will be able to see in it (through the constitution) as a kind of "insurance" in case they lose the elections. The opposite is also true. If the constitutional powers of the Court are reduced to a level where it does not pose a political threat to any of the parties, their need to influence the selection of judges will decrease, and their selection will naturally becom less dependent on political involvement. But in this, eventuality, the Court's

see P. Legrand, *The Impossibility of 'Legal Transplants'*, 4 *Maastricht J. Eur. Comp. Law.* 111 (1997).

[25] Also see Doerfler & Moyn, supra note (distinguishing between two strategies: "disempowerment" v. "personnel").

advantages in protecting against the misuse of power by the majority, especially its powers on minorities, will also be lost. This is especially problematic in a society like Israel that has large minorities who need protection.

We believe that the right balance point lies in adopting the process-based approach to judicial review, similar to the one proposed by the American jurist John Hart Ely. According to this approach judges should not engage in the realization of values, but only in maintaining the democratic rules of the game and protecting discrete and insular minorities from the tyranny of the majority.[26] In the United States, it is common to use for the Court the metaphor of an umpire (CJ Roberts also used this during the confirmation phase of his appointment in the Senate), like a referee in a sports game, who is supposed to uphold the rules of the game.[27] The Court should protect the rights related to the fairness of the democratic process and the ability change the government by democratic means - in Ely's words "clearing the channels of political change" - including freedom of expression, the right to vote and the right to be elected, freedom of association, and the right to demonstrate. In addition, the Court should make sure that there is no attempt to exclude hated or unpopular minorities, who are vulnerable to serious harm by the democratic majority.

In the *Enrolment to the army of Ultra-Orthodox Jews* case (2006), Judge Grunis tried to promote this approach in Israeli law, but in the face of strong and reasoned opposition from President Barak, he abandoned it.[28] The process-based approach also faced criticism in the United States, mainly due to the difficulty of distinguishing between procedure and substance, and the difficulty of defining what is the majority and what is the minority.[29] Another recent criticism, leveled by Doerfler and Moyn, claims that even regarding the maintenance of procedural rights and the rules of the game, the U.S. Supreme Court has revealed a partisan political approach, so that this approach is not helpful in reducing the Court's political bias. The most prominent example is of course the ruling in the case of *Bush v. Gore*,[30] where the judges confirmed the election results in favor of Bush, with a clear partisan division between conservatives (who approved) and liberals (who disapproved), but Doerfler and Moyn also prove their claim from a historical perspective, while referring to the issue of defining constituencies (gerrymandering) or campaign financing.[31]

Such criticisms, however, do not undermine the validity of the process-based approach. Like many other distinctions and line drawings, there will be in the process-based approach borderline cases and "gray" areas where the distinctions will be blurred, but this does not undermine their effectiveness in the majority of

[26] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).
[27] Chief Justice Roberts Statement – Nomination Process (15.9.2005) ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire)
[28] HCJ 6427/02 *The Movement for Quality Government v. The Knesset*, Nevo, 11.05.2006. Also see M. Cohen-Eliya, *Towards a Process-based Limitation Clause*, 10 *Law and Government* 521 (2007) (Hebrew).
[29] See, e.g., P. Brest, *The Substance of Process*, 42 *Ohio St. L.J.* 131 (1981); R. Dworkin, *The Forum of Principle*, 56 *N.Y.U. L. Rev.* 505 (1981) 469; L. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theory*, 89 *Yale L.J.* 1071-1069 (1980).
[30] *Bush v. Gore*, 531 U.S. 98 (2000).
[31] R.D. Doerfler-S. Moyn, *The Ghost of John Hart Ely*, 75 *Vand. L. Rev.* 769 (2022); for a response *see* A. Ahmed, *Democracy and Disenchantment*, 75 *Vand. L. Rev. En Banc* 223 (2022).

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other cases. As to the criticism on bias in the application of the approach, we believe that the combination of political balance in the nomination process of judges, along with the adoption of the process-based approach, can mitigate the difficulties in Ely's approach and strengthen its advantages.

The more the judges are appointed in an agreed and balanced manner between the political camps, the less the fear that the court may rule in a partisan way when applying the process-based approach. In our opinion, especially in the Israeli society, it is important that the Court refrain as much as possible from ruling on divisive value-laden disputes, but maintain its vital role in protecting minority rights. The process-based approach is the right way for the Court to deal with issues such as the divisions between the large Arab minority and the Jewish majority, the tension over the combination of a Jewish and democratic state, and the tension between conservative and liberal values. In the global context of the rise of populism and the threat of deteriorating into semi-authoritarian regimes like in Poland and Hungary, it is of high importance that Israel concentrate on judicial steps that should ensure the maintenance of the democratic rules that allow for political change, protect the opposition, and maintain free speech.

As part of the *New Deal*, we suggest therefore that Israel's Basic Laws explicitly declare a commitment to a process-based approach in the interpretation of the Basic Laws, or that judges adopt this interpretation.

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