A Prescription for a Symptom of Polarization?

di Mark Tushnet

In this brief comment I provide some internal and external comments on the proposal by Professors Cohen-Eliya and Porat that Israel adopt a rule that judicial appoints be subject to a requirement of approval by two-thirds of the nation's parliament. By "internal" I refer to comments about the proposal itself; by "external" I mean comments about the overall constitutional conjuncture to which the proposal responds. The comments should be taken as reflections that require more substantiation that I provide here.

Both types of comments have to be understood in light of some general considerations about scholarship in comparative constitutional law. National constitutions are products of contingent events, distinctive national histories ("path dependencies"), national legal and political cultures, and much more. Outsiders to the nation aren't disqualified from making observations about local developments and proposed changes but they—and those who read their comments—must be sensitive to the possibility of misunderstandings and miscommunications.

Comments on the Proposal Itself

The proposal is motivated by the fact that Israel is (or has become) a highly polarized system. Requiring approval by a two-thirds majority would in principle substantially reduce the effect of polarization on judicial selection. It seems to me that the workability of some of the proposal's features depends upon how widespread a disposition toward compromise is among parliamentarians in a system of strongly polarized parties.

Why should we think that enough participants in the system of highly polarized parties would be willing to agree to the nomination of someone not affiliated with their party (in some broad sense)? That is, why should we think that the two-thirds rule would produce judicial nominations rather than deadlock and persistent vacancies? Indeed, if some parties take the position that the courts have been systematically hostile to their interests, knee-capping the courts by depriving them of personnel would seem to be an attractive strategy. And, given Israel's recent history, in which governing coalitions have nothing close to a two-thirds majority and, importantly, face a legislative minority quite hostile to the governing coalitions' programs, achieving such a majority would seem unlikely.

The proposal addresses the deadlock problem in a brief suggestion about the possibility of some default mechanisms: "a lottery, an arbitration, or [a] mediation process." These mechanisms can take many forms and perhaps the proposal should spell out some of the possibilities. How wide-open would a lottery be? (If confined to candidates who received some threshold in the deliberations, the default

mechanism might increase the risk of deadlock—and increase the risk that one side will consolidate control of the courts if the role of the dice generates three or four even numbers in a row.) Assuming that an arbitration mechanism requires at least one "neutral" member, how would that neutral member be identified? (And, if deadlock happens often enough, why go through the charade of seeking a two-thirds majority rather than just saying, "Let's let the neutral pick the nominee"?) I'm not familiar enough with the literature on mediation to be sure, but my intuition is that mediation won't work when one side finds deadlock an acceptable outcome.

It's not clear to me that partisans who find deadlock acceptable would go along with the use of any of these mechanisms. I note the possibility that something like a lottery would yield a completely unacceptable nominee might provide such partisans with an incentive to vote for a devil they know rather than a completely unknown devil. If so, they might decide end the process before deadlock triggers the default mechanism—that is, come to some agreement on a nominee.

Perhaps, though, deadlock shouldn't actually be a matter of such concern as to be addressed in the proposal itself. That agreement might be unlikely, after all, doesn't mean that it's impossible. And here's where the national political and legal culture comes in. When I first encountered Israel's political and legal culture as an established scholar I was struck with how *small* the national political elite was. Everyone seemed to know everyone else, and not just in their political lives: They knew what their children were doing (was there a rebellious teenager around?) and what the quality of their intimate relations was (was the marriage going through a rocky patch?). Of course that was in the era of Ashkenazi political dominance and increasing demographic pluralism might well affect the quality of that sort of shared knowledge.

Yet, Israel's parliament itself remains quite small. Accounts of personal relations by legislators elsewhere often include observations along the lines, "Of course he comes across as a rigid ideological blowhard in public, but actually when you get to know him he's a decent human being who, at least on some matters, is reasonable enough in trying to come up with solutions to problems."

To put the point a bit more formally: Polarized *parties* might not lead to polarized personal relations among legislators. When parliamentarians sit down behind closed doors to talk about potential nominees perhaps their conversation will deal primarily with the candidates' professional qualifications. The participants' evaluations of those qualifications will of course be affected by their party affiliations. "Extreme" possibilities will be ruled out, which is to say that every party will have a list of completely unacceptable nominees. They might also have lists of preferred candidates but be open to the possibility of choosing someone not on their list. Perhaps the interpersonal nature of the discussions (in contrast to the way in which public political campaigns occur) will sand down the edges of the positions enough to make it possible for the participants to come up with a candidate able to obtain the two-thirds majority.

I've suggested that the Israeli parliament's small size might conduce to substantive discussions of candidates' qualifications rather than to posturing that merely reflects the polarization that characterizes the political system as a whole. More important than size, though, is political culture: How do Israeli parliamentarians interact with each other when out of the public eye? I'm reasonably confident that an outsider to that political culture can't know enough

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about it to venture comments worth taking seriously; indeed, I'm reasonably confident that many insiders don't have a strong enough grasp on their own political culture to be able to make comments worth taking seriously. And, finally, I think it worth noting that unless the people considering the proposal can be confident that Israel's political culture would produce deadlock only on rare occasions, the default mechanisms will come into play with some frequency and so should be spelled out, at least in alternative forms, in the proposal itself.

External Comments: Looking Beyond the Proposal

Now to the "external" perspective. Here I draw on a framework Bojan Bugaric and I are developing to address the ways in which legal scholars have responded to concerns about democratic decline (for present purposes I take the current state of affairs in Israel as an example of democratic decline). We use a medical metaphor: Scholars identify a symptom of democratic decline, offer a diagnosis of its cause, and prescribe a remedy.

We state but leave in the background the proposition that the symptom might disappear on its own as the disease runs it natural course before the remedy could be prescribed or once taken alleviate the symptom. That proposition is important, though, because scholars need to consider the possibility that even though the symptom is worrisome it won't last forever and that waiting it out might be better than intervening (a version of the principle, "First do no harm"). Our general argument is that frequently there's a mismatch between the diagnosis and the prescription because the prescription addresses a symptom while leaving the underlying illness untreated.

At least from afar it seems that there is indeed such a mismatch here. The symptom is the set of judicial "reform" proposals advanced in early 2023 by the governing coalition. According to Professors Cohen-Eliya and Porat and many others these proposals threaten to undermine the institutional basis of a well-functioning constitutional democracy such as the availability of the courts to protect minority rights—as indeed they do in the Israeli context. (I add that qualification to emphasize that one's evaluation of proposals for institutional change must be sensitive to local variation, contingencies, path-dependencies, and the like.) Their prescription is the two-thirds majority proposal, which, on their account, would if adopted reduce the politicization of the courts and enhance their ability to function over the long run as a guarantor of constitutional democracy.

The mismatch is this: The diagnosis reveals that the underlying illness is the high degree of political (and social/cultural) polarization in Israel today. The prescription, though, doesn't on its face have much to do with eliminating *that* illness. Perhaps there's an argument to be made that a court whose decisions are and are seen to be even-handed and unconnected in any systematic way to any of the axes of polarization would contribute to reducing polarization. I can imagine a mechanism by which that might occur—with the courts as models of good non-polarized political behavior—but am skeptical about its efficacy in the short- to medium-term.

What does this mismatch imply? One implication might be that many deadlocks will occur. As the courts are "de-staffed" by unfilled vacancies perhaps they won't make the disease worse (as they perhaps have in the past) but they also won't be able to do a lot of important work, such as resolving ordinary cases that have no connection whatever to the things that polarize Israel. Forcing the medical metaphor a bit, we might think of this withering away of judicial capacity

to do ordinary work as an "iatrogenic" illness—an illness independent of the underlying disease that is caused by the treatment.

Another possibility is that the prescription will be adopted and will alleviate the problems of polarization as they manifest themselves in the courts. But, because the underlying illness isn't being treated it might manifest itself elsewhere, for example in the growth of paramilitary forces. That's particularly true because some of the political energy generated by polarization has been used to attack and defend the courts. Deprived of an outlet in controversies over judicial structure, that energy might flow elsewhere. I take no position on whether "solving" the problems polarization causes for the courts while creating or deepening problems in other domains is in some general sense "worth it." I note, though, that legal scholars should be attentive to the possibility that the prescriptions we offer may "work" with respect to the institutions we pay most attention to but may cause problems for other institutions.

In mentioning the possibility that legal scholars might focus on the domain—legal institutions—they know best (and probably properly so), I introduce another perspective on the mismatch. Perhaps our attitude is and should be, "Sure, the problems for the courts are caused by polarization, but as scholars of law and legal institutions we have basically no clue about what to prescribe to bring polarization under control—or [again to force the medical metaphor] about how to cure the underlying illness. Go find a specialist in something else—resolution of intergroup conflict, perhaps—for that."

I have considerable sympathy for the last part of the comment but wonder about its implications for our work as legal scholars. Perhaps we should abandon attempts to prescribe remedies for symptoms entirely and find something else to do with the time that frees up. Perhaps we should "go big": Rather than taking existing institutional arrangements as the starting place and tweaking them for symptomatic relief, try to reimagine our institutional arrangements in the way that Roberto Unger once did (why confine ourselves to thinking about three, four, or five branches?). My current effort along these lines is to think what it would mean to treat constitutions as a set of recommendations rather than as law, whether higher or otherwise.

Or maybe we could hold on to the hope that we can prescribe remedies to cure illnesses in our political institutions. As constitutional lawyers we actually do have tools for thinking about addressing polarization. Consider for example the institutional possibilities for secessionist regions: independence, yes, but also confederation, asymmetrical federalism, complex systems of bilateral and multilateral treaty arrangements, and probably quite a few more.

As a consumer of news about Israel I'm struck by the fact that the discussions that reach me through the major newspapers seem stuck in an unproductive dialogue about two-state solution or a one-state solution, neither of which actually addresses the polarization within the Jewish community in Israel. But perhaps the thoughts underlying those discussions could be brought to bear on *that* polarization. Indeed, the Cohen-Eliya-Porat proposal might be seen not as a freestanding proposal for the specific symptom of proposed judicial "reforms" but as an example of an institutional arrangements requiring concurrent majorities from the polarized communities (rather than from the polarized political parties). Focusing on the illness's causes we—even we lawyers but probably collaborating with other social scientists—might be able to offer institutional designs such as consociationalism or non-geographic federalism that might do more in the long

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run to preserve the courts as guarantors of constitutional democracy that *any* institutional innovation associated with the courts alone.

Mark Tushnet
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