# Political Courts and Judicial Pushback: A Response to Moshe Cohen-Eliya and Iddo Porat

*di Rehan Abeyratne*

## 1. Introduction

Israel faces a moment of constitutional crisis and, perhaps, of opportunity. The crisis emerged soon after the return of Prime Minister Benjamin Netanyahu backed by the country's most conservative coalition government to date.[1] The new government proposed legislation in January 2023 that would weaken the judicial review powers and independence of the Supreme Court. Among other things, it would permit the Israeli legislature (Knesset) to override provisions in the country's Constitution (Basic Laws), require a supermajority of 12 out of 15 judges on the Supreme Court to hold legislation unconstitutional, and effectively permit the governing coalition to appoint judges to the Supreme Court and to remove them without cause.[2]



Following widespread protests, the government announced on 27 March that it would pause the legislation.[3] Many proposals for constitutional reform - including the adoption of a written constitution - have since emerged, suggesting that a broader constitutional revolution may be afoot.[4] Professors Moshe Cohen-Eliya and Iddo Porat published their essay advocating a "New Deal" for the Israeli judiciary in response to the government-proposed legislation and prior to the budding constitutional moment.[5] It remains a valuable and sober contribution to the debate, drawing helpfully from their comparative work on judicial polarization.[6]

In this response, I focus on Cohen-Eliya and Porat's proposal to reform the judicial appointment process. My arguments pertain, first, to the normative and conceptual foundations of their proposal and, second, to an aspect they do not consider: the possibility that the Supreme Court itself might resist such reforms.

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[1] *Israel Election Final Results: Netanyahu, Jewish Far Right Win Power, Fiasco for Left*, *Haaretz* (3 November 2022).
[2] M. Cohen-Eliya-I. Porat, *A New Deal to the Israeli Judicial System* (2023) *DPCE Online*, 1; R. Weill, *War over Israel's Judicial Independence*, *Verfassungsblog* (3 January 2022).
[3] *Israeli PM Netanyahu Announces Pause on Judicial Reform After Mass Protests*, *Associated Press* (27 March 2023).
[4] J. Leifer, *Whose Constitution? Whose Democracy?*, *New York Review of Books* (13 April 2023).
[5] Cohen Eliya-Porat, supra note 2.
[6] M. Cohen-Eliya-I. Porat, *Regaining Court's Legitimacy in the age of Polarization - A Comparative Perspective* (draft paper on file with author).

## 2. The Supreme Court as a Political Institution

At present, Supreme Court judges in Israel are appointed by a nine-person committee, consisting of judges, representatives of the Bar Association, and political leaders.[7] Cohen-Eliya and Porat argue that this arrangement is problematic for two reasons. First, they point out that the participation of Supreme Court judges on the committee is "detrimental to the perception of judges as non-partisan."[8] Second, they worry that the committee will lose its current political balance and may be subject to political capture.[9] Their proposed solution is to locate the judicial appointments power in the Knesset, with nominees to the Supreme Court requiring the support of a 2/3 supermajority to be selected.[10]

I agree with much of Cohen-Eliya and Porat's analysis. The presence of Supreme Court judges on the selection committee may well erode the institution's image as non-partisan. In polarized societies like Israel, judicial selections will almost inevitably take on a partisan flavor and the committee judges would be seen to support one political camp or the other.[11] I would add that where judges have a prominent role in judicial selection, there is the even more problematic possibility of them trading favors or otherwise engaging in corrupt practices. India's experience with the "collegium" - a judicially created body giving Supreme Court judges the final word on appointments to the higher judiciary - illustrates these problems well.[12] I also agree with Cohen-Eliya and Porat that empowering the Knesset to select judges would not necessarily be problematic for judicial independence. They point out that many countries rely on political bodies to appoint judges.[13] And, in at least in some of those countries - like Australia and New Zealand - there has been little, if any, judicial polarization.



Yet, the normative and conceptual basis for Cohen-Eliya and Porat's arguments, in my view, would benefit from some revision and clarification. At a normative level, they defend their proposal on the grounds that it will preserve "political balance" on the Supreme Court, which is "essential for its perception as a non-partisan institution."[14] The authors do not provide evidence to support the assumption that the Supreme Court has this reputation in the first place. To the contrary, they cite polling to show that the Court has the support of 86 percent of voters on the left of the political spectrum and of only 32 percent of those on the right.[15] Cohen-Eliya and Porat are concerned that, under the current system, the Supreme Court "in a few years" is likely to become unbalanced politically, such that it tilts too much in a conservative direction.[16] This suggests that, like the public, they view the institution as an important bulwark preserving (what is left of) liberal constitutionalism in Israel. Thus, achieving a "political balance" on the Supreme Court does not seem to be primarily about ensuring that there is an equal

[7] Cohen Eliya-Porat, supra note 2, 4.
[8] Ibid 5.
[9] Ibid.
[10] Ibid 6.
[11] Cohen-Eliya Porat, supra note 6.
[12] See R. Abeyratne, *Upholding Judicial Supremacy: The NJAC Judgment in Comparative Perspective* (2017) 49 *George Washington International L. Rev.* 569, 608-10.
[13] Cohen Eliya-Porat, supra note 2, 6.
[14] Ibid.
[15] Ibid, 4.
[16] Ibid, 5. Cohen-Eliya and Porat note briefly that we could also conceive of a scenario where liberals capture the Court, but they imply – correctly – that this is a remote possibility.

number of liberal and conservative justices or preserving the Court's non-partisan image. Rather, the balance that is implicitly advocated here is an institutional one: the Court must be protected as a liberal counterweight to conservative political power.

Given the immense political and institutional stakes involved, it is also important to have conceptual clarity on the Court's role in Israel. I share the authors' concern that the Court may become *partisan*,[17] which I take to mean that it would carry out (and be seen to be carrying out) the political agenda of a certain party or coalition. Take, for instance, the U.S. Supreme Court today. With its 6-3 conservative majority, case outcomes on most salient constitutional matters align closely with Republican Party prerogatives.[18] But even if we wish the Israel Supreme Court to avoid the fate of its American counterpart, it does not follow that we must treat it as a non-*political* institution. I have in mind the constitutional revolution led by Justice Aharon Barak in the 1990s, which is often treated as apolitical or, in the Dworkinian sense, as purely an exercise in Herculean judging,[19] when it was also part of a broader liberal political project.[20]

To be fair, Cohen-Eliya and Porat do not adopt this position or argue that the Supreme Court exists outside politics. But I think they would be on firmer ground if they explicitly acknowledged that the 1990s revolution imbued the Court with a liberal, cosmopolitan political valence. This is certainly how it has been interpreted by conservative opponents, which, as Alon Harel argues, explains much of the current government's hostility to the Court.[21] Accepting the Court as a political body, and reframing the normative concern about balancing in institutional terms, clarifies what is especially worrying about the conservative counterrevolution: it seeks to make Court nakedly *partisan* in a way that the liberal revolution never did.



## 3. The Possibility of Judicial Pushback

[17] Ibid.
[18] J.F. Witt, *How the Republican Party Took Over the Supreme Court*, *New Republic* (7 April 2020).
[19] R. Dworkin, *Law's Empire*, Harvard, 1986.
[20] See R. Abeyratne-I. Porat, *Introduction: Towering Judges – A Conceptual and Comparative Analysis*, in R. Abeyratne, I. Porat (Eds), *Towering Judges: A Comparative Study of Constitutional Judges*, Cambridge, 2021, 1-18.
[21] A. Harel, *The Proposed Constitutional Putsch in Israel*, *Verfassungsblog* (14 March 2023); A. Harel, *Barak's Legal Revolutions and What Remains of Them: Authoritarian Abuse of the Judiciary-Empowerment Revolution in Israel*, in R. Abeyratne, I. Porat (Eds), *Towering Judges: A Comparative Study of Constitutional Judges*, Cambridge, 2021, 174-94.

Across the world, courts have recognized implicit limits on constitutional amendments through unconstitutional constitutional amendment (UCA) doctrines such as "basic structure",[22] "salient features",[23] or "material core."[24] These doctrines, though variously named, all recognize judicial independence as a sacrosanct principle that is beyond the scope of constitutional amendment. For present purposes, this is relevant because courts in recent years have used UCA doctrines to strike down or read down constitutional amendments that threatened judicial independence.[25]

Consider three cases in which constitutional amendments altering judicial appointment or removal procedures were invalidated on UCA grounds. First, in India, the Supreme Court invalidated a constitutional amendment and accompanying legislation that created a National Judicial Appointments Commission (NJAC).[26] The NJAC would have comprised six members, including three justices of the Supreme Court. It was intended to replace the existing "collegium" system, in which the Chief Justice and a few fellow justices had the final word on appointments to the Supreme Court and High Courts of India. The Indian Supreme Court held that the NJAC unconstitutionally impinged on judicial independence by, *inter alia*, placing the appointments power outside sole judicial control. As I have written elsewhere, this judgment is unconvincing as it does not explain why either the constitutional text or the core principle of judicial independence requires judges to have the final say on appointments.[27] Indeed, the judgment only makes sense in terms of preserving institutional power: the Supreme Court was unwilling to relinquish its authority over judicial appointments.



Second, in Bangladesh, the Supreme Court struck down a constitutional amendment that sought to move the judicial removal power from the Supreme Judicial Council (comprised of judges) to Parliament.[28] The amendment would have permitted a two-thirds majority in Parliament to remove sitting judges. Much like in India, the Court held that this reform would violate judicial independence, which formed part of the Constitution's basic structure. This judgment, though, arguably was more justified than its Indian analog. Political leaders in Bangladesh have regularly interfered with the judiciary and this Amendment granted Parliament plenary power to remove judges. By contrast, the NJAC in India vested the judicial appointment power in a commission whose membership was not dominated by a single institution.[29] Had the Bangladesh Supreme Court let this amendment stand, it would have enabled the governing majority in Parliament to remove judges at will, effectively neutering any independent check on their authority.

Finally, in Slovakia, the Constitutional Court struck down a constitutional amendment that would have required judicial nominees to be vetted by the

[22] *Kesavananda Bharati v. State of Kerala*, (1973) SCC 225 (India).
[23] *Mahmood Khan Achakzai v. Federation of Pakistan*, PLD 1997 SC 426 (Pakistan).
[24] PL. ÚS 21/2014 (Slovakia).
[25] See, e.g., *Semenyih Jaya v. Pentadbir v Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 (Malaysia); *Munir Hussain Bhatti v. Federation of Pakistan*, PLD 2011 SC 407 (Pakistan).
[26] *Supreme Court Advocates-on-Record Association v. Union of India* (2016) 4 SCC 1 (India).
[27] Abeyratne, *supra* note 12, 613.
[28] *Bangladesh v. Asaduzzaman Siddiqui*, Civil Appeal No. 6 of 2017 (AD) (Bangladesh).
[29] See P.J. Yap-R. Abeyratne, *Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia* (2021) 19(1) *International J. Const. L.* 127.

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National Security Authority (NSA) and various other security agencies.[30] The Court recognized judicial independence as part of the Slovak Constitution's "material core".[31] It held that the amendment in question was unconstitutional as it might: (1) impinge on the independence of sitting judges; (2), permit the NSA to unduly influence judicial outcomes; and (3), violate the privacy of judges, judicial candidates, and their families. Interestingly, the Slovak Parliament amended the Constitution following this judgment to prohibit substantive judicial review of amendments. This amendment was itself challenged and this case is currently pending before the Constitutional Court.[32]

These examples illustrate that, whether normatively defensible or not, courts are willing to wade into treacherous political waters to maintain their institutional authority and independence. In each case, the changes to judicial appointment or removal procedures were enacted through constitutional amendments, requiring courts to resort to extraordinary UCA doctrines to invalidate them. The Indian and Bangladeshi cases also highlight how judges are reluctant to relinquish their roles in the appointment and removal processes.

Let us now return to Israel. The Israeli Supreme Court has not explicitly adopted any UCA doctrine. In the landmark *Hasson* judgment,[33] the Court said it was unnecessary to determine whether it had the power to invalidate Basic Law provisions. Yet, it effectively read down parts of the controversial Basic Law: The Nation State to comply with other Basic Laws, including the Basic Law: Human Dignity and Liberty.[34] One could imagine the Court using similar interpretive principles to limit, if not invalidate, proposals to reform the judiciary.

Thus, even if a proposal to alter the judicial appointment process were politically accepted, there remains the possibility that the Supreme Court may object on judicial independence grounds. Indeed, the 1984 Basic Law on the Judiciary provides for the independence of judges.[35] Is that a sufficient basis upon which to read down and therefore limit the scope of either the government's proposed reform (making the appointments process more partisan) or Cohen-Eliya and Porat's alternative (removing judges from the appointment process entirely)? Would a majority on the Supreme Court sign on to such judgments? These are questions I leave to the authors and to other scholars of Israeli constitutional law.

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[30] PL. ÚS 21/2014 (Slovakia).
[31] Ibid; T. Ľalík, *The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (PL. ÚS 21/2014)* (2020) 16 *European Const. L. Rev.* 328, 329-30.
[32] S. Drugda, *On Collision Course with the Material Core of the Slovak Constitution: Disabling Judicial Review of Constitutional Amendment*, *Verfassungsblog* (3 December 2020).
[33] HCJ 5555/18 *Hasson v. the Knesset* (8 July 2021) (Israel).
[34] See R. Abeyratne-Y. Roznai, *Interpreting Unconstitutional Constitutional Amendments*, *in* C. Bernal, S. Choudhry, and C. O'Regan (Eds), *Research Handbook on Constitutional Interpretation*, Edward Elgar, 2023 (forthcoming); R. Weill, *A Covert Constitutional Revolution? Is Basic Law: Israel--the Nation-State of the Jewish People Democratic?*, *Balkinization* (19 December 2021).
[35] Basic Law: The Judiciary (1984), Chapter A(2).