# Response to Commentators

*di Moshe Cohen-Eliya & Iddo Porat*

**Abstract:** We would like to thank all the commentators for their thoughtful engagement with our Post. We benefited greatly from these comments by such esteemed scholars, and they provided us with new perspectives on our topic and required us to clarify and crystallize our argument. There are several main themes that recur in the different comments, and we will organize our response around them.

**Keywords:** Israel, Judges, political polarization, balancing, secret deliberations

## 1. Deadlock

In the first part of his comment, Mark Tushnet puts the finger on the main problem that our balancing proposal raises - deadlock.[1] The same problem is also raised in Antonia Baraggia comment.[2] We suggest selection of judges in Israel by a two thirds parliamentary majority in a parliamentary committee made of proportional representation of the different parties. This, we argue, would require a compromise between the opposition and the coalition, and would not allow the coalition full control over nominations.[3] However, as pointed out by Tushnet and by Baraggia, what happens if the two political camps are not willing to compromise? - a script that becomes almost inevitable in conditions of heightened political polarization. The challenge of deadlock is a pertinent one, and one which was much on our mind. Indeed, having such new heights of polarization in so many countries require a new and focused attention to the problem of preventing deadlock, as the problem has not received enough attention in the literature yet.

Tushnet stresses the following difficulty in preventing deadlock: it would usually be the case, he argues, that one of the political camps would benefit from a deadlock and therefore would have no incentive to compromise on a candidate which it does not approve of. In Israel, suggests Tushnet, this party might be the conservative camp, which would not object to the crippling of the court created by the stop of new nominations.



[1] Mark Tushnet, *A Prescription for a Symptom of Polarization?* DPCE ONLINE 13.4.2023.
[2] Antonia Baraggia, *A New Deal for the Israeli Judicial System. Yes, but what New Deal? A response to Moshe Cohen Eliya and Iddo Porat*, DPCE ONLINE 12.7.2023.
[3] Moshe Cohen-Eliya, Iddo Porat, *A New Deal to the Israeli Judicial System*, DPCE ONLINE 18.1.2023.

Responding to this challenge, we should point out, first, that the political camp that would benefit from a deadlock would not always be the same camp. Rather than depending on a general skepticism of the court - currently associated with conservatism - the question of who benefits from deadlock would depend on the existing balance of power on the court, and how deadlock would affect it vis-à-vis the alternative. Thus, currently, there are three Israel judges that are about to retire, reaching the retirement age of 70 - all of them are liberal judges. In such a situation there is indeed an incentive for a deadlock for the conservative camp, as their retirement would dilute the current liberal majority on the court, while the nomination of new judges would most likely be divided between conservatives and liberals. This however would not always be the case, and if more conservative judges retire than liberals, the liberal camp would have an incentive for a deadlock. One might argue that this would even out over time. But, taking on the challenge, we thought of adding to our suggestion the following arrangement - retirement of judges should be set up so that each retirement round would consist of one liberal and one conservative judge. In this way, neither political camp would have an incentive to create deadlock. Of course, this would require some adjustments to the current system, but such adjustments should not pose insurmountable difficulties. If we take care of the incentive for deadlock, we believe that the two thirds mechanism may provide for a good enough system for reaching a reasonable compromise on nominations.

Baraggia stresses another aspect of deadlock: the legal and the political culture. According to Baraggia, the model that we try to transplant in Israel is a German model. However, German legal and political culture is much less polarized and less fragmented than the Israeli one, and, is based much more on consensus and cooperation. Thus, the two thirds rule that resulted in compromise and cooperation in Germany would result in Israel in deadlock and even heighten conflicts.[4]



This is another important point, and one that we are also aware of. However, the Israeli experience is a bit more complicated on this issue. This experience shows that despite already high levels of polarization, previous judicial selection committees in Israel were able to reach a compromise over nominations and divide nominations between the two factions on the committee. Previous committees were made of a balance of power between judges, lawyers, and politicians, and required a compromise between the "judicial block" (aligned with a liberal worldview) and the "political block" (aligned, in most recent governments, with a conservative worldview). Our suggestion therefore does not dramatically change the prospects of a compromise, nor does it raise the danger of deadlock which is already present within the current nomination scheme in Israel, due to polarization (these two blocks, we should mention, were highly polarized in recent nominations). What our suggestion does though is to increase democratic legitimacy, by forming a committee that reflects the relative sizes of the different parties much more accurately than the contingent combination of judges, lawyers, and politicians, and decrease the potential of using

[4] Baraggia, *supra* note 2.

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professionals - judges and lawyers - as proxies for political agents, as we witness happening in Israel these days.

## 2. Secrecy

The second theme that recurred in the comments - secret deliberations over nominations - also relates to deadlock. In our proposal we suggested (again following the German model), that the parliamentary committee in charge of nominations would hold deliberations in secrecy, and, furthermore, that the plenary vote ratifying its choice would also be in a secret ballot.

Julius Yam's comment shows how the secrecy of the judicial selection committee in Hong Kong first enhanced public trust in that institution - as secrecy provided for a professional process which is immune from public pressures.[5] But then, after the 2019 national security laws, the same secrecy served to decrease trust - as secrecy was a sign for non-transparent authoritarianism on the side of the government. Yam argues that "[w]hether withholding information about judicial appointments enhances a judiciary's social legitimacy or undermines it depends on whether trust and confidence in both the process and those involved in the process already exists." A similar concern about secrecy – that the non-transparency of nominations would increase suspicion in a polarized society – is also present in Baraggia comment.[6]

We hope, first, that our suggestion to have a parliamentary nomination committee that is based on proportional representation would enhance trust in that institution, at least in terms of its democratic accountability. Secondly, we are aided here by an observation in Tushnet's comment according to which deadlock might be averted if there is a political culture of good personal relations among politicians once put in a closed room.[7] If this is the case, then closed door deliberations might increase the chances of compromise and cooperation even in the face of acute polarization. This, admittedly, would come at the cost of legitimacy and accountability, but this might be a reasonable tradeoff if the danger is one of deadlock.



## 3. Democratic Backsliding and Judicial Pushback

Several of the comments object to our New Deal since it does not take into consideration the background of democratic backsliding in Israel. Rehan Abeyratne, for example, argues that there is an asymmetry between the kind of politicization that occurred due to the liberal and progressive hold over the Israeli judiciary, and the politicization envisioned by the proposed conservative reform.[8] The former can be viewed as an institutional balancing mechanism in which the liberal court balances non-democratic tendencies

[5] Julius Yam, *Secret Appointments: Hong Kong's Experience in Selecting Judges*, DPCE ONLINE 13.2.2023.
[6] Baraggia, *supra* note 2.
[7] Tushnet, *supra* note 1.
[8] Rehan Abeyratne, *Political Courts and Judicial Pushback: A Response to Moshe Cohen-Eliya and Iddo Porat*, DPCE ONLINE 17.4.2023.

from the conservative political factions, as in the case of Poland and Hungary. The conservative politicization would on the other hand be "naked partisanship". Tania Groppi also stresses that developments in Israel should be viewed on the background of rising populism in countries such as Hungary and Poland, and that in such conditions our balancing approach may miss the context of fending off attempts at judicial take-over.[9]

This is another important challenge that is crucial for the framing of the Israeli case. Our view is that there might be a fine line between authoritarian take-over, and the adoption of a conservative worldview - nationalistic, traditional/religious, and non-globalist - that is still committed to the ground rules of democratic liberalism and is thus a legitimate choice within the democratic game. In some cases, this line is not so fine, such as in Hungary and Poland, where the commitment to liberal democracy is quite thin and the centralization of power and limitations on what Ely calls "the channels of political change", robust.[10] In other cases, it is clearly within the democratic game, even assuming some threats for democratic rule - this is arguably the case of the conservative rule in Britain, and in many other Western European countries, that is against immigration and European integration but is still within the democratic game. The US may have flirted more closely with the breakdown of democratic rules during the Trump administration but is probably still closer to the UK than to Hungary on an overall assessment. The question where Israel stands on this divide is a very loaded one in contemporary Israel. It is also a tricky question, and the answer often depends on who gets to decide whether the country has stepped over the line. The judicial overhaul plan was probably the closest flirtation that Israel had with the concentration of power and the limitation of checking mechanisms since its inception. However, our view is that a fair assessment of the Israeli case should also not overlook the many similarities between the political backlash against judicial liberal activism in Israel and in many other democratic countries, including the UK. We should also be careful not to suppress valid concerns over the limits of judicial objectivity by too hastily assigning them with autocratic tendencies. To our mind, therefore, the jury is still out on the question of backsliding in Israel and our suggestions may help in the direction of keeping the conservatives on board in the democratic game, rather than alienating them and thus increasing the threat of such backsliding.



Baraggia mentions an additional aspect relating to the threat of non-democratic concentration of power in Israel - Israel's unicameralism. This fact, she argues, makes for an argument against shifting the entire decision power in nomination to the hands of the one house of parliament, which lacks sufficient protections against majorities' rules.[11] As a response we should note that we object to the idea of giving control to the coalition to make nominations by itself, and rather, require the consent of the opposition by adopting the two third model. In a system with only one chamber, this is the

[9] Tania Groppi, *New and old challenges to the legitimacy of constitutional adjudication*, DPCE ONLINE 20.4.2023.
[10] JOHN H. ELY. DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) 103.
[11] Baraggia, *supra* note 2.

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closest we can get to bi-cameralism - a veto power to the opposition requiring the consent of both opposition and coalition to each nomination.

Abeyratne mentions another important element that is part of the judicial scenery when it perceives its role as protecting against authoritarian takeover. This is what Abeyratne calls "judicial pushback" - the willingness of judges to step over even formal limitations of their powers to fend off governmental reforms that limit their powers. The most notable example is the doctrine of Unconstitutional Constitutional Amendment (UCA) - which was developed in India, Bangladesh, and Slovakia mostly in the context of judicial nominations. This is something to be taken into consideration, when attempting any kind of reform of the judiciary - whether justified or not. We agree, and we take note of this possibility. Indeed, the Israeli judiciary has developed its own version for UCA, even in the absence of a formal constitution and thus of a constitutional basic structure. However, this point does not do away with the major question of assessing any reform on its own merits.

## 4. Thinking Big

An important point is mentioned in Tushnet's comment and resonates also with the comments of Baraggia and Groppi - thinking of solutions outside of the legal sphere. Tushnet analogizes polarization to a disease, and our New Deal as a suggested cure. The cure, however, argues Tushnet, does not address the cause of the disease but only one of the symptoms - the challenges to courts' neutrality. We should instead "think big" and suggest general solutions to polarization, such that may include changes such as federalism or consociationalism, otherwise polarization would keep creating new pressures on the judicial system. Tushnet further posits that if the cause of the disease might disappear by itself, it may not be worthwhile to do anything, because of the danger of creating only more harm by our attempts to address it. Baraggia and Groppi, in the context of populism and backsliding, also advise us to think of the larger context in which courts operate and, following Gardbaum,[12] to adopt measures in other spheres of government in addition to trying to adopt judicial interpretative methods such as Ely's Process theory.



First, as to the possibility that polarization would go away by itself and is only a temporary phase or wave, this is indeed a possibility. However, initial indications seem to show that the rise of polarization is persistent, global, and steep. The option of just waiting until the stormy weather vanishes seems to be getting farther from us. One of the possible reasons for the persistence of polarization is information technology, social networks, and new types of media, that create the "echo chamber" effect and enhances political polarization. The implications of these new technologies are still a long way from being fully understood,[13] and even longer from suggesting

[12] Stephen Gardbaum, *Comparative Political Process Theory*, 18 INT J.CONST.L. 1457 (2020).
[13] Jonathan Haidt, *Yes, Social Media Really is undermining Democracy*, ATLANTIC (28 July 2022).

possible remedies, so that there is reason to believe that polarization is here to stay at least for the near future.

As to the more general suggestion of thinking big, we accept it. Indeed, we believe that subject to necessary adjustments our two principles – depoliticization and balancing – could be used as guiding principles in many other areas other than law. They can be viewed as general strategies to tackle the problems of politicization that polarization creates in a host of institutions that were formerly conceived of as politically neutral, e.g., the media, academia, the army, and religion. We suggest depoliticization - to the extent possible - coupled with political balance - as general remedies for polarization, not only in the context of courts. Of course, there is much thinking to be made in many other areas of public policy and governance, and we are both personally engaged in trying to expand our view on polarization as it is, indeed, one of the greatest challenges of our time.

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