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Majoritarian politics in a consensus democracy: how judicialization of politics helped lay bare the contradictions of Israel's constitution

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The crisis over judicial reform in Israel in 2023 led to concerns that Israeli democracy was under threat from a government and parliamentary majority bent on radical change. From the standpoint of comparative political institutions, this crisis is a puzzle, because Israel is generally understood to be one of the prime examples of "consensus" democracy. We explain the puzzle of consensus-inducing institutions (parliamentary government and proportional representation) yet a "majoritarian" crisis as stemming from various behavioral changes in the party system, and the anomaly of a strong supreme court despite a constitution that is unentrenched (changeable by parliamentary majority). We show how judicial interventionism undermined the mechanisms of Israel's consensus institutions. Erosion of consensus mechanisms supercharged the polarization and bloc formation which developed in Israel's party system, and which further undermine consensus democracy. Despite the crisis, we suggest that Israeli democracy is resilient and that its consensus-promoting mechanisms are likely to reemerge.

KEYWORDS

consensus democracy, Israeli Supreme Court, judicial appointment process, Knesset, judicialization of politics, majoritarian democracy, cycling

1 Introduction

In 2023, in the midst of Israel's nationwide controversy and protests over the government's package of judicial reform measures, commentators began using phrases like "majoritarian nightmare" (Sachs, 2023) to describe the situation the country was facing. For many political scientists, familiar with classic typologies of democracies, such as that of Lijphart, any claim of majoritarianism (understood as an unchecked electoral majority) would seem strange. Israel, after all, is one of the classic examples of *consensus* democracy, the polar opposite type to majoritarian democracy. On the other hand, Israeli democracy undoubtedly includes important majoritarian traits as well, chief among them the unentrenched nature of its constitution, which a majority of the Knesset can amend without any further procedural requirements. Yet this feature is by no means a new development,[1] and other key Israeli political institutions – most notably, parliamentary government and proportional representation – have not recently been altered. What, then, has changed?

1 That is to say, if it makes Israel majoritarian, then Israel has always been majoritarian!

The 2022 election was distinguished by the outright victory of a unified pre-electoral coalition; one of the key issues uniting that coalition was the parties' view of the Supreme Court. The victory of a unified bloc implies a 'majoritarian' political dynamic. Such a dynamic was always possible under the rules of the game, but was previously prevented by a party system that accommodated the formation of relatively heterogeneous governing coalitions which tended to shift over time.[2] This reality both engendered a powerful incentive to compromise and typically ensured that government coalitions were ideologically at least somewhat diverse. This reality ultimately flowed from the electoral system, but while institutions can influence outcomes, they cannot guarantee them. Various political developments over the past few decades altered that reality in spite of the formal institutions remaining substantially the same.

One of those changes originated in the relationship between the institutional equilibrium associated with consensus democracy and the Israeli Supreme Court. Up until the 2022 election, the proportionality of the electoral system had always fragmented the Israeli party system sufficiently that the court's independence has been protected against the emergence of a unified and determined Knesset majority that might seek to rein it in. The court, in recent decades, has claimed a great deal of authority for itself, becoming "probably one of the most powerful supreme courts worldwide" (Roznai, 2024). There had been relatively minimal hindrance in this accumulation of power from the other branches of government. The backlash, however, has now come, amidst a highly polarized political context. We join Porat (2023) in ascribing to the Court a major (though hardly unique) role in the development of this polarization. More specifically, we argue that judicial intervention, by undermining parliamentary sovereignty, gradually eroded some of the incentives for compromise inherent in consensus democracy. These factors, together with the increased personalization and pre-election coalition formation, thus helped lay the groundwork for the current crisis.[3]

We start off by presenting the situation and the puzzle it presents. We then explain the consensus-majoritarian distinction and in more depth, specifically in the legislative context. We then turn to judicial institutions, placing them into comparative perspective. Both the current institutional setup of the Israeli judiciary, as well the one proposed by the government to replace it, are unusual in their design, in ways that are important to the development and character of the crisis. We then sequentially present our main arguments. First, that the judiciary's independence and authority were ultimately incongruent with Israel's constitutional amendment formula, which meant that an existential confrontation was essentially just a matter of time. Second, that judicial interventionism had slowly undermined the mechanisms of Israel's consensus institutions. Third, this erosion of consensus mechanisms supercharged the polarization and bloc formation which developed in Israel's party system over the past decade to bring about the party system majoritarianism which sparked the constitutional crisis. We conclude with a note of optimism about the resilience of Israeli democracy and the potential re-emergence of the consensus-promoting mechanisms within it.

2 Israel's crisis of "majoritarianism"

Israel is unusual among democracies in having its fundamental political and legal structure subject to change by a single-house legislative majority (on almost all issues). Thus, though it requires negotiation among the various parties represented, it is possible for a government controlling merely 61 of the Knesset's 120 seats to restructure key institutions without consent of the opposition or other actors. Indeed, this is precisely a major agenda item of the government formed following the November, 2022, general election. This election returned to power Benjamin Netanyahu, the leader of the Likud Party, along with four coalition partners. Each of the partners is a component of a right-wing/Haredi[4] bloc of parties that, despite separate campaigns, programs, and organizations, is a "natural" ally of the Likud. That is to say, this set of parties clearly signaled that all would prefer to be in government together if the election result were favorable to such an outcome. Meanwhile, the other parties that obtained representation were all essentially committed to opposing the return to power of Netanyahu. When the five parties—Likud, Religious Zionism (which included a distinct party, Otzma Yehudit, on its electoral list[5]), and the two Haredi lists (UTJ and Shas)—combined for 64 seats, they proceeded to form a governing coalition. Notably, these parties did not collectively win half the votes, thus combining for a "manufactured majority"—a point we shall return to later. The government that formed thus had a narrow basis in the Knesset and an even narrower basis in the electorate, yet proceeded with a legislative agenda that included a major constitutional restructuring focused on changes to the process of appointments to the Supreme Court and of the latter's authority to overturn legislative and executive acts.

As the coalition advanced its proposals to gain greater control over judicial appointments and to limit the Supreme Court's authority, scholars of the Israeli legal system sounded the alarm. For instance, Sachs decried that "in Netanyahu's new Israel, the slimmest of majorities could decide anything," a situation of "pure, unbridled majoritarianism" (Sachs, 2023). Other authors saw a crisis rooted in a government seeking a radical departure from current practices (Porat, 2023) and drew parallels to the Hungarian government's "populist constitutional project" and similar measures to reign in courts by governments in Poland and Turkey (Roznai and Cohen, 2023). To some observers, the proposed judicial overhaul was so radical as to be a threat to democracy itself. The reforms were decried as a "judicial

2 Not just different from each other (inter-bloc alternation, e.g., A+B+C, then D+E+F and vice versa) but varying permutations of the parties in government such that the government coalition is not simply the parties who were previously in opposition (e.g., A+B+C, then B+C+D, then A+D+E).

3 We will refer mainly to the period prior to the terrorist attack emanating from the Gaza Strip on 7 October 2023 and the ensuing war, which at least temporarily shifted the government's and public's agendas.

4 Also known as ultra-orthodox Judaism.

5 While they ran on a single list (along with a smaller third religious–right party), the parties announced in advance that it was a "technical" alliance and that they would split once again after the election. They did so, and bargained as distinct parties for the purposes of government formation.

coup" by some academics[6] and by leaders of opposition parties in the Knesset (Keller-Lynn, 2023). In addition, one of the major international surveys of the state of democracy even changed Israel's status in 2023 from liberal democracy to a mere "electoral democracy" (Nord et al., 2024).

Israel's alleged risk of descending into a less democratic form of government was made possible by the anomaly of a powerful supreme court yet an institutional design that has few rules to disperse power. Notably, Roznai and Cohen (2023) do not include coalition government and fragmented multipartism among characteristics of a political system that disperse power, but refer mainly to separate institutional checks, i.e., federalism, bicameralism, and presidentialism.[7] Yet it is multipartism and resulting coalition governance that are the hallmark of the consensus form of government as typically understood by political scientists. Moreover, a powerful judiciary is, in this conception, a further consensus-inducing feature in the sense that it represents a dispersal of power by introducing a veto player with the power to limit the range of policy choice that a parliamentary majority can implement. A paradox, however, is that institutional checks, including a powerful judiciary, in some cases can undermine consensus-seeking within the legislature and among political parties, as we argue later.

The Israeli crisis of 2023 thus presents a puzzle. How could majoritarianism and even populism and a risk to democracy itself come to a country with the key institutions of consensus democracy and even an unusually strong and independent judiciary? We must concede that a government with a bare majority of seats, having won the election as a unified front, nonetheless having won on less than a majority of voter support, and embarking on fundamental policy changes without bargaining with other actors is indeed a good definition of majoritarianism in action. Yet this is not supposed to happen in a country with Israel's form of government! The Israeli case is—supposedly, at least—a prime example of a democracy that operates via "consensus." In order to resolve this puzzle, it is important to set out the ways in which the Israeli case is, at least allegedly, a paradigmatic case of consensus democracy.

3 Israel as a case of consensus democracy

That Israel could suffer from a majoritarian crisis might surprise those familiar with the classics of comparative politics, under the classificatory scheme of which Israel emerges as a prime case of "consensus" democracy. Majoritarian and consensus patterns of democracy are conceptualized by Lijphart (2012)[8] as opposing concepts. As an ideal type, a consensus democracy is one approximating a situation under which all groups that may be affected by a potential decision are involved in the crafting of a policy. By contrast, a majoritarian democracy is one in which a bare majority—meaning a government holding not much more than half of parliamentary seats--decides all policies with virtually no input, and certainly no veto, from opposition parties or other actors. Other scholars (e.g., Powell, 2000) have added to the ideal type of majoritarian democracy the notion that governments, and presumably the policies they implement, have a mandate from the electorate. In other words, the government that is formed is clear to voters prior to the election, in terms of which party or group of parties will form it, and what its policy priorities will be. The concept of an electoral mandate is foreign to consensus democracy, inasmuch as consensus must be forged among multiple parties with conflicting priorities and through bargaining after elections.

Lijphart defines two distinct dimensions that characterize how features of democracies push a system toward one or the other archetype. He refers to these dimensions as *executives–parties* and *federal–unitary*. Within this model, the most concentrated power would be at the combination of unitary distribution of power and bare-majoritarian decision making. The most dispersed would be the combination of federalism and policymaking by broad coalitions. The most important institutional feature promoting broad coalitions in this model is the use of a highly proportional electoral system under the majority decision rule typically facilitated by parliamentarism.

'Majoritarian' and 'consensus' democracies are not exhaustive categories – the terms refer to the tendencies at the ends of each scale capturing the two dimensions. Countries can combine majoritarian features on one dimension with consensus on the other. For example, Canada usually features single-party majority governments but has a robust federal system in which provinces have considerable autonomy over their own affairs and there is a strong supreme court–Lijphart refers to this combination as "majoritarian federal." Israel itself is a case that, according to Lijphart, is the best example of a "unitary–consensus" model, in which power is concentrated in the central government but that government itself tends to be comprised by multiparty coalitions that encourage a broad consensus of interests in the policy-making process. While there is no question that the Israeli system remains a unitary democracy (as opposed to a federal one), there is evidently doubt from recent developments in the country's domestic politics whether it remains a consensus democracy. We suggest that this puzzle can be resolved by clarifying the core institutions that are generally understood to promote consensus among multiple political parties together with their wider context, including institutional, behavioral and transient factors that might erode such consensual politics.

On his "executives–parties" dimension, Lijphart uses a series of indicators to contrast majoritarian (bare majority) and consensus (broad coalition) governance. These indicators include proportional representation (PR), a multiparty system, and a tendency for

6 This phrase was common in discourse about the government's proposal. For example see "Prof. Yuval Noah Harari: Judicial Coup in Israel 'Will Destroy Academic Freedom,'" *Haaretz*, 26 March 2023, https://www.haaretz.com/israel-news/2023-03-26/ty-article/.premium/prof-yuval-noah-harari-judicial-coup-in-israel-will-destroy-academic-freedom/00000187-1d1a-d7c4-ab8f-fd3ea9d70000.

7 We would caution that it is mistaken to consider presidentialism a tool for power dispersal inasmuch as it concentrates executive authority in a single individual and has profound impacts on party organization and behavior, as indeed was seen during the period in which the Israeli Prime Minister was directly elected; see Samuels and Shugart (2010).

8 Earlier editions of Lijphart (2012) also recognize Israel as one of the more "consensus" democracies.

short-lived cabinets. No one would dispute that Israel has PR and multiparty politics; moreover, it has one of the shortest average cabinet durations among parliamentary democracies (Shomer et al., 2021).

These characteristics are not independent of one another. Indeed, multipartism, coalitions, and frequent changes of coalitions are best predicted by the main features of the electoral system. Among long-established democracies, Israel has the second highest "seat product," which defines the degree to which a country's electoral system promotes a high number of political parties (Taagepera, 2007; Shugart and Taagepera, 2017). The seat product is a country's mean district magnitude[9] multiplied by the assembly size, based on the logic that the more legislative seats are available—overall and in each electoral district—the greater the opportunities for smaller parties to win representation and potentially participate in cabinet coalitions. Because Israel uses a single nationwide district for all 120 seats in the Knesset, it has a very high seat product.[10]

All components of Lijphart's "executives–parties" dimension can be connected to the seat product via a quantitative logical model (Taagepera and Nemčok, 2019). For example, key features of this dimension of political power distribution include the effective number of parties and the average duration of cabinets. These are not inputs that are independent of the electoral system, but rather can be predicted accurately from the seat product itself. Israel's seat product has not changed since the establishment of the state of Israel, although other variables within the electoral system have changed, most notably the legal threshold. For decades it was as low as 1% but has been increased several times, most recently to 3.25% since the 2015 election (Shugart, 2021).

Thus, the classification of Israel's formal institutions as consensus-fostering in terms of their promotion of a multidimensional party system (Zur and Bakker, 2023) and coalition governance is incontrovertible. Nonetheless, to really understand what makes consensus democracy tick, we need to unpack the notion of consensus relationships among political parties. This will help clarify the role of the seat product in encouraging precisely the sort of broad and shifting multiparty coalitions that typify the consensus end of Lijphart's executives–parties dimension. By clarifying where the incentive for consensus comes in, it will also help clarify that institutional incentive may be muted (to a greater or lesser degree) by the choices of political actors.

The essence of consensus-inducing relations among political parties is the existence of majority-rule decision making under proportional representation,[11] when no party controls a majority of seats. That is, it is less about forcing consensus through minority-veto requirements (like a strong upper house, or supermajority requirements such as entrenched constitutional provisions) but a context in which every party can be outvoted (McGann and Latner, 2012). In the fluid multiparty context that PR and majority rule ordinarily foster, excessive demanders can be replaced by a different party—whether through formally changing the cabinet coalition or by a more "balanced" relationship between cabinet and parliament that generates opposition influence on policy (Strom, 1990; Huber and Powell, 1994). This dynamic can be understood as a beneficial case of "cycling."

The concept of cycling majorities stems from the social choice literature, in which a central finding is that majority rule is inherently unstable (Arrow, 1951; Black, 1958; Riker, 1982). In theory, any majority can always be defeated by some other majority—for instance, in a three-person game, one of the players in a 2–1 majority can always offer the third player a better payoff and bring the outcome closer to his preference, and this process can go on indefinitely, hence "cycling" over different decisions. In actual legislative bodies and the democratic process more generally, the more deleterious effects of cycling can be contained by agenda control rules and other institutional solutions, though these, too, seem to imply democracy can only be practiced in a limited form. Cycling thus often has a negative connotation.

On the other hand, other authors argue that cycling—or its potential—can be beneficial (Miller, 1983; McGann, 2006; Li, 2019). Under this argument, majority tyranny is best prevented by institutions which allow minorities to make offers to members of the current majority which split that majority. To be able to make such offers implies a party offering some policy proposal that differs from its ideal preference (which might be relatively "extreme") in order to make it attractive enough to induce defection from within the majority, thus preventing an outcome the party inducing the split would like even less. In this way, even the opposition can influence policymaking – but this depends on coalitions' fluidity.

When all actors believe that majorities may shift, no tyrannical majority can persist. This beneficial cycling is most likely to emerge in the real world under conditions of majority-rule parliamentary government with the high party fragmentation typically fostered by a high seat product (i.e., relatively high proportionality). The situation of party fragmentation under majority decision rule lowers the "defection cost" because members of the majority are not banishing themselves to opposition by splintering the current majority (Li, 2019: 6–7, 134–5). In other words, beneficial cycling is fostered by the precise institutional combination that characterizes the executive and legislative components of the Israeli political system – though, as we argue below, it is undermined by the judicialization of politics.

The argument that PR with parliamentarism produces beneficial cycling assumes sufficient fluidity of the party system such that *no pre-electoral bloc of parties can capture a majority of seats on its own*. Some parties in today's coalition may prefer to be in coalition with different parties tomorrow—whether that "tomorrow" means literally any day when the current coalition may break apart or after an upcoming election produces a slightly different configuration of coalition possibilities. Importantly, cycling does not have to occur in any directly observable way, where the most observable is coalition breakdown. That is, short duration of cabinets, which is a predictable feature of parliamentary democracies with high seat

9 Meaning the number of seats up for election in each district.

10 When there is a single nationwide district, the seat product is equivalent to the square of the total number of seats. Thus in Israel it is 14,400; the only higher one among long-term democracies is the Netherlands at 22,500. By contrast, if 120 seats were elected in single-seat districts the seat product would be 120; if that number of seats were elected in twelve districts averaging ten seats each, the seat product would be intermediate, at 1,200. Thus the seat product captures the joint effect of the number of seats in the entire assembly and the average district on such outcomes as the potential for small-party representation.

11 Technically, all that is required is the lack of a single-party majority, but the effect is significantly strengthened if the electoral system minimizes the possibility that such a majority can result from the election.

products (Taagepera and Sikk, 2010; Taagepera and Nemčok, 2019), need not actually occur. The effects of cycling may manifest in less obvious ways, such as agreements for coalition partners to dissent when votes are available from an opposition party. More to the point, the mere *potential* for cycling may be sufficient to prevent governing partners from pushing too far with extreme positions, precisely because doing so risks their more moderate partners (on a specific issue) making a deal with an opposition party instead. This flexibility of multiparty democracy, then, prevents their descending into majority tyranny, or what concerned observers might call a "majoritarian nightmare."

The theory and empirics behind party-system fragmentation and low defection costs associated with a high seat product are strong. The high seat product means that new parties–which might be (and in Israel often are) breakaways from existing parties–have relative ease of gaining representation. In Israel, even very small shares of the vote can guarantee a party representation. However, as we note later, 'governability' reforms such as increasing the legal threshold to 3.25% have raised defection costs. Nonetheless, Israel still has the basic political institutions that should tend to induce beneficial cycling, so why has it been possible for a government to pursue a radical agenda? The answer, we argue in a later section, lies largely in how the theoretically expected outcomes can be undermined by certain political choices. Specifically, the more the party system becomes defined by blocs in which parties make ideological commitments that foreclose working with parties outside their preferred bargaining partners, the less cycling we observe and the more the pattern of democracy comes to resemble a majoritarian one.

This effect is partly because the defection costs–so critical for making cycling a potential feature of politics (Li, 2019)–are higher when parties in the majority have pre-committed to supporting a specific prime minister and government consisting of a specific set of ideologically consistent partners. Moreover, a pre-electoral bloc is both a product of increased polarization (signaling a set of parties that want to work with each other but not with other parties) and itself an accelerator of polarization (by drawing clear lines between parties). These conditions are further exacerbated in Israel due to the long and increasingly controversial tenure of Netanyahu as Likud leader and Prime Minister.[12] Over time, many party leaders outside the right/Haredi bloc have refused to work with him due to what they see as past betrayals (Aronoff, 2022) and his ongoing corruption investigations and trials (Navot and Goldschmidt, 2023).

We argue that the behavioral factors that undermine consensus democracy have occurred in great part in reaction to the increased intervention of the judiciary. The Israeli Supreme Court has not merely been the main subject of the attacks of the current government, its interventions have helped erode the functioning of the institutional mechanisms supporting consensus politics by fostering the judicialization of politics and polarization of the party system. To elaborate these developments and the Court's role in them, we now first turn to explaining Israel's institutional status quo in the area of judicial institutions and constitutional law, putting these into comparative perspective.

12 Netanyahu by now has accumulated one of the longest tenures as prime minister of any established parliamentary democracy.

4 Constitutional court appointments in parliamentary democracies

Israel has an anomalous combination of pure majority-rule parliamentarism, which includes the ability of parliamentary majorities to make fundamental changes to constitutional structure, with a strong and highly independent supreme court. Thus Israel has the prime consensus-inducing institutional combo–parliamentarism with a high seat product–but also the veto potential of a strong court (a court, which has a veto on appointments to itself). It is, of course, this latter feature that the government formed after the 2022 election set out to overhaul. In this section, we compare both the Israeli status quo with respect to judicial power and the government proposals to provisions in other democracies with broadly similar political systems.

We focus on the appointment of constitutional courts, meaning whichever court is entrusted with final appeals in constitutional judicial review; while some countries have a separate, specialized constitutional court, many countries combine this function with general appellate jurisdiction, as in Israel. We also focus specifically on democracies that are fundamentally parliamentary in nature.[13]

The diversity in appointment mechanisms may be summarized in terms of four main models: executive, legislative, mixed, and commission.[14]

1 *Appointment by the executive*: often, the government is advised by an independent commission formed by statute or government decision rather than entrenched constitutional law. Such informal or statutory advisory commissions, while present under other models, are especially significant under executive appointment, due to their potential to constrain an executive that otherwise has high discretion (Feenan, 2008). This is the predominant method of appointment in Commonwealth and Nordic countries.
2 *Appointment by the assembly*: sometimes this requires a regular majority (e.g., Poland, Switzerland), but more often involves supermajority voting (Germany, Croatia, Hungary, Portugal).
3 *Mixed appointment:* this entails different political actors or branches each appointing some judges (e.g., France, Spain, Italy, and Austria). There are many variations, but most commonly the appointers include two or three of the following: parliament, the government, the head of state, or representatives of the judiciary itself.
4 *Appointment commission*: this method involves a central role for a constitutionally-defined commission appointed by various actors. Sometimes, the commission model is little different from executive appointment systems where the commission has statutory authority, as recommendations are still sent to the government or president. Often, commissions have functions beyond court appointment, such as oversight and removal, as is the case in Israel. Few parliamentary

13 Interpreting these terms broadly, to include any democracy where the cabinet can be dismissed by vote of the assembly majority and does not have constitutionally defined dependence on a separately elected presidency.

14 Except where stated otherwise, details of examples taken from constitutional texts found at Constitute: constituteproject.org/constitutions.

countries use a constitutionally-defined commission; examples include South Africa and Nepal. The composition of appointments commission naturally varies. To illustrate, in South Africa, the Judicial Service Commission is made up of 23 members: 3 senior judges, the minister of justice and 4 others appointed by the President,[15] 5 representatives of lawyers' and law professors, and 10 representing Parliament (6 of these are from the lower house, half of which must come from opposition parties). The appointment of the head of the court is somewhat more 'political' than that of the other justices: the President of the Constitutional Court is appointed by the President at his discretion after consulting with the JSC, while other justices of the court are appointed by him from a JSC-selected shortlist of four names per vacancy.

Some constitutions give a major role in judicial appointment to the head of state. This set of countries includes cases of presidents who are not directly elected or otherwise are mostly ceremonial, such as Italy. Directly elected presidents in France and Romania appoint a third of constitutional judges. In Slovenia (whose president is directly-elected) and Czechia (whose president was elected by parliament until 2013), the president makes all appointments, subject to confirmation vote by the Senate.

As noted already, some countries give a major role to the judiciary itself in appointing judges. Sometimes this process is through a council that oversees the judiciary, and other times it falls to the supreme court. In cases of executive and commission appointment methods, it is often judges of the very same court who play an advisory or mandatory role in the decision process. In The Netherlands the government chooses from a shortlist proposed by the lower house; by convention, the house picks its shortlist from a longer list of recommendations submitted by the court itself (Van Koppen, 1990). In Albania and Estonia, a similar arrangement is constitutionally mandated, effectively giving the judiciary a great deal of control over judicial appointments. In India, the judiciary took control of judicial appointments through reinterpretation of the constitution. The text of the Constitution of India vests appointments in the president after consultation with senior judges. In 1993, despite an earlier ruling to the contrary, the Supreme Court determined that the senior judges' recommendation is binding and that no other branches have a say in its appointment. Since then, the Court has consistently asserted that any change from this system (even by constitutional amendment) would be an unconstitutional violation of the independence of the judiciary.

4.1 Israel's judicial institutions compared

We now consider how Israel compares to the various models surveyed. Israel's judicial appointments committee is made up of nine members: three senior judges, two representatives of the Bar Association, two representatives of the Knesset (with an informal norm that there be one each from the government and opposition), the minister of justice, and another member appointed by the government. The committee used to vote by majority rule, a 2008 statutory amendment[16] made a majority of seven out of nine required for Supreme Court appointments. Under the old rule, the judges had a particularly strong position on the committee (Dotan, 2002; Friedman, 2016). The three generally presented a unified front on the committee. As a result, and because they had a choice of coalition partner (the two further votes they needed to make appointments could come from the Bar representatives, the government, or any one vote from those blocs together with the opposition representative), they had a very strong bargaining position.

The current rule, instead, gives a veto to any three members; the most obvious blocs of common interest are: (1) that of the judges and (2) that of members representing the parliamentary (government) majority. Assuming those blocs are unified, for an appointment to be made, the choice must be agreeable to both the government and the current judges of the court.[17] Hence, this voting rule has meant that if the government's preferences are aligned with that of the Court, it will be easy to appoint judges, whereas if they are at odds, there may be deadlock on appointments. Especially since the longstanding previous rule allowed the consensus of the legal profession to appoint the court, incumbent judges clearly have the upper hand, because the status quo of the court's composition (of which they are members) already matches their preferences. When faced with a friendly government, the judges can easily maintain the court's ideological complexion; when faced with an unfriendly government, the court can use its veto power to protect the status quo.

Israel is somewhat unusual among longstanding parliamentary democracies in using the commission appointments model for its constitutional court, a model more common among well-established democracies for appointing appellate courts without constitutional jurisdiction. Meanwhile, the commissions used in executive appointment countries lack constitutional status, and sometimes may lack authority (formal or informal) to bind the executive to their recommendation. While the mixed model typically involves different branches making their own appointments independent of each other, the commission model (depending on the specific composition) may involve bargaining between different branches. Some variants of the commission model closely resemble the assembly appointment model, as bargaining takes place mainly between different political parties.

What is more unusual (but not unique) is giving judges, and the legal profession as a whole, such a high degree of influence over the process. Collectively, judges and lawyers hold a majority of five out of nine members. As we saw, in South Africa, by contrast, the commission is far more political, with only eight out of twenty-three members representing judges and lawyers, and the government reliably controlling around twelve out of twenty-three seats. This is not

15 South Africa's President is in fact a prime minister, being elected by and accountable to the majority of the National Assembly.

16 To the Law on the Courts, not to the Basic Law itself. See he.wikisource.org/wiki/%D7%97%D7%95%D7%A7_%D7%91%D7%AA%D7%99_%D7%94%D7%9E%D7%A9%D7%A4%D7%98.

17 There is some asymmetry between these blocs: although the judges (who typically confer and present a united front in the committee) can usually further rely on the support of the lawyers' representatives, the government's representatives are more likely to be disunited, and are less likely to be able to rely on the committee's opposition member for extra support.

necessarily a universal feature, however; note, for instance, Nepal's 2015 constitution, which grants the legal profession a majority on the appointments committee.

Besides appointments, it is worthwhile to briefly review a few other salient unusual features of the Israeli judiciary. Firstly, when sitting in its capacity as the High Court of Justice, the Supreme Court has original jurisdiction in the vast majority of administrative cases of judicial review, the main exception being a set of cases the Court has itself delegated to lower courts (Dotan, 2002). It is also largely acknowledged as holding a monopoly on judicial review of legislation, although there has been one case of a law struck down in a lower court.

Israel also has an attorney-general that is unusually powerful and independent of the government (Casey and Kenny, 2022). The attorney general functions as both the government's top legal advisor, its representative before the courts, and chief prosecutor. Unusually, this post is not appointed by the prime minister but by a special commission (separate from, but similar to the judicial appointments commission). The attorney-general can be fired by the government only under a somewhat complex procedure. Perhaps unsurprisingly, the attorney-general has often been perceived as an ally of the Supreme Court and the legal establishment. The position is considered powerful, and the Supreme Court holds that the attorney general's advice to the government is binding in all administrative decisions, which includes the proposal of legislation to the Knesset. The role and appointment of this position has been a matter of controversy throughout the Israeli judicial overhaul debate.

Ultimately, however, perhaps the most unusual aspect of the judicial system was not the high degree of judicial independence, but the fact that the constitutional framework supporting it is not (or only very minimally) entrenched relative to other laws.

5 The incongruence of an unentrenched constitution with a highly independent judiciary

As we have seen, Israel's judiciary is institutionally set up to be comparatively highly independent. This situation has come to be, and remained so, despite the fact that none of it is legally entrenched. A majority of the Knesset has always had the authority to modify it. If these institutions are, in principle, so easy to change, how have they remained so stable for so many decades, despite the courts' heavy involvement in political matters since the 1990s? And what changed in the last few years to bring about the ongoing crisis?

To briefly summarize, in the initial decades of statehood, this institutional independence attracted no controversy, as the court took a consistently apolitical stance and did not engage in constitutional judicial review (Porat, 2023).[18] After this stance changed in the 1980s and 1990s, and the court became more active, the existing institutional arrangements gradually began to attract critical attention. Nonetheless, the court's independence was protected very effectively by the fragmentation of the party system and the plurality of voices and ideologies present in every government (as well as the fact that governments were often short-lived). Further, these factors protected many of the court's rulings from being easily overruled by parliamentary majorities. In other words, the core element of consensus democracy, as we reviewed earlier, protected judicial independence.

Though many proposals for judicial reform have been proposed over the years, very few passed into law (most notably the 2008 change of the voting rule on the Appointments Committee). This pattern of gradual change (and Supreme Court power) seemed bound to persist until the election of the 2022 Netanyahu government, a pre-electoral coalition which seemed unusually unified – in particular, on the issue of the court's power and independence. The emergence of this coalition has upended the previous constitutional equilibrium in which the Knesset's ability to effect constitutional change was more limited than that of the Supreme Court.

5.1 Israel's (large-C) constitution

It is often said that Israel has no constitution, a cliché which is unfortunately highly misleading. The position the Supreme Court has taken since the 1990s is that the Basic Laws have constitutional status and therefore, for all intents and purposes, form Israel's current constitution. This position is an interpretation of the 'Harari decision' taken by Israel's Constituent Assembly in 1950 (Soffer, 2006). In deciding not to formulate a constitution at the time, it was instead decided to leave it up to subsequent legislatures to formulate constitutional laws in piecemeal fashion.[19] Starting in 1958, the Knesset has ratified over a dozen Basic Laws covering to some degree all main subject areas usually covered by the average modern democratic constitution.

Though the courts did not hold that Basic Laws generally had constitutional status before the 1990s, the Supreme Court had previously struck down a law for being in conflict with a Basic Law – this first happened in its 1969 *Bergman* decision (Soffer, 2006: 313). The rationale given then was not the Basic Law's constitutional standing but instead more narrowly the violation of its entrenchment rule, which forbids changes to Basic Laws by any less than 61 MKs.[20] Four basic laws include clauses which entrench those laws in their entirety, while four other Basic Laws include specific entrenched clauses (two of these clauses require a two-thirds majority to change), the rest of the law remaining unentrenched.[21]

Israel is unusual (but not unique) in having a constitution which is entrenched so minimally. However, before the 2022 Netanyahu government, it often *felt* like a major hurdle nonetheless. The main reason for this is that party fragmentation in the Knesset[22] has always

18 An (arguable) exception of the 1969 *Bergman* decision, as we'll see.

19 "Harari proposal passes, ending prospects for an Israeli constitution" *Centre for Israel Education,* nd. https://israeled.org/harari-proposal-constitution/.

20 This entrenchment was interpreted to require the passage of any provisions contrary to the existing Basic Law as requiring passage by the same stated majority, whether or not those provisions were incorporated into the Basic Law itself.

21 As a temporary measure, a number of sections added to Basic Law: the Government at the start of the 2020–21 Knesset to facilitate rotation in the prime ministership were entrenched (requiring 70 MKs to be changed) for the duration of that Knesset to prevent reneging.

22 In combination with political realities such as the uncoalitionability of the Arab parties.

been sufficient to require coalitions to include significant ideological diversity, with the effect that passing amendments has often been difficult in practice. An important example is that past governments have always included some parties with strongly contrasting preferences regarding religion and state issues. Supreme Court rulings have also often affected policies dear to some sectors or parties but controversial for others, so that the simple fact that the sector most strongly opposed to a ruling is represented in the government does not mean swift government action to counter that ruling. Again, this is consistent with the diversity of the parliamentary majority under a high seat product being normally sufficient to prevent radical changes.

The idea that it has been hard to amend Basic Laws does need to be nuanced. Government parties were in sufficient agreement in 2009 to pass a special budget arrangement as a Basic Law to bypass the Basic Law's annual budget requirements.[23] The 1993 Supreme Court ruling against the requirement that imported meat be kosher as violating the Basic Law: Freedom of Employment was successfully overridden by an amendment which incorporated an override clause into that law. The original law was amended to utilize this override clause, which was upheld by the court in 1996.[24] Moreover, the past decade saw the passage of entirely new Basic Laws (in 2014 and 2018) – the first passed since the constitutional revolution of the 1990s. However, a strong argument can be made these exceptions actually support the rule, as all represented fairly minor changes to the status quo. The fact is that the multiparty politics facilitated by proportional representation helped significantly moderate constitutional lawmaking.

Effectively, there was always a certain incongruence between the court's independence and the lack of entrenchment of those institutions. The government of the day always enjoys the support of a majority of the Knesset. However, when government coalitions were sufficiently diverse, and the Knesset as a whole was less polarized and so more politically accommodating of changeable coalitions, elected politicians' collective action problems prevented them from posing a real threat to judicial independence. Effectively, the Supreme Court relied on proportional representation to maintain party fragmentation and incentives for consensus. But while institutions such as the electoral system can produce very strong incentives, they are not deterministic; coalitional and electoral outcomes are always influenced by many other factors.

In some ways, however, the 2022 Netanyahu government is not that different from past governments – its constituent parties originate in different sectors and their preferences diverge on many policies. However, on the objective of reducing the power of the Supreme Court, they have found themselves to be in general agreement, even if not for the same reasons (Shapira et al., 2025).[25] The Haredi parties' biggest grievance against the Court stems from its successive rulings against the continued exemption from military service given to Haredi yeshiva students; for Religious Zionism and Otzma Yehudit, it is the Court's various rulings against West Bank settlers. The Likud's own grievance stems partly from Netanyahu's legal troubles, partly from its need to keep up its alliance with the aforementioned parties, and partly from the fact that the Court forms a general obstacle to policy-making, one which Netanyahu and many of his voters do not perceive to have benefitted them in the past. For all these parties, there is also a broader social-cultural antagonism to the court as representing the old, secular, Ashkenazi elite and its relatively neutral, liberal state ethos – as opposed to their ideal of a state identified strictly with the Jewish people.

5.2 The government's overhaul proposals compared

The government's original judicial overhaul proposals, put forward by justice minister Yariv Levin in January 2023, included many individual elements. To put these proposals into comparative perspective, we will only cover the main ones (Roznai et al., 2023). Firstly, the government proposed to drastically alter the composition of the Judicial Appointments Committee. Other than the judges on the committee, all members of the Committee would be appointed by the government or represent government parties (by virtue of chairing Knesset committees, a role typically reserved for government MKs). Though other variations were considered, the initial proposal involved an increase of the size of the committee and a retention of the decision rule of 7 members, so that the judges on the committee would no longer possess a veto. As we saw above, though there are other countries with similar government control over judicial appointments, other appointment commissions do not see such a high degree of government dominance.

Secondly, the government's proposals would have required judicial review over legislation to be considered by the Supreme Court sitting *en banc* rather than by a smaller panel (as is the current usual practice) and a supermajority of 12 out of 15 judges for a law to be struck down. While both requirements would constrain the court, the latter would obviously be considerably more significant. While there are examples of constitutional courts who need supermajority agreement to strike down legislation, they are in a minority – examples include Czechia, Peru, and Taiwan (Caviedes, 2022); Poland also recently adopted such a rule under the PiS government. More importantly, however, is the effect it would have had in combination with the first proposal. If, as envisaged, a government coalition were to have a rather free hand to appoint judges, then a supermajority rule would make it fairly easy for almost any government to insulate its legislation from judicial review by appointing enough friendly judges. Indeed, it's quite likely that such a combination of rules would result in permanent deadlock on the court on many if not most issues.

Thirdly, the government also proposed introducing a general override clause which would have allowed the Knesset to overturn any ruling striking down a statute. Although the initial bill called for an override to require a vote of an absolute majority (61 MKs), other versions of the proposal went up to two-thirds. An override clause of this kind already exists formally for Basic Law: Freedom of Employment, and of course, a Knesset absolute majority already has the power (in principle) to change almost any Basic Law in reaction to a court ruling. However, an override clause would probably be more convenient politically, as it (superficially) avoids potentially tampering with general and abstract provisions, and only shields a specific concrete issue from the application of constitutional provisions. Override or "notwithstanding" clauses are

23 Hayim Ramon "HCJ Shaffir v. the Knesset - the Supreme Court accelerates the coup d'etat against Israeli Democracy." (Editorial; Hebrew) *Dyoma*. 30 May 2021, https://dyoma.co.il/law/788.

24 HCJ 4676/94 Mitrael limited and others v. Knesset and others, 1996.

25 Nor with perfect agreement about the manner of achieving this goal in practice. Indeed, it seems that the far-reaching scope of the proposed reforms may partly originate with this disagreement regarding the means. It looks like it may have been a logroll.

not unknown in other countries, but they are always allowed for a specified number of constitutional provisions, not all of them. Moreover, they almost always involve one or more constraining conditions, such as supermajority rule or an expiration date.

Thirdly, the legislation included a provision explicitly shielding Basic Laws, as constitutional legislation, from judicial review. Although the Supreme Court claims the power to strike down regular legislation on the basis that the Basic Laws have constitutional status (and the Knesset passes Basic Laws in its inherited capacity as constituent assembly), this has not stopped it from claiming the power to strike down Basic Laws as well. In two recent cases, the Supreme Court found the Knesset's power to pass Basic Laws is limited by abstract principles the court argued underpin Israel's constitutional process, though no law ever established them as such. These principles include that Israel is to be a Jewish and democratic state, and that constitutional provisions must be general and abstract in nature and not personal.[26] This line of judicial interpretation is similar to the doctrine declared by the Indian Supreme Court and others, which asserts that the constituent power is limited by an unalterable 'basic structure', even though such restrictions see no mention in the constitutional text. The explicit denial of the power to strike down a Basic Law is therefore also extremely similar to attempts in at least one other country to put an end to a practice often perceived as judicial overreach (Albert, 2019). Opponents of the law point out that as long as the Basic Laws remain unentrenched and one may be passed by a majority of the Knesset, eliminating review of Basic Laws is tantamount to giving the government coalition of the day the power to shield any of its legislation by labeling it a "Basic Law."

Fourth, the government proposed to limit the Court's authority to strike down administrative actions under the reasonableness doctrine in the case of cabinet or ministerial decisions. Like the power to strike down Basic Laws, this is a power the Supreme Court has developed itself, with no direct basis in legislation. Developed from precedents in administrative law from the UK and other common law countries, the Israeli court began applying the doctrine more assertively in the 1980s to assert that administrative decisions (including appointments) which are based on 'improper' considerations or have 'unreasonable' outcomes are invalid (Dotan, 2002). Among other applications, this power currently allows the court to review any kind of executive appointment and set it aside as 'unreasonable', even if they do not violate legal criteria. This unusually strong and wide-ranging power has been applied with regard to a wide range of appointments (Dotan, 2018). Of the legislation originally proposed, this is the only one which has passed as of early 2025, as an amendment to the Basic Law: the Judiciary. It was subsequently struck down by the Supreme Court in early 2024.

Lastly, the legislation included a proposal to essentially eliminate the independence of the Attorney-General and other legal advisors to the government. Their appointment would henceforth be political, the Attorney-General being appointed and dismissed much like any government minister. As we discussed above, Israel is a major outlier in this area, so this would bring Israel more in line with other countries. However, in broader terms, considering the unentrenched nature of Israel's constitution, the Attorney-General's independence is arguably an important safeguard.

Almost all parts of the government's overhaul program had been presaged by proposals put forward over the past two decades, including a override clause,[27] alterations to the composition of the appointments committee,[28] supermajority voting on unconstitutionality,[29] restricting judicial review,[30] and modifying the position of Attorney-General.[31] There is no doubt, however, that the government's original plans combined a large number of these proposals, and in each case produced a variant that was more radical (sometimes much more) than previous proposals. As we discuss below, it was also the first program which clearly enjoyed the backing of the entire government.

All considered, the widespread panning of the government's proposed reform package is hard to characterize as unwarranted. The substance of the proposals represents a radical change with potentially far-reaching consequences, especially in the aggregate. Indeed, the package seems to be a grand logroll combining all the various measures most favored by different elements of the coalition.[32] Moreover, unlike some past proposals,[33] the overhaul package

26 HCJ 5969/20 Shaffir and others v. the Knesset and others, 2020.

27 Most notably by the Netanyahu government in 2014 ("Ministers have approved MK Shaked's bill to bypass the Supreme Court" (Hebrew), *Haaretz*, 26 October 2014 https://www.haaretz.co.il/news/politi/2014-10-26/ty-article/0000017f-db4f-df9c-a17f-ff5fde4b0000) and 2018 ("The ministerial committee has approved: 61 MKs will be able to re-instate a law struck down by the High Court") (Hebrew), *Globes*, 6 May 2018 https://www.globes.co.il/news/article.aspx?did=1001234432) and in the Olmert government in 2007 (Fuchs, Amir. 2007, "The override clause: the Canadian Model and its appropriateness for Israel" (Hebrew), IDI, 22 December 2007 idi.org.il/articles/7964) with a more moderate ministerial proposal in 2012 ("Gronis vs. Ne'eman: rethink Basic Law: Legislation, or generations to come will regret it." (Hebrew) Haaretz, 17 April 2012 haaretz.co.il/news/law/2012-04-17/ty-article/0000017f-e195-d7b2-a77f-e39742690000.

28 Most notably in 2011. Bill regarding the Bar Association's representatives in the Judicial Appointments Committee (law amendments) 2012 (Hebrew) retrieved from: main.knesset.gov.il/activity/legislation/laws/pages/lawbill.aspx?t=lawsuggestionssearch&lawitemid=420163.

29 Most notably in 2008. "Government has approved Friedman's bill to limit high court's authority." (Hebrew). Globes, 7 September 2008. www.globes.co.il/news/article.aspx?did=1000379177.

30 Most notably in 2008 (ibid).

31 E.g. in 2009 "Division of the Attorney-General's authority between government legal advisor and chief prosecutor (draft bill)" (Hebrew). News1, 2 September 2009 news1.co.il/Archive/0019-D-42359-00.html

Another example is the idea of the establishment of a separate constitutional court to take over the Supreme Court's constitutional judicial review power. A proposal to this effect passed first reading in the 15th Knesset (1999–2003) and has been put forward since repeatedly.

32 While the Haredi parties repeatedly indicated they see the override proposal as the most important part of the plan ("The Haredi Exemption," *Israel Policy Forum*, 25 June 2024. https://israelpolicyforum.org/2024/06/25/the-haredi-exemption/), Forum Kohelet, the think tank which prominently advised the government on the overhaul plan, was strongly opposed to it ("Economist at think tank behind behind legal overhaul now warns of financial fallout" *Times of Israel*, 8 March 2023 http://timesofisrael.com/economist-at-think-tank-behind-legal-overhaul-now-warns-of-financial-fallout/.

33 "Gronis vs. Ne'eman."

included no countervailing proposal to entrench the Basic Laws and thus set them on a clearer and more secure footing (and, for many, a more clearly constitutional one). For a set of reforms framed as restoring balance, it is hard not to see them as inaugurating a new imbalance.

All this is also coupled with the government's non-consensual approach to passing the proposals. While it may be hard to determine objectively whether or not the government made adequate efforts to secure a broader support, or to determine which side was more intransigent, the fact is that members of the government have not been shy about threatening to use the majority to pass the proposals as they stood. Apparently, they were willing to press their advantage and make constitutional changes unilaterally, without any opposition support, just as past Netanyahu governments had done when passing new Basic Laws in 2014 and 2018. On the other hand, the government did, in March, 2023, concede to the mass demonstrations by postponing passage of the judicial overhaul (Sharon, 2023b)–– with the exception of the reasonableness law––and engaged sporadically in negotiations with the opposition.[34] At any rate, comparisons with recent constitutional changes in Poland and Hungary – in both of which judicial independence was compromised – are certainly not surprising, even if important details differ.

As we were finalizing this article, the government presented a new reform proposal, a compromise worked out between the justice minister and Gideon Sa'ar, who had joined the government in November 2024[35]. Though not all the details are clear yet, they are clearly significantly more moderate than the original government proposals. The new plan envisions changing the composition of the appointments committee so that instead of the two Bar Association representatives, one lawyer would be selected by the government and one by the opposition. The decision rule for Supreme Court justices would change to majority rule, subject to the condition that at least one government representative and one opposition representative approves. As a result, the Supreme Court would no longer hold a veto, nor would representatives of the legal profession have the ability to make appointments independently of the political branches. Unlike the original government proposal, the government would not be able to appoint judges independently either. Though there are no close parallels in other countries, there is some similarity to countries where the assembly appoints judges by supermajority rule, ensuring the majority has the support of some of the opposition for its proposed nominees. The plan also seeks (currently only in vague terms) a Basic Law on Legislation which would regulate and define how Basic Laws are passed, including an entrenchment formula, while limiting judicial review of Basic Laws.

34 Of course, this was almost certainly the result of the pressure of the demonstrations - and in politics, a political camp whose primary tactic is of public demonstrations and civil disobedience may reasonably be argued to be intransigent. It may be the case that both sides of this controversy were acting intransigently.

35 Nistan Shafir, "Levin, Sa'ar present judicial overhaul compromise," Globes, 9 Jan. 2025. https://en.globes.co.il/en/article-levin-saar-present-judical-overhaul-compromise-1001499112.

6 Judicial review, polarization, and corrosion of consensus mechanisms

Reflecting a widespread phenomenon in the democratic world (Hirschl, 2008), Israeli politics has become judicialized at a rapid pace in recent decades, with courts coming to play a central role in politics. As in many other democracies, this process has been highly controversial, emerging without political consensus on such a role for the judiciary in the abstract, and producing much dispute over the Supreme Court's rulings in practice. By its nature, judicial review tends toward unilateralism rather than compromise, and whichever parties perceive themselves as its beneficiary come to face less of an incentive to compromise with other parties. Regardless of what one may hold regarding the Supreme Court's activity from a normative or legal standpoint, it has clearly weakened the mechanisms which encourage parliamentary compromise under consensus democracy.

6.1 Judicial activism and judicialization affecting consensus mechanisms

After its foundation in the early state, the Supreme Court had adopted a professional and strictly apolitical tone for about three decades (Dotan, 2002; Soffer, 2006). The Court's approach began to change in the 1980s and 90s as part of a broader international current of 'global constitutionalism' which saw countries with similar legal systems adopting a growing judicial role in human rights and constitutional issues (Porat, 2023). A view emerged that the Supreme Court should "take an active part in shaping society's values, developing the law and protecting human rights" (Soffer, 2006). The Court progressively lowered the requirements of legal standing (Dotan, 2002), and decided more questions to be justiciable, for example by extending the doctrine of reasonableness (Porat, 2023). These forms of judicial review, often not derived from any statute, require officials to comply with requirements and procedures laid down by the court.

Moreover, though laws had been struck down before, in 1995 the Court developed a much stronger view of constitutional review. This 'Constitutional Revolution' declared by the Court was reflected primarily in its application of provisions of the recently-passed Basic Law: Human Dignity and Liberty (1992) and Basic Law: Freedom of Employment (1992). Both laws were passed during the Knesset's final session, after the government had fallen and a date had already been set for an early election. A number of opposition MKs exploited the government parties' lack of coordination and focus on the election campaign to promote the passage of these laws, which had previously been held back by the concerns of the religious parties in the government (Avnon, 1998: 547n20). The bills did not pass into law unamended, nor did they represent the full scope of the ambition of their promoters. Nonetheless, their potential significance had passed under the political radar, with not even a majority of MKs present and almost no media attention (Sapir, 2009). Moreover, some of the promoters of this legislation reassured concerned parties that it would not effect radical constitutional change—only to later embrace the Supreme Court's new position based on it (Sapir ibid. 366–370). The Court's far-reaching judicial review under these Basic Laws, so often controversial, thus proceeds from a legislative process which itself lacked consensus, deliberation, and perhaps also good faith – points often raised in opposition to these rulings.

Besides these controversies, there is a more general way in which the judicialization of politics undercuts the workings of consensus democracy. Consensus democracy results from the need of multiple parties to cooperate to pass policies, and the possibility that a given party might get excluded from a winning coalition. To some extent, these conditions assume a degree of parliamentary sovereignty: the cooperation of a majority coalition of parties must be able to affect policy. External constraints such as judicial review can diminish this, and may also reduce the potential cost for a party to be excluded from the coalition. Changes to the status quo from outside parliament can erode these incentives. In taking decisions that are strongly favored by a minority (or by a majority unable to mobilize this preference effectively in electoral politics), the Supreme Court sharply reduces those parties' incentive to compromise on those issues. Since this reduces the fluidity of coalitions, it directly undermines the "beneficial cycling" that we discussed earlier, and upon which consensual democracy depends.

Judicial activism is inherently unilateral, neither requiring nor recognizing compromise. By making legal changes opposed by some parties and supported by others, the courts greatly reduce the latter parties' incentive to compromise – both on those issues themselves, and in any future negotiation where those parties have an expectation of favorable judicial intervention. Instead of having to achieve things through legislative negotiation, they have an alternative path to policy change through the extra-parliamentary channel of judicial review.[36] For a 'losing' party, the incentive to compromise is also eroded, given that any careful compromise might be undermined by future court action. Under parliamentary supremacy, a stable outcome may emerge from a compromise endorsed by a large majority, since the more parties are included, the less the policy, once legislated, is threatened by cycling, a process internal to parliamentary and electoral politics. On the other hand, the possibility of judicial review threatens the stability of such a legislative bargain. Instead, it incentivizes legislative actors to seek passage of more extreme policies by narrow majorities. Moreover, with the Court slowly establishing itself as an alternative center of decision-making, the incentive to seek change by altering the makeup of the court increases.

No less crucially, the court's growing activism has not been received equally by different parts of the electorate (Soffer, 2006; Porat, 2023). It is clear that, at least since the early 2000's, a deep legitimacy gap existed regarding the courts, with religious Jews less likely to report trust in the Supreme Court than other citizens. This is especially true of Haredim, whose suspicion is rooted in an accumulating discontent over the court's decisions, mostly in religion and state issues. A high point in overt Haredi opposition to the court was the 1999 mass Haredi demonstrations, which happened against the background of rulings requiring municipal religious services councils to admit Reform and Conservative members, limiting the authority of rabbinic courts in divorce cases, and the landmark 1998 ruling invalidating the arrangement under which Haredim were exempted from military service (Zicherman, 2019). The latter issue has most retained its salience, remaining a political sticking point ever since. Though political compromises have been reached on the issue, the Court has struck those down on the basis that they violate the Basic Law on Human Liberty and Dignity. These rulings interpret that Basic Law as enshrining a right to equality – despite such a provision having deliberately been left out of it due to fears that such a principle would threaten the draft exemption (Soffer, 2006: 318; Sapir, 2009: 365). Another important example is the Supreme Court's approval of the constitutionality of the Gaza disengagement policy of 2005, perceived by the settlers' movement and its supporters (many of them belonging to the Religious Zionist sector) as showing bias in the Court's rights protection – disregarding their rights while protecting those of others (Breuer, 2023). We merely offer a few examples of the Court's interventions. Many more significantly affected policy and altered the terms of bargaining on the issues at stake.

Whether or not the Supreme Court's rulings have been legally or even normatively correct, they have clearly affected the political system – at both elite and mass levels. While it is true that the court has made important rulings in favor of right-wing and religious causes (Sharon, 2023a), public perceptions among such citizens (rightly or wrongly) are of a one-sidedness in the Court, whose legitimacy among a large part of the population has thus been badly damaged if not completely broken. "Polls in Israel show a steadily increasing and radical divergence between Left voters and Right voters in their support of the Court, with the last poll showing that while 86 percent of left-leaning citizens expressed trust in the Israeli Supreme Court, only 32 per cent of the right leaning citizens expressed the same trust" (Porat, 2023). As this poll demonstrates the divide is deeply enmeshed with the broader political divide in the electorate. This divide is rooted in existential-seeming issues like conflicts over draft exemptions for Haredim and state policies beyond the Green Line (Mor, 2023). Though it undoubtedly had other causes, the emerging polarization was exacerbated by the court's growing involvement in politics, particularly the fair number of rulings on these issues that were more in line with views of the center-left.

By forming a focal point for the increasing polarization in the party system, judicialization has also eroded the fluidity of the party system, which is needed for cycling to be possible. Firstly, frustration with the court feeds extremism, as repeated judicial interventions shift policy responsibility to the court while decreasing faith in change through negotiated compromise in the Knesset. Instead, the possibility of unilaterally imposing policies through judicial or executive action are made to seem more effective and therefore more attractive. Secondly, the emergence of a clear-cut political bloc made up of multiple parties effectively reduces the degree of fragmentation; the stronger blocs are, the more they approximate actual political parties. Naturally, they also limit the number of possible coalitions. In Israel, it seems these mechanisms of polarization have become self-reinforcing, overwhelming the consensus mechanisms as well as feeding the backlash against the Supreme Court.

The outright victory of Netanyahu's pre-electoral bloc allowed Likud's junior coalition partners to set high demands in coalition negotiations. Unsurprisingly, the government's overall strategy involves overcoming the obstacle the Supreme Court poses to it, on the one hand through its plan to neutralize the Supreme Court through Basic Law amendments and unilateral executive action, and failing that, through unilateral executive (in)action. Perhaps the most prominent example of the latter is the government's general non-compliance with the Supreme Court's ruling that Haredi military-age men be drafted.

36 As may have been the case in the negotiations over the judicial overhaul itself - the opposition having a reasonable expectation that the Supreme Court would quash the legislation if passed (as indeed it did with the only part of it which was passed).

In the aftermath of the 2022 election, (Navot et al, 2025) polarization over the issue of the judiciary ultimately exposed the Court's constitutional vulnerability: the majoritarian nature of Israel's written constitution (the majority rule amendment formula). As the new government presented its plans to effectively undermine the Court's independence, it seemed like its only remaining defence was citizen uprising. Due to strong support for the Court among one side of the electorate, this is exactly the response which occurred, with unprecedented weekly mass demonstrations which went on for months ultimately leading the government to pause the legislation and pursue negotiations with the opposition.

Though the government subsequently went ahead with one piece of its overhaul agenda, by the time the war broke out and the overhaul was again put on hold, it had only passed the reasonableness law – one of the smaller changes it originally proposed. In a bold and essentially unprecedented move, the Supreme Court struck down this change to Basic Law, extending its own power of declaring unconstitutionality to changes made to the constitutional text itself.[37] Whether this decision proves to be a stable resolution of the question remains to be seen, but it is hard not to see it as raising the stakes of the constitutional conflict, a move which is not without its risks.

7 Party system change and judicial reform, 2009–2022

7.1 The increasing role of pre-electoral blocs

Though tensions between the Supreme Court and successive governments have been ongoing (and perhaps growing) ever since the court took on an activist posture, calls for reform intensified particularly over the course of the past fifteen years in which (with the exception of one year) Netanyahu has led governments. The long tenure of one one person as party leader and prime minister–including some years in the 1990s–is unusual. While long tenure of one leader is not in itself a problem, it may tend to enhance personalization over collective interests of political parties (Frantz et al., 2022), and it implies a deeper problem when the leader himself is under judicial constraints and outright trial, as Netanyahu recently has been (Rahat, 2023; Navot and Goldschmidt, 2023). This personalization of politics is arguably even more troubling for the normal functioning of consensus democracy when linked as tightly to judicialization, as reviewed in the previous section.

Many parties on the right put judicial reform on their agenda during this period.[38] Nonetheless, matters have only come to a head with the government which took office in 2022. One major reason is the way the political landscape has evolved since 2009, especially since 2018, with the emergence of an electoral bloc allied to Netanyahu and an opposing group of parties united in refusal to cooperate with Netanyahu, and an increased salience for cultural and religion-state issues – which has influenced the specific membership of those blocs. It has also made Netanyahu's coalition increasingly polarized (Amitai et al., 2025) and less inclusive of other political directions.

In effect, Israel now has a pre-electoral bloc headed by a dominant and long-term leader, and consisting of parties whose commitment to one another is partially cemented by opposition to the very judiciary that is investigating that leader, contributing to an ongoing polarization of the parties into pro-and anti-Netanyahu camps. None of this complex of features is a likely outcome of multiparty parliamentary democracy, yet the institutions that sustain that model of democracy have obviously not prevented it from arising.

Though pre-electoral coalitions occur in some other PR-parliamentary countries, this was a new phenomenon for Israeli politics. More importantly, Israel's pre-electoral coalition that formed the government following the 2022 election is combined with increasingly polarized, acrimonious, constitution-focused, and personality-driven politics, which is a combination apparently not observed in such intensity elsewhere.

In terms of constitutional priorities, the polarization and realignment of the party system has made Netanyahu's bloc in particular less diverse. Until the 2022 election, all governments led by Netanyahu had incorporated parties with some stake in the Supreme Court's independence and current direction, who might be relied on to block or moderate any threat to the Court. The ideological diversity of these, as well as other past governments, especially the role of parties from the center to center-left, thus helped protect the judiciary. Clear examples include the role of Meretz in the 1992–1995 government[39] and Kadima in 2006–2009[40]. In the 2015–2019 Netanyahu government Kulanu fulfilled this role.[41] It was during the same government that a split emerged between Yisrael Beitenu and the right wing camp over the Haredi conscription issue and religion and state issues more broadly. After the April, 2019 election, with Yisrael Beitenu having left the pro-Netanyahu bloc in 2018, it became impossible for the Likud and its remaining allies to form a majority coalition. This inability to form a coalition was also partly a result of fragmentation on the right, with a party called New Right (led by Naftali Bennet) falling a fraction of a percentage point below the threshold and Zehut, another right-wing splinter party also costing the wider right some votes. This failure to form a majority led to the sequence of elections (Shamir and Rahat, 2023), whereby another was held later in 2019, as well as in 2021 (producing the 'Change' coalition headed by Bennet which included Yisrael Beitenu as a partner along with Yesh Atid and left-wing parties and Ra'am, an Arab party).

Finally, the 2022 election produced the majority (in seats, though not votes, as noted earlier) for a narrow right-wing/Haredi pre-electoral bloc. Prior to this election, Netanyahu had sought new votes for his emerging bloc among the far-right, fostering the inclusion of Otzma Yehudit in the Religious Zionist joint list. Thus, the governing bloc became even more strongly unified in grievances against the court system, as well as with the person of Netanyahu himself.

37 HCJ 5658/23 Movement for Quality of Government v. the Knesset, 2023. English text of the ruling: versa.cardozo.yu.edu/opinions/movement-quality-government-v-knesset.

38 E.g. the New Right (2019), Israel Beitenu (2019), National Union (2009), party manifestos retrieved from the Israel Democracy Institute's database (idi.org.il).

39 "What happened when the left tried to bypass the high court?"(Hebrew) *The Marker,* 23 April 2018, themarker.com/blogs/fromthearchives/2018-04-23/ty-article/0000017f-f8eb-ddde-abff-fcefd43c0000.

40 "Government has approved Friedman's bill."

41 "The ministerial committee has approved: 61 MKs."

7.2 Governability-promoting reforms helped give a narrow pre-electoral coalition a stable majority

The success and stability of Netanyahu's political coalition has been helped by several small institutional changes which had recently been made to increase 'governability'. The problem is that the flipside of these changes is a reduction in the potential for the beneficial cycling we noted earlier as being a key advantage of the high seat product and parliamentary government. For example, the electoral threshold, raised to 3.25% at the 2015 election, kept Meretz and Balad out of the Knesset in 2022, whereas the previous threshold of 2% would have given those parties seats. Had votes been the same, Netanyahu's bloc would still have won, though on a reduced majority of 61 MKs. Meanwhile, over several decades Knessets have adopted increasingly stringent rules on both the passage of no-confidence votes (Freidberg and Hazan, 2021: 308–9) and legislators' defecting from their parties (Nikolenyi, 2019). These measures have reduced the bargaining power of individual coalition MKs during the life of a government. This bargaining power might have compelled the government to moderate its line on the judicial issue. As we noted earlier, low "defection costs" are essential for beneficial cycling and these reforms have literally been motivated to deter defection. Thus centralization of power within the government in the name of 'governability' has made it easier for the government to reduce discussion of legislative proposals with government MKs (and in the Knesset more broadly), instead requiring them to support ready-made bills prepared by the ministers.

In this context, the only remaining check in the system is the diversity of the coalition. It is not that Netanyahu's coalition is not diverse in general terms – it consists of parties representing three different sectors in Israeli societies (two of them represented by two parties each) with distinct priorities. As noted, its component parties do not even have the same preferences over how to constrain the judiciary, only a general commitment to the principle. It has also had no shortage of internal discord. For instance, a pause on the overhaul was called, in the midst of widespread protests, after the Defense Minister (from Likud) stated the controversy was harming Israeli security.[42] Discord over the overhaul plans continued to crop up even in wartime in 2024.

The situation demonstrates the importance of dispersing power in the elected branches – including, crucially, through proportional representation – to protect the rules of the game, especially in a plural society where those rules exist at the behest of a social consensus which is narrow at best. The focus on improving governability has perhaps been excessively eager to make it easier to form and maintain government coalitions, failing to provide any institutional counterbalance.

8 Conclusion

Despite having the theoretically ideal combination of political institutions to support a consensus model of democracy, Israel began experiencing a severe political crisis after the 2022 election when the coalition backing the return of Benjamin Netanyahu as Prime Minister began pursuing a fundamental redesign of the judiciary. We have argued that the fundamentally majoritarian nature of the government's actions, despite unchanged consensus-inducing institutions, is a result of several political and behavioral changes that have undermined consensus. We highlight the emergence of a pre-electoral coalition committed to Netanyahu and in alignment on the objective of judicial reform. We also describe the effects of a Supreme Court which has played an active role in politics during the last few decades. This role has both helped polarize society and undercut the parliamentary authority on which interparty bargaining depends. Whereas consensus democracy depends on the opportunity for "beneficial cycling" whereby majorities are flexible, pre-electoral coalitions, judicialization and polarization undermine this potential. Such incentives are undoubtedly further undermined when the Prime Minister himself is embroiled in a corruption trial. Together, these ingredients have combined to bring to the surface contradictions of Israel's constitution which have hitherto remained obscured by the effects of coalition fluidity.

The political crisis, which generated mass protests and heated rhetoric about an alleged "judicial coup" intended by the government, has led to claims that democracy is under threat. Indeed, one of the most widely referenced international democracy-rating organizations, Varieties of Democracy (V-Dem), produced headlines[43] with its report in 2024 when it claimed that Israel was no longer a liberal democracy (Nord et al., 2024: 6, 11). We would urge caution in interpreting this demotion of status.[44] We agree that deepening polarization and the government's stated willingness to pass fundamental constitutional reform by a narrow majority place great stress on democracy, yet we are more sanguine about the system's resilience. For instance, we are aware of very few public polls since early 2023 that show the 2022 government coalition collectively winning a majority of seats in a new election. Even a major change to the status of the judiciary thus may not endure a future change of government. Moreover, the reform process thus far has itself exposed internal divisions within a coalition whose partners (and even individual legislators of Likud) do not always agree on details of specific reform proposals.

It should be said that without reforms strengthening and balancing the constitutional framework, the underlying contradictions of the system will probably continue to threaten its stability. Such reforms should in any case include, firstly, removing the judicial veto on Supreme Court appointments so that they can be made on the basis of mutual agreement among government and opposition, and secondly, the entrenchment of the Basic Laws so that future constitutional amendments require greater political consensus, securing the rules of the game against unilateral changes by one political camp. Nonetheless, the most important mechanism for restraining power and encouraging compromise in Israeli politics is proportional representation. With Israel's electoral system remaining mostly unchanged, significant institutional capacity for inducing beneficial cycling remains in place, and may reassert itself in the near future. These institutions will not

42 The speech led Netanyahu to announce he would fire Gallant, a move that led to massive protests, and Gallant remaining in the post (Reich and Lischinsky, 2023).

43 See, for example, Hauser Tov (2024).

44 The change V-Dem reported since its previous assessment was within the margin of error (Nord et al., 2024, 58), and a key piece of their qualitative evidence was the passage of the "reasonableness" law (14), a minor part of the wider proposed overhaul which was in any case overturned by the Supreme Court.

guarantee consensus is reached on difficult issues, but they do generate a better process for reconciling divisions than court rulings that tend to favor one side over the other in such disputes without giving opportunities for compromise.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

JM: Conceptualization, Resources, Writing – original draft, Writing – review & editing. MS: Conceptualization, Writing – original draft, Writing – review & editing.

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