

SYMPOSIUM ARTICLE

Political Polarisation and the Constitutional Crisis in Israel

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(First published online 24 November 2023)

Abstract

The article aims to further the understanding of the current constitutional crisis in Israel through the lens of political polarisation. Israel, like other countries around the world, is experiencing a substantial increase in political polarisation. Recent data shows that since 2009 affective polarisation (the extent to which individuals have negative feelings towards members of the opposing party or group and positive feelings towards their own party or group) has risen by 180 per cent. The article discusses the various phenomena associated with an increase in polarisation and the problems it raises, traces the reasons for the increase in polarisation in Israel, and argues that polarisation has played an important role in creating the conflict between the current government and the Supreme Court, and in making it so intense and intractable.

Keywords: constitutional crisis; political polarisation; Israel

1. Introduction

Israel is a highly politically polarised society. Between 2009 and 2022 polarisation in Israel rose by 180 per cent.¹ According to some estimates, Israel is more polarised than the United States and is among the most polarised countries in the world.² Since early 2023 Israel has also been experiencing a severe constitutional crisis following an overhaul reform plan for its Supreme Court, which attempts to curb its powers. These two facts are not

¹ Yair Amitai, Noam Gidron and Omer Yair, 'Political Polarization in Israel, 1992–2022' (forthcoming) (draft with the author).

² *ibid* (showing that the level of affective polarisation in Israel measured in 2022 surpasses the level of affective polarisation measured in the United States during the 2016 presidential elections).

unrelated. This article focuses on the phenomenon of polarisation to better understand the current crisis in Israel. The article briefly surveys some of the current definitions of polarisation and the possible reasons for its increase in Israel. It argues that the increased polarisation is intertwined with the processes that led to the current constitutional crisis, and the fact that the current crisis appears to be so intense and intractable can be explained by the dramatic rise in polarisation that preceded it.

2. Polarisation: Definitions and characteristics

Political polarisation ('polarisation') is a state of affairs where politics is driven towards the poles and away from the centre. As such, polarisation may take two main forms: (i) a rise in the power of extreme parties and a weakening of centre parties (extremes polarisation),³ and (ii) a clear division between two opposing and antagonistic political camps (dual polarisation). I will concentrate on the second type of polarisation, which seems to characterise Israel, as well as other polarised countries such as the United States, Brazil and India.⁴

In addition to the above-mentioned typology, the literature has distinguished between four types of polarisation, along two axes: mass polarisation versus elite polarisation, and ideological polarisation versus affective polarisation. *Mass polarisation* is the polarisation of the general population, while *elite polarisation* is measured only within the political elites: party members, politicians, and so on. *Ideological polarisation* refers to the extent to which the positions of people belonging to opposing political camps diverge on policy issues, while *affective polarisation* is the intensity of feelings and attitudes towards the other political camp (such as the extent to which people hate those in the other political camp). Where these measurements have been conducted, it was typically the case that elite polarisation and affective polarisation rose far more dramatically over the last couple of decades than mass polarisation and ideological polarisation.⁵

Polarisation, especially of the dual polarisation type, is characterised by the following six attributes: *identity*, *entrenchment*, *totality*, *threat*, *irrationality* and *non-compromise*.

Identity means that belonging to a political camp becomes part of a person's identity. During polarisation one's political camp defines who one is and

³ This is characteristic of polarisation in European countries; see, eg, the classic work by Giovanni Sartori, 'European Political Parties: The Case of Polarized Pluralism' in Joseph La Palombara and Myron Weiner (eds), *Political Parties and Political Development (SPD-6)* (Princeton University Press 1966) 137.

⁴ In this respect Cass Sunstein refers to the 'cascade phenomenon', a dynamic that pushes members of the two distinct 'tribes' to the extreme: Cass R Sunstein, 'Deliberative Trouble – Why Groups Go to Extremes' (2000) 110 *Yale Law Journal* 71.

⁵ Noam Gidron, James Adams and Will Horne, *American Affective Polarization in Comparative Perspective* (Cambridge University Press 2020); Thomas Carothers and Andrew O'Donohue (eds), *Democracies Divided: The Global Challenge of Political Polarization* (Brookings Institution Press 2019); Levi Boxell, Matthew Gentzkow and Jesse M Shapiro, 'Cross-Country Trends in Affective Polarization' (2022) *Review of Economics and Statistics* 1, 18, https://doi.org/10.1162/rest_a_01160 (graph showing a steep incline in affective polarisation levels in the United Kingdom from 2005 to 2020, the time of the study).

how one defines and perceives oneself, like belonging to a tribe or an ethnic group. *Entrenchment* follows from identity. If politics is part of one's identity, it becomes very difficult to move from one political camp to another as it requires a radical change – a change in the person's identity. Studies show that during polarisation, if one's political camp changes its policy preferences, the result is not a move to the other political camp but a concomitant change in one's preferences. Identity also connotes *totality*, in the sense that a person's political affiliation determines a totality of life choices and experiences – from the neighbourhood in which one lives, to one's friends, the media one consumes, the celebrities one looks up to, and even choice of life partner.

It also connotes *threat* from the opposing political camp, as a political victory for the other side would not only bring about wrong policies, it would undermine one's identity and way of life. My political opponent is thus perceived not just as wrong, or misguided, but as alien, dangerous and nefarious. In addition to being nefarious, the political opponent is also *irrational*. The totality of polarisation brings about completely different views of reality by the two opposing political camps. It thus becomes almost impossible to view the world through my political opponent's eyes, and it appears that my opponent cannot see reality clearly and is delusional, or has gone mad and lost her rationality. To use a familiar polarisation quip, you (my political opponent) are not just 'wrong'; rather, 'there is something wrong with you'.

The sixth attribute, *non-compromise*, follows from threat and irrationality. If the other political camp has malevolent intentions or has gone mad and, furthermore, threatens my identity and way of life, it is hard to strike a compromise or cooperate with it. Election campaigns are therefore geared much less at persuading the centre or the swing votes, and are aimed instead at strengthening the political base, and preparing it to 'battle' with the opposing camp.⁶

Finally, the literature has attempted to define 'pernicious polarisation': polarisation that reaches dangerous levels. I will use the following definition, suggested recently by Mark Tushnet:⁷

[Polarisation is pernicious when] (a) one group of people sees disagreement with their views as unreasonable and (b) that group is large enough that their refusal to accommodate others (if it's close to a majority) or to accept the imposition of what they regard as unjust policies (if it's a minority) threatens social stability.

3. Polarisation in Israel

Recent data shows that polarisation has increased substantially in Israel during the last decade and a half. According to a forthcoming study by Amitay, Gidron and Yair, affective polarisation (the assignment of negative feelings to the

⁶ Gidron, Adams and Horne (n 5); John T Jost, Christopher M Federico and Jaime L Napier, 'Political Ideology: Its Structure, Functions, and Elective Affinities' (2009) 60 *Annual Review of Psychology* 307.

⁷ Mark Tushnet, 'Constitutional Polarization and National Unity' (2024 forthcoming) *Law and Ethics of Human Rights* (draft with the author).

opposing political group, and positive feelings to one's own group) has risen by 180 per cent since the beginning of 2019 and reached its highest level ever – 6.2 on a scale of 1 to 10 – during the 2022 elections. By comparison, the level of affective polarisation documented between Democrats and Republicans in the 2016 election was only 4.7 points on the same scale, and the level recorded in Israel in 1992 was only 2.4 points.⁸ These findings are consistent with earlier studies that demonstrated a rise in polarisation between 2009 and 2015.⁹ Current levels of polarisation, after the constitutional reform plan and the protest movement that followed it, may even be higher. This section will attempt to survey some of the reasons for the rise in polarisation referred to in the literature, both locally and globally, and describe the trajectory that led to the current high level of polarisation in Israel.

Israel is the homeland of the Jewish people, and Jewish history is inexorably intertwined with internal conflict, sects, division and disagreements. Famously, the destruction of the besieged Jerusalem by the Roman empire in 70 AD was helped by an internal dispute between the Jewish defenders who fought against each other, burning their own reservoir of wheat. Predating this was the separation between the kingdoms of Judea and Israel mentioned in the Bible and estimated to have happened around the tenth century BC. Jewish doctrine – *Halacha* – is based at its core on the idea of unresolved disagreement, having no 'pope' or 'ecumenical councils' to proclaim an official view of the 'Church'. The Jewish small towns of Eastern Europe – the *shtetls* – that comprised the largest Jewish community prior to the Holocaust, were also famous for their culture of heated debate, ideological antagonism and sectarianism. Researchers have argued over the years that this 'cultural DNA' has been transmitted into the Zionist project and the State of Israel. Thus, in the election to the first council of representatives of the Jewish population in Palestine during the British Mandate in 1920, the tiny Jewish community of 80,000 people, with 20,000 eligible to vote, produced no fewer than 19 parties to compete in the elections.¹⁰ The inability to coalesce around an agreed core may also have been among the reasons for the anomaly of not adopting a constitution upon independence from the British – the only state to exit colonialism after the Second World War without adopting a constitution.¹¹ The ideological divisions, and the division between secular and religious Jews, were complemented by a

⁸ Gidron, Adams and Horne (n 5).

⁹ Lotem Bassan-Nygate and Chagai M Weiss, 'It's Us or Them: Partisan Polarization in Israel and Beyond' (2020) 3 *MENA Politics Newsletter* 24, 24–26; Lotem Bassan-Nygate and Chagai M Weiss, 'Party Competition and Cooperation Shape Affective Polarization: Evidence from Natural and Survey Experiments in Israel' (2022) 55 *Comparative Political Studies* 287.

¹⁰ Rafi Mann, 'A Poisonous and Suffocating Atmosphere', *The Seventh Eye*, 20 April 2019, <https://www.the7eye.org.il/327574> (in Hebrew).

¹¹ New Zealand may count as an exception to this generalisation as formally it achieved independence from the British in 1947. However, New Zealand acquired independence gradually in a process that started at least as early as 1907 when it became a dominion rather than a colony, and continued in 1931 when the United Kingdom enacted the Statute of Westminster Act. New Zealand's morphing into independence, therefore, does not reflect the general trend of decolonisation of the post-Second World War era.

further division – between Jews and Arabs – as the Jewish state included a large Arab minority comprising roughly 20 per cent of the citizenry.

Despite this polarising cultural DNA, or maybe because of it, the early years of the state were characterised by a heroic attempt to create a cohesive new identity that would bring together Jews from different diaspora into a metaphorical ‘melting pot’ to produce the new Israeli Jew. This new identity was based on Jewish nationalism, socialism, physical labour and a connection with the land, and a British style of liberal tradition. Israeli politics in its early years was dominated by the centre-left democratic-socialist party, MAPAI (which later became the Labour party), which at its height held half of the seats in parliament and reigned undefeated until 1977. The seeds of the current polarisation – a true division between two political camps that morphed over time into two identity groups – can be traced only to the late 1970s, and is arguably different from the sectarianism that characterised the previous Jewish experience.

The breakdown of the Left’s political hegemony in 1977 also represented the breakdown of Israel’s attempt at a cohesive Israeli identity, and the beginning of polarisation. Instead of one identity, two opposing identities began to develop. The Left has gradually lost its socialist banner and its identification with the working classes (following similar processes in the Left all over the Western world) and its nationalist banner, and adopted instead the banner of liberalism, individualism, cosmopolitanism, human rights and the Peace Process. The Right retained the hawkish nationalism that characterised it during the early years of the state when it was but a small political minority, but relinquished some of its economic libertarianism towards a new coalition with Jewish traditionalism, with the religious parties, and with the Mizrahi Jews (predominantly Jews who emigrated from Arab and Muslim countries), who were, as a whole, traditionalist, had difficulty in overcoming social and economic gaps with the Ashkenazy Jews (Jews who emigrated from Europe and the West), and were alienated by the dominance of the Ashkenazi leadership of the Labour party.¹²

These two political groups gradually became more distinct and antagonistic. The main issue that polarised Israeli society in the 1980s and 1990s was the Peace Process and the attitude towards the occupation of the West Bank and the Gaza Strip since 1967. However, despite the Peace Process becoming practically moot since the late 2000s, and the two major political camps becoming closer in terms of their agendas on the economy and on security, Israeli politics and society did not become less polarised. On the contrary, the last two decades have seen polarisation reaching new heights, and centring around identity rather than policy or ideology.

Three main topics galvanised this identity polarisation of the last two decades. The first of these involves the personality of Benjamin Netanyahu – the charismatic, effective and divisive right-wing leader and Prime Minister for almost two decades – and his legal indictment for corruption. Netanyahu epitomises, in his personality and rhetoric, the right-wing anti-elite agenda,

¹² See generally Menachem Mautner, *Law and the Culture of Israel* (Oxford University Press 2011) Ch 4 ‘The Decline of Formalism and the Rise of Values’.

accusing the mainstream media, as well as the academic and legal elites, of being controlled by the previous Left hegemony, and viewing his own indictment as persecution by the left-oriented legal establishment. Also involved are differences over conceptions of the Jewishness of the state and of secularism versus traditionalism or religiosity (including debates over women's rights and LGBT rights) versus religious accommodation; and the debate over the legal system and specifically the powers of the Supreme Court. The Supreme Court has become the beacon of the liberal cosmopolitan and individualist camp, by its ability to curb the rising political power of the more traditionalist and nationalist political forces, which are also rising in terms of their demographic numbers.

To this set of local circumstances that are unique to Israel one must add elements that Israel shares with the rest of the world, and which are reasons for polarisation to occur at the global level. Some of those elements have special relevance in Israel. First, the rise of new media and, in particular, social media erodes the common grounds for interchange of ideas and for middle ground; it creates instead isolated 'echo chambers', enhancing separatism and extremism.¹³ The traditional media has also gone through far-reaching changes owing to the introduction of the internet and the smartphone as competing sources of news; it is now much poorer than before and far more reliant on different types of sponsorship. It has also gone through bifurcation along ideological lines in many parts of the world, including in Israel with the creation of a right-wing TV channel (Channel 14), similar to Fox News in the United States.¹⁴ Secondly, the dramatic rise in economic gaps between the rich (and especially the ultra-rich) and the poor and middle class increases social alienation between people with very different life experiences, and causes polarisation.¹⁵ Thirdly, social alienation and polarisation are also attributed to the effects of globalisation, which causes increasing differences between city dwellers and rural or periphery dwellers, and between a bureaucratic or free-trade mobile class and local blue-collar classes. This was colourfully named by David Goodhart as the difference between the 'anywheres' and the 'somewheres'.¹⁶ Finally, a set of events that occurred at the beginning of the twenty-first century and created social and political stress, and thus intensified antagonism between different factions of society, is also regarded as enhancing polarisation. These include global terrorism; mass waves of immigration,

¹³ eg, Eli Pariser, *The Filter Bubble: What the Internet is Hiding from You* (Penguin 2011); Pablo Barberá and others, 'Tweeting from Left to Right: Is Online Political Communication More Than an Echo Chamber?' (2015) 26 *Psychological Science* 1531; Elizabeth Suhay, Emily Bello-Pardo and Brianna Maurer, 'The Polarizing Effects of Online Partisan Criticism: Evidence from Two Experiments' (2018) 23 *International Journal of Press/Politics* 95; Ro'ee Levy, 'Social Media, News Consumption, and Polarization: Evidence from a Field Experiment' (2021) 111 *American Economic Review* 831–70.

¹⁴ Guy Grossman, Yotam Margalit and Tamar Mitts, 'How the Ultrarich Use Media Ownership as a Political Investment' (2022) 84 *Journal of Politics* 1913.

¹⁵ The classic work by Piketty on the growing economic disparities in the West is illuminating in this respect: Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014).

¹⁶ David Goodhart, *The Road to Somewhere: The New Tribes Shaping British Politics* (Penguin 2017).

which have affected Europe, in particular; the economic crisis of 2008, which strained the bonds of the European Union as well as having global impact; and, more recently, the COVID-19 pandemic, the effects of which are still too early to assess.¹⁷

4. The problems of polarisation

Polarisation is not always a bad thing. It is associated with an active and engaged citizenry, and with clarity as to the contending values and policy decisions that a society faces. There was a time in US history when the political system was not polarised enough, and the contention was that voters had no real options of choice as the two major parties were too similar.¹⁸ However, polarisation that carries with it the six attributes described above (identity, entrenchment, totality, threat, irrationality, non-compromise), and reaches a level where it can be described as pernicious, may have serious implications for the stability and well-being of a society. I wish to highlight here three such problems produced by polarisation that are especially pertinent to the crisis in Israel.

First, pernicious polarisation undermines efforts at collective action based on neutral rules of the game. In that respect it is threatening to the democratic project itself which, in its liberal version, is based on creating a neutral framework within which people with different conceptions of the good can cooperate with each other to achieve shared goals of stability, prosperity, fairness and personal freedom.¹⁹ The problem lies in the fact that the opposite conception of the good becomes a threat to one's identity, an illegitimate and dangerous position, and one that cannot be promoted within the neutral framework. Admittedly there are some positions – such as blatantly racist and misogynistic views, or those that blatantly espouse violence – which should be excluded from the neutral framework. However, what should be excluded from this framework is among the thorniest of questions in liberal democracies, and should be restricted to a limited group. What we see in times of polarisation, instead, is a willingness to dramatically expand the limits of that group to include almost the entire opposite camp. If what we believe to be happening is that the opposite political camp is manipulatively attempting to take over the entire democratic game and turn the country into a totalitarian state with the mentality of the Middle Ages – which persecutes women, LGBT people and racial minorities – or into a progressive secular dystopia where religion is persecuted, national identity obliterated, and the distinction

¹⁷ John B Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* (Columbia Global Reports 2016); Danilo Di Mauro and Luca Verzichelli, 'Political Elites and Immigration in Italy: Party Competition, Polarization and New Cleavages' (2019) 11 *Contemporary Italian Politics* 401.

¹⁸ The report usually cited in this context is 'Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties' (1950) 44 *American Political Science Review* 15.

¹⁹ Jennifer McCoy and Murat Somer, 'Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies' (2019) 681 *Annals of the American Academy of Political and Social Science* 234.

between the roles in society of men and women eroded, then one cannot allow the democratic game to continue on a business-as-usual basis and is entitled to depart from general rules of etiquette, and even fairness, in the name of self-preservation. Once one side takes this position, it provides an incentive for the other side to do the same; otherwise, it would be disadvantaged, and the entire scheme of setting neutral rules of the game is placed under threat.²⁰

Secondly, a more specific issue that emanates from this general problem is that of neutrality of institutions. During polarisation, institutions that are based on the idea of neutrally serving the entire polity, and on having a logic different from the partisan political logic, fall prey to the same process that undermines the neutral rules of the democratic game. The worldview of the opposing political camp is now considered a threat to the institution, and a justification arises to equate the institution itself with one conception of the good that aligns with one's political camp. In addition, the totality of polarisation and the warlike and non-compromising nature of the conflict emanating from the threat posed by the opposing political sides mandates that no centre of power be left unattended, lest it falls to the hand of the opposing side. In the age of polarisation, every centre of power becomes a target for a political struggle for partisan control, even centres that were previously considered outside the political arena. Polarisation, therefore, erodes the ability to have institutions that provide a common and shared framework and can be regarded as bipartisan rather than political, such as the media, civil society, academia and, of course, the courts.²¹

Courts are particularly susceptible to this problem of partisanship as they are traditionally viewed as being neutral and objective arbiters in society's conflicts, and their perception as being partisan therefore strongly undermines their basis of legitimacy. What we see in terms of the partisanship of courts follows this general pattern. In the United States, the polarisation of the Supreme Court itself has been steadily intensifying over the last two decades, with the judges more clearly aligning themselves according to ideological and even partisan lines.²² While, for a long time, the two political camps in the

²⁰ Eli Finkel and others, 'Political Sectarianism in America' (2020) 370 *Science* 533; Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Viking 2018); Stephan Haggard and Robert Kaufman, *Backsliding: Democratic Regress in the Contemporary World* (Cambridge University Press 2021).

²¹ For the partisanship conception of academia see 'The Growing Partisan Divide in Views of Higher Education', *Pew Research Centre*, 19 August 2019, <https://www.pewresearch.org/social-trends/2019/08/19/the-growing-partisan-divide-in-views-of-higher-education-2>; for the media: Jeffrey Gottfried and Jacob Liedke, 'Partisan Divides in Media Trust Widen, Driven by a Decline among Republicans', *Pew Research Centre*, 30 August 2021, <https://www.pewresearch.org/short-reads/2021/08/30/partisan-divides-in-media-trust-widen-driven-by-a-decline-among-republicans>; for the military: Michael A Robinson, 'Who Follows the Generals? Polarization in Institutional Confidence in the Military', *ASPA Preprints*, 17 September 2019, <https://preprints.apsanet.org/engage/apsa/article-details/5d7bf7ebd0706700120e0524>.

²² For an overview of the partisan turn of the Supreme Court see Richard L Hasen, *The Supreme Court's Pro-Partisanship Turn* (2020) 109 *Georgetown Law Journal Online* 50; Lee Epstein and Eric Posner, 'Opinion: If the Supreme Court Is Nakedly Political, Can It Be Just?', *The New York Times*, 9 July 2018, <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html>.

Court were even, with a slight advantage to the Right, in the last few years the entire institution has been coloured by conservative views, since the conservative majority became insurmountable. This is also clearly reflected in surveys carried out on the US Supreme Court after the recent *Dobbs* decision concerning the right to abortion:²³ only 13 per cent of Democrats supported the Court against 39 per cent support of Republicans.²⁴ Those surveys also show that not only does trust become partisan but that the general level of trust is diminished, and the general level of legitimacy of the Court is in decline partly as a result of polarisation.

Finally, the third problem that emanates from polarisation is that it stands in the way of natural processes of societal change through peaks and lows and a pendulum of political control. Polarisation, with its deep distrust of the opposing political camp and its sense of urgency and catastrophe, brings each camp to dig its heels in deeply and to resist any kind of change that might benefit the other political side. Conversely, polarisation might substitute gradual change into radical revolutionary change, as one political camp feels the urgent need to undo the nefarious and dangerous control over the state of the other political camp. The current crisis in Israel is an example of this phenomenon.²⁵

5. Polarisation and the current crisis in Israel

Polarisation and the processes that led to it are important in understanding the reasons for the current crisis in Israel. Polarisation is also important in understanding why it appears to be so intractable and intense. In this section I will attempt to provide a description of the crisis that highlights the role of polarisation in it.

5.1. Polarisation and the reasons for the crisis

I will argue that polarisation has intensified the effects of a process that predated it – of the Israeli Supreme Court moving from a more professional to a

²³ *Dobbs v Jackson Women's Health Organization*, No 19-1392, 597 US ___ (2022).

²⁴ 'Majority of Public Disapproves of Supreme Court's Decision to Overturn *Roe v. Wade*', *Pew Research Centre*, 6 July 2022, <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade>. A more recent poll has shown an even greater disparity between Republicans and Democrats when measuring the level of 'job approval' of the Court (74 per cent of Republicans expressed trust in the Court and only 13 per cent of Democrats): Jeffrey M Jones, 'Supreme Court Trust, Job Approval at Historical Low', *Gallup*, 29 September 2022, <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

²⁵ Jennifer McCoy and others, 'Reducing Pernicious Polarization: A Comparative Historical Analysis of Depolarization', Carnegie Endowment for International Peace, Working Paper, May 2022, https://carnegieendowment.org/files/McCoy_et_al_-_Polarization_final_3.pdf. The publication documents 105 episodes since 1900 in which countries were able to successfully depolarise from pernicious levels of polarisation and remain depolarised for at least five years. It finds, however, that in the long term many of them fall back into polarisation, arguing that polarisation harms society's ability to adjust to change.

more political model. In order to do this I situate Israel within the set of countries that inherited the British style of parliamentarianism and judicial structure – such as the United Kingdom, Canada, Australia and New Zealand – and within the general context of the populist backlash of the last two decades.²⁶

As Israel followed the British parliamentary system and did not adopt a constitution, its Supreme Court retained its British colonial features as a professional court that developed public law and human rights through administrative law rulings. As with other British-based or Westminster-type courts, it had a very central role in the Israeli system of the rule of law but was not considered to be one of the centres of power in the Israeli polity, and its judges remained largely anonymous and professional throughout its first three decades. In that, it differed, as did the other courts in the Westminster model, from both the US Supreme Court and from post-Second World War European constitutional courts, which were more clearly intertwined with politics and had political representation as part of the logic of their judicial nomination scheme.²⁷

Polarisation was not the only factor eroding the professional model of legitimacy. The erosion had already started in the 1980s owing to two processes.²⁸ The first is the growing influence of what can be termed ‘global constitutionalism’ on Westminster-model courts. This term refers to the idea of constitutionalism and constitutional rights as a shared universal project, based on the notion of liberal cosmopolitanism and on the reality of constitutional courts and judges interacting globally and adapting shared processes of constitutional adjudication. Global constitutionalism reached its peak in the late 1990s as constitutional courts rose in power and constitutionalism became almost a global norm.²⁹ In the same vein, a liberal cosmopolitan understanding was regarded as the key solution for social and political problems.³⁰ Westminster-model judges were not immune from this trend and gradually began to adopt global constitutional doctrines such as proportionality, and eroding deferential tests

²⁶ Iddo Porat, ‘Court Polarization: A Comparative Perspective’ (2023) 46 *Hastings International and Comparative Law Review* 3, 22–30.

²⁷ According to *Basic Law: The Judiciary*, judges in Israel are appointed by a committee of nine members made up of representatives of the executive, the legislature, the Supreme Court and the Israel Bar Association. The ethos of nomination throughout its first decades of operation was strictly professional, and did not involve political or ideological representation as part of the considerations for nomination.

²⁸ See generally Gerd Strohmeier, ‘Does Westminster (Still) Represent the Westminster Model? An Analysis of the Changing Nature of the UK’s Political System’ (2015) 14 *European View* 303.

²⁹ For a sense of liberal (over-)optimism after the collapse of the communist block see Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992).

³⁰ Ran Hirschl, ‘The Judicialization of Mega-Politics and the Rise of Political Courts’ (2008) 11 *Annual Review of Political Science* 93. For a general overview of judicial globalisation and its social and intellectual logic see Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004) 70; Anne-Marie Slaughter, ‘Judicial Globalization’ (2000) 40 *Virginia Journal of International Law* 1103; Jenny S Martinez, ‘Towards an International Judicial System’ (2003) 56 *Stanford Law Review* 429, 436–37.

such as the *Wednesbury* reasonableness test in the UK.³¹ In Israel, this change during the 1980s was manifested, among other things, by lowering the requirements of legal standing and of justiciability, by broadening the meaning and scope of the doctrine of reasonableness, and later by the adoption and development of the doctrine of proportionality. These changes allowed the Court a much broader capacity to protect human rights, as well as to rectify governmental deficiencies and corruption, but they also expanded the scope of its rulings and made it more of a central player in Israeli social and political life.³²

Secondly, the professional model of legitimacy was eroded by the introduction of judicial review of basic rights in each of the countries here discussed. The first was Canada, which adopted the Canadian Charter of Rights and Freedoms in 1982 and conferred the power of judicial review on the Supreme Court. Following this came the New Zealand Bill of Rights Act of 1990, the UK Human Rights Act of 1999 and, in Australia, bill of rights legislation in the states of Victoria and the Australian Capital Territory – all of which had only a weak form of judicial review.³³ In Israel, two Basic Laws incorporating human rights were adopted in 1992. These two Basic Laws were then interpreted through a series of Supreme Court decisions as introducing a full Bill of Rights with a strong form of judicial review (that is, the power to strike down primary legislation) in Israel, amplifying the Court's ability to protect human rights, and also to take part in Israeli social and political life.³⁴

Both processes, which were already occurring before polarisation, eroded the professional model by enhancing the political involvement of the courts and decreasing the ideal of parliamentary sovereignty that was part of the British model.³⁵ They further had the effect of associating the courts (in varying degrees, depending on the country) with the liberal and cosmopolitan set of ideas of global constitutionalism.³⁶

Once polarisation reached the political scene, during the first decades of the twenty-first century, the erosion of the professional model was substantially intensified. First, polarisation, as described above in the case of Israel, included the bifurcation of the polity along the lines of traditionalism versus liberalism, and local and national identity versus cosmopolitanism and individualism. This same bifurcation was manifested in a wave of conservative and populist

³¹ eg, Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 *American Journal of Comparative Law* 583.

³² See Mautner (n 12).

³³ Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781.

³⁴ See Iddo Porat, 'The Platonic Conception of the Israeli Constitution' in Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press 2017) 268, 277–82.

³⁵ For the UK, joining the European Union in 1975 also contributed to the erosion of parliamentary sovereignty and introduced new European concepts to English public law; see Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28 *European Journal of International Law* 763.

³⁶ eg, *R v Oakes* [1986] 1 SCR 103 (Canada); CivA 6821/93 *Bank Ha'Mizrachi and Others v Migdal* (9 November 1995), https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C93%5C210%5C068%5C01&file=93068210_z01.txt&type=4.

backlash against the liberal wave of the 1990s, targeting among others also the legal elites and courts. It therefore intensified the identification of the courts in the Westminster model, such as the UK Supreme Court, and even more so the identification of the Israeli Supreme Court as a political actor serving one political side (the Left) rather than as a neutral institution of government.

Secondly, as mentioned above, in the age of polarisation every centre of power becomes a target for a political struggle for partisan control, even those centres that were previously considered outside the political arena, and this included the partisan struggle of control over the courts. Israel is probably the country where, in recent years, the conservative backlash against the Supreme Court and the struggle for control over it has been most explicit – a phenomenon that has gradually intensified over the last two decades. Therefore, if in the past the Court could have maintained its reputation of being politically neutral and non-partisan even after the effects of global constitutionalism described earlier, once polarisation intensified this was no longer fully possible. 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 per cent of left-leaning citizens expressed trust in the Israeli Supreme Court, only 32 per cent of the right-leaning citizens expressed the same trust.³⁷

An additional effect on Westminster courts was a process of polarisation among the judges themselves, as occurred in the United States. As the conservative backlash against the judiciary intensified, it also strained the professional nomination method and included attempts to give greater representation to conservative judges in the nomination process.³⁸ Once conservative judges entered the court (or when some of the existing judges became more conservative, possibly reflecting the same political polarisation process), one could witness signs of polarisation in the courts themselves between conservative and liberally oriented judges. In Canada, as well as in the UK, there are signs of an increase in conservative tendencies of the courts, but the formation of two ideological camps is less distinct.³⁹ In Israel, however, the right-wing governments have been able to nominate at least five conservative-oriented judges among the 15 judges of the Supreme Court, creating an increasingly clear division between

³⁷ Tamar Hermann and others, 'Israeli Democracy Index 2021: Democratic Values', Israel Democracy Institute, 6 January 2022, <https://en.idi.org.il/articles/37857>. The same survey taken in 2019 found that 59 per cent of Israelis think that judges are affected in their decisions by their political inclinations to a great or considerable extent: Tamar Hermann and others, *The Israeli Democracy Index 2019* (Israel Democracy Institute 2019) 48, <https://en.idi.org.il/media/14242/the-israeli-democracy-index-2019.pdf>.

³⁸ eg, Owen Bowcott, 'Plan to Reform Supreme Court is Attack on Independent Judiciary, Says Labour', *The Guardian*, 15 November 2020, <https://www.theguardian.com/law/2020/nov/15/supreme-court-plans-an-attack-on-independent-judiciary-says-labour> (referring to conservative proposals aimed at stopping judicial involvement in constitutional issues).

³⁹ Robert Danay, 'A House Divided: The Supreme Court of Canada's Recent Jurisprudence on the Standard of Review (2019) 69 *University of Toronto Law Journal* 3; JJ McCullough, 'How Supreme Court Reform Unites Canadian Conservatives and American Liberals', *The Washington Post*, 14 July 2022, <https://www.washingtonpost.com/opinions/2022/07/14/canada-supreme-court-conservatives-american-liberals-undemocratic>.

liberal and conservative judges of the Court.⁴⁰ It is already very much part of the general consciousness and of media and academic parlance to speak of conservative and liberal judges, and to identify the two camps within the Court.⁴¹ One should note, however, that polarisation among the judges in Westminster countries is still substantially less acute than it is in the US, to which we now turn.⁴²

These developments go a long way in explaining why the Israeli Supreme Court has been in a state of constant conflict with the political system for at least the last two decades. The two concurrent developments discussed above have made this clash inevitable: first, Israel experiencing the global right-wing and populist wave over the last two decades, and being more and more divided along the lines of traditionalism, nationalism and localism versus liberalism, individualism and cosmopolitanism; and second, the Court increasing its political visibility and abilities, and representing a stronghold of liberalism and cosmopolitanism,

5.2. Polarisation and the reasons for the intensity of the crisis

Strong conflict around the Supreme Court in Israel therefore did not come as a surprise to anyone and had been brewing for many years. Following the processes described above, a state of an unstable and ongoing conflict between the political system and the Court became an existing fact of life for at least two decades preceding the current crisis, and one of the probable scenarios was that it would erupt into a direct conflict. What was surprising, though, was the intensity of the current crisis and the extent to which it spilt over into a full-scale and traumatic societal upheaval. The events are still unfolding as these lines are being written and it is hard to have the necessary historical perspective, but it seems that the severe polarisation in Israel makes it more difficult for Israeli society to adapt to the changes of the last few decades. It would appear that polarisation hinders Israel's ability to have normal cycles of the political pendulum between two centres of power and two worldviews, and turns the conflict instead into a severe and intractable crisis.

Taking into consideration the trajectory of the Supreme Court, as described above, and the changes in Israeli society, it might have seemed that the liberal pendulum of the Court has reached a certain high end and a swing of the pendulum to the other, more conservative, side was a possible and even natural

⁴⁰ Mainly as a result of recent nominations by the conservative Minister of Justice, Ayelet Shaked, a conservative camp has been formed in the Israeli Supreme Court, with 4–5 out of the 15 Supreme Court justices now belonging to an evolving conservative camp; see Michael Hauser-Tov and Chen Maanit, 'Libertarian Israeli Think Tank Pushes "Conservative" Judges for Supreme Court', *Haaretz*, 25 November 2021, <https://www.haaretz.com/israel-news/2021-11-25/ty-article/.premium/judicial-candidates-evaluated-by-think-tank-in-effort-to-gain-right-wing-majority/0000017f-db6e-d856-a37f-ffef0f80000>.

⁴¹ Iddo Porat, 'Solving One-Side Polarization: Supreme Court Polarization and Politicization in Israel and the U.S.' (2021) 15 *Law and Ethics of Human Rights* 221, 235.

⁴² eg, David Said, 'Why Canada's Supreme Court Isn't Likely to Go Rogue like its U.S. Counterpart', *The Conversation*, 5 July 2022, <https://theconversation.com/why-canadas-supreme-court-isnt-likely-to-go-rogue-like-its-u-s-counterpart-186020>.

course of events. Such swings are famous in the history of the US Supreme Court, and similar changes can be detected, as mentioned above, in the UK and the Canadian Supreme Courts.⁴³ A political reaction to this rising power of the Court from the right wing in Israel was also expected and followed global trends in the second decade of the twenty-first century, including in the UK.⁴⁴ Indeed, such a change has started to evolve with the selection of more conservative judges to the Court, and a gradual change towards a less activist and more conservative Court, which nevertheless is not breaking away from the past and from the important democratic checks that the Court has developed.

However, the characteristics of polarisation outlined above – the turning of politics to identity, its totality, the sense of threat, urgency and catastrophe, the great distrust of the opposing political side, and the weakening of mechanisms of compromise – all coalesced to make this gradual change impossible.

First and foremost, responsibility for the current crisis and for the break from gradual change lies with the current government and its radical reform plan. Instead of waiting for the processes of change to play out, or making small-scale adjustments, the government chose a radical departure from the last three decades and an overhaul that wished to have immediate and extensive change, undermining many judicial mechanisms that have been developed over the years and interwoven into the Israeli democracy.⁴⁵ Polarisation had much to do with it. I would suggest that the right-wing government was caught up in a perception of imminent threat from the opposing political side – epitomised by the Supreme Court – believing that the opposing political side, aided by the Court, would undermine its traditionalist Jewish identity, that it stands for nefarious and unreasonable positions, and that if the

⁴³ See n 38 and accompanying text.

⁴⁴ Edward Malnick, 'Supreme Court To Be Overhauled to Curtail Its Constitutional Powers: Reforms Being Considered Include a New Name for the Body to Make Clear that It Is Not a U.S.-Style Constitutional Court', *The Telegraph*, 14 November 2020, <https://www.telegraph.co.uk/politics/2020/11/14/britains-supreme-court-faces-overhaul-concerns-us-style-election>; Ella Glover, 'Boris Johnson "Planning Reforms which Would Let Ministers Overrule Judicial Decisions"', *The Independent*, 6 December 2021, <https://www.independent.co.uk/news/uk/politics/boris-johnson-reforms-judicial-review-b1970290.html>; Jessica Elgot, 'Johnson Publishes Plans to Regain Power from Courts and MPs: Legislation Will Ban Courts from Ruling on Dissolution of Parliament and Allow PM to Call Elections', *The Guardian*, 1 December 2020, <https://www.theguardian.com/politics/2020/dec/01/boris-johnson-publishes-plans-to-take-power-back-from-courts-and-mps>.

⁴⁵ Article 30 of the Coalition Agreement between the Likud Party and the Religious Zionism Party, 29 December 2022, reads as follows (a similar provision also appears in the Coalition Agreement between the Likud Party and the Ultraorthodox Parties, 28 December 2022): 'All the coalition parties would support all legislation proposals, including in Basic Laws, as suggested by the Minister of Justice, with the purposes of, inter alia, regulating the relationship between the branches of government and their powers, and in particular the relationship between the Knesset and the government vis-à-vis the judicial system and the Supreme Court and the method of selecting judges. All of this is in order to restore the proper balance between the branches. The legislation will also include enacting Basic Law: The Legislation, and an override clause. All law proposals mentioned in this article will be absolutely and fully prioritized in any circumstances over any other legislation', <https://main.knesset.gov.il/mk/government/pages/governments.aspx?govId=37>.

government would not act now and use the opportunity it had to change things radically, these forces would completely take over the Israeli polity. This has caused a crisis on a scale that had never happened before and can explain the widescale protest movement that evolved as a reaction.

Yet, polarisation has played a part in the opposing political side as well, in intensifying the reaction and in lowering the chances of finding a way out of the serious crisis. A sense of threat and of being attacked, and apprehension from the erosion of democratic and liberal guarantees because of the reform were not irrational or out of touch with reality. It was, furthermore, greatly exacerbated by the fact that the government that took on itself these radical changes was formed, for the first time in Israeli history, with the aid of an extreme right-wing party with historical roots of supporting outright racism rather than with the aid of centre right or centre parties, as had always been the case. Parties that were traditional allies of the right in forming a coalition – the national religious party, and the ultra-Orthodox parties – seemed to have gained extra leverage in this coalition, which excluded from it the moderate centre parties. In such a situation, changing radically the role of the Court was alarming. This is so in that the Court has always been an important check on the incursion of religion into the private lives of secular Jews, and in the maintenance of liberal values, in a polity in which demography played into the hands of the more religious or traditionalist parts of society. Though the reform would not deprive the Court of all of its powers, the extensiveness of the reform was a valid and serious reason for concern for the liberal camp. Furthermore, the experience of other countries, such as Poland and Hungary, in which judicial reforms turned eventually into democratic backsliding, provided an ominous background for comparison.

However, the effects of polarisation have arguably intensified this sense of threat on the liberal side and made it hard for it to take into consideration the apprehensions and valid concerns of the opposing political camp, which felt that the long-term Court expansion had always acted to its detriment. On the liberal side of the political map, too, there developed a sense of imminent catastrophe, of assigning the opposing political camp with nefarious and irrational motives, of seeing it as undermining the identity of the state, taking away all of its liberal guarantees and being posed on the destruction of the liberal camp. A sense of total war emerged, and the rhetoric of war and resistance developed. While the dangers of the reform were real, the most extreme and catastrophic scenario took hold within parts of the liberal camp as the most likely, or even the only one possible.

The Court itself is now caught up in the middle of these two polarised camps. As mentioned above, the Court itself is partly polarised, and its judges have taken different stands on central doctrinal issues related to the current conflict.

6. Conclusion

The above is not a very optimistic description. As these lines are being written both camps are thoroughly entrenched in their positions and, while attempts

at a compromise are ongoing, they do not seem very promising. Even if some kind of compromise were to be achieved, it appears that it would be no more than a temporary ceasefire until the next eruption of the conflict. Polarisation creates a tragic situation: on the one hand, times of polarisation, in which social cohesion is under threat, are times in which compromise is most needed; on the other hand, an environment of polarisation is most inhospitable for compromise: the distrust is too great for any side to make magnanimous moves, or even small steps towards the other side. However, societies, and especially the Israeli society, are resourceful and may eventually find ways of adapting to new dangers, including polarisation. Understanding polarisation as one of the causes of the current conflict takes us a long way in that direction. Further exploring how we can mitigate polarisation is therefore crucial, not only for Israel but for many other countries facing polarisation today.

Acknowledgements. Not applicable.

Funding statement. Not applicable.

Competing interests. The author declares none.