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SYMPOSIUM ARTICLE

The Attempt to Capture the Courts in Israel

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Abstract

A central element in the Israeli government's agenda to overhaul the judiciary, unveiled in January 2023, is its proposal to give it and its parliamentary coalition control over the selection and promotion of judges. This article shows that this proposal is an attempt to capture the courts. To illustrate this, the article looks at the government's proposal through three different perspectives: first, the perspective of the rationale of the current system of judicial selection, against the background of court governance in Israel and its constitutional system; second, the perspective of changes in Israel's judicial selection system over the past two decades; third, the comparative perspective of trends in judicial selection in other democracies.

Keywords: judicial selection; court capture; court governance; judicial overhaul

1. Introduction

On 4 January 2023, Israel's Minister of Justice unveiled a plan to overhaul the judiciary by reducing its powers and giving the government more control over judicial selection. Over the following few months the Chair of the Constitutional, Law and Justice Committee of the Knesset (Israel's parliament) spearheaded the government's attempt to turn this plan into legislation.[1] The most important proposal that the government tried to enact, at least in the eyes of the government, was its suggested change in the system of selecting judges to all courts in Israel in a way that would give control in the selection

[1] Draft Bill Basic Law: The Judiciary (2023) (in Hebrew) (Minister's Bill); Draft Bill to amend Basic Law: The Judiciary (Amendment – Strengthening the Separation of Powers) (draft for discussion published by the Chair of the Constitution, Law and Justice Committee, 17 January 2023) (in Hebrew); Bill to amend Basic Law: The Judiciary (Amendment No 3) (Strengthening the Separation of Powers) (2023) (in Hebrew) (First Reading Bill).

to the government and to the coalition that supports it in the Knesset. As the explanatory notes of the bill clarified, the intention was to 'strengthen the influence of the public's elected officials – the representatives of the executive and the legislature' in the selection of judges,[2] in order for those judges to reflect 'the values of the public'.[3]

These explanatory notes understate the anticipated effects of the bill. This article will show that through this bill the government has attempted to capture the courts. In other words, rather than simply increasing the influence of the government, if legislated this bill would grant the government complete control over judicial selection and promotion, replacing considerations of professional merit with considerations of loyalty to elected officials, thus risking judicial independence.

The involvement and influence of the executive and legislature in judicial appointments is legitimate as long as the principle of judicial independence is safeguarded and objective considerations are applied in judicial selection and promotion.[4] However, that is not the case with the proposed bill. Rather than democratic legitimacy and judicial accountability – principles that are legitimately involved in judicial appointments and justify legislative and executive involvement – what the bill promoted was the capture of the courts, through absolute executive control of judicial selection and promotion.

How do we recognise court capture? The term 'capture' comes from regulatory theory, and involves the realisation that a regulatory agency may come under the control of its regulated industry.[5] Similarly, courts may come under the control of either private entities or other branches of government.[6] One of the main functions of judges is to decide independently, only in accordance with the law. In cases involving other branches of government, when judges decide independently according to the law they preserve the rule of law, protect human rights, and constitute a check on governmental power.[7] If the other branches of government capture or take control of the courts and threaten judicial independence, they reduce or eliminate the ability of judges to fulfil these functions. We have indeed seen this phenomenon in recent years, as executives in democracies that are undergoing democratic erosion or constitutional retrogression (such as Hungary and Poland) co-opt courts by packing them with judges who are loyal to the government, by granting the government control over the appointment and promotion of judges, and by installing particularly loyal judges in court leadership positions such as presidents of courts.[8]

[2] First Reading Bill (n 1).

[3] Minister's Bill (n 1).

[4] See, eg, American Bar Association, 'The Judicial Independence Monitor', November 2022, 13–14, 31; International Association of Judicial Independence and World Peace, Mount Scopus Standards of Judicial Independence (consolidated 2022), arts 4(2), 4(4).

[5] Ernesto Dal Bó, 'Regulatory Capture: A Review' (2006) 22 *Oxford Review of Economic Policy* 203.

[6] Jonas Anderson, 'Court Capture' (2018) 19 *Boston College Law Review* 1543.

[7] Frans van Dijk and Geoffrey Vos, 'A Method for Assessment of the Independence and Accountability of the Judiciary' (2018) 9 *International Journal for Court Administration* 1, 4.

[8] Nóra Chronowski and others, 'The Hungarian Constitutional Court and the Abusive Constitutionalism', *MTA Law Working Papers*, 2022/7, https://cadmus.eui.eu/handle/1814/74522;

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Populist authoritarian leaders also achieve court capture by neutralising the courts' powers of judicial review, as was also attempted in Israel, for instance, by suggesting that decisions to strike down laws would necessitate an 80 per cent majority of the Court, thus making court packing tactics easier to fulfil.[9] While this article focuses on judicial selection, it is important to keep in mind that the government's attempt at court capture should be understood against the background of the other initiatives to reduce judicial powers.

For the purpose of explaining why the government's bill on judicial selection is an attempt to capture the courts, the article will present the current system of selecting judges in Israel, and the changes that the bill strives to make. The article looks at the proposed changes through three different perspectives in order to show why the proposals are an attempt at court capture: first, the perspective of the rationale of the current system against the background of the manner of court governance and the constitutional system in Israel; second, the perspective of changes in Israel's judicial selection system over the past two decades; third, the comparative perspective of trends in judicial selection in other democracies.

2. The judicial selection system in Israel

Israel's system of appointing judges is based on the work of the Committee for the Selection of Judges (the Selection Committee). According to the Basic Law: The Judiciary, judges of all courts are appointed 'by the President of the State, in accordance with the selection of the Committee for the Selection of Judges'.[10] As the Selection Committee selects judges for all courts, it means that it is also charged with judicial promotions from lower to higher courts. The Selection Committee is composed of nine members:[11]

> the President of the Supreme Court, two other justices of the Supreme Court chosen by their fellow justices, the Minister of Justice and another minister assigned by the government, two members of the Knesset selected by the Knesset, and two representatives of the Bar Association, selected by the National Council of the Association.

The chairperson is the Minister of Justice. In other words, the Selection Committee has a majority of legal professionals (three justices and two members of the Bar), and a minority of the representatives of the executive and legislative branches (two ministers and two members of the Knesset, of

Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78, 126–7; Kriszta Kovács and Kim Lane Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union' (2018) 51 *Communist and Post-Communist Studies* 189. For more examples see David Kosař and Samuel Spáč, 'Judicial Independence', *Justin Working Papers*, No 3/2022.

[9] First Reading Bill (n 1); Bill to amend Basic Law: The Judiciary (Amendment No 4) (Judicial Review over the Validity of a Law) (Israel) (2023) (in Hebrew).

[10] Basic Law: The Judiciary, s 4(a) (in Hebrew).

[11] ibid s 4(b).

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which, in the past three decades, usually at least one was a member of the parliamentary opposition[12]).

Decisions to appoint justices to the Supreme Court require a seven-member majority of the Selection Committee, thus necessitating a wide consensus on the Committee, as opposed to selection to all other courts, which necessitates a regular majority of the Selection Committee.[13] Removal of judges from office is made upon a decision either of the Selection Committee 'adopted by a majority of seven members at least' or of a disciplinary court that is made up of judges or retired judges appointed by the President of the Supreme Court according to a decision of the Supreme Court's bench.[14] Removal of judges from office based on disciplinary court decisions are rare (only a few cases were published – for instance, a case in 1988 in which a judge was convicted in a disciplinary court of improper behaviour in office for changing verdicts after giving them and for wrongly fabricating court minutes), and removal based on a decision of the Selection Committee occurred only once in the 2005 case of Judge Hilla Cohen (who was previously convicted in a disciplinary court for manipulating court minutes, but the sentence did not include removal).[15] Presidents of the Supreme Court in Israel are also selected by the Selection Committee; according to the law, they are selected only from among the justices of the Supreme Court.[16] Informally, for decades, the Selection Committee invariably selects the senior justice of the Supreme Court bench to serve as its President ('the rule of seniority').[17]

3. The proposed change

The bill of the Chairman of the Constitution, Law and Justice Committee of the Knesset, which was endorsed by the Committee as its bill and passed a first reading in the Knesset, seeks to change the composition of the Selection Committee. The bill suggested that the Selection Committee would be composed of nine members:

- President of the Supreme Court;
- two other retired judges appointed by the Minister of Justice with the consent of the President of the Supreme Court;
- the Minister of Justice and two other ministers to be chosen by the government; and

[12] HCJ 4956/20 *The Movement for the Quality of Government in Israel v The Knesset* (10 August 2020) (in Hebrew).

[13] Courts Law, 1984, s 7(c) (in Hebrew).

[14] Basic Law: The Judiciary, ss 7, 13; Courts Law, ibid s 17.

[15] Limor Zer-Gutman, 'The Levels of Judges' Behavior Scrutiny' (2006) 9 *Mishpat Umimshal* [*Law and Government*] 15 (in Hebrew).

[16] Courts Law (n 13) s 8.

[17] The rest of the justices do not submit their candidacy for the position; see Minutes of the Constitution, Law and Justice Committee of the Knesset, 9 July 2017 (in Hebrew). Suzie Navot argues that seniority has become a constitutional convention: Suzie Navot, 'The Seniority System as a Constitutional Convention', *ICON-S-IL Blog*, 16 January 2017 (in Hebrew).

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- three members of the Knesset (two of whom would be from the coalition and one from the opposition).[18]

The Minister of Justice would remain chair of the Committee, and all decisions of the Committee would be made by a regular majority, including those relating to the selection of justices of the Supreme Court.[19] In other words, the government and its parliamentary coalition would have control over five of the nine members of the Selection Committee (three ministers and two members of the Knesset from the coalition), and would be able to select judges for all the courts, including the Supreme Court, without the consent of any other member of the Committee.

In the light of massive resistance to the bill from the opposition and the public, after it passed first reading in the Knesset and moved towards the final second and third readings, the government presented a revised version of the bill,[20] claiming that it was less extreme. This bill was approved by the Constitution, Law and Justice Committee of the Knesset for a second and third reading. The Selection Committee, according to the bill, would be composed of 11 members, including the President of the Supreme Court and two other Supreme Court justices (for Supreme Court appointments), or two other presidents of lower courts (for lower court appointments); three ministers (including the Minister of Justice); and five members of the Knesset of whom three would be from the coalition and two from the opposition.[21] Therefore, the government and its parliamentary coalition would constitute a six-member majority of the Selection Committee.

The bill proposes a complex decision-making mechanism for the Selection Committee. For appointing Supreme Court justices, within a term of the Knesset, the Committee would select two justices with an absolute majority (six members of the Committee), one justice with an absolute majority which includes a member of the Knesset from the opposition, and the rest of the justices with an absolute majority which includes a member of the Knesset from the opposition and a Supreme Court justice. The Committee would select judges to lower courts with a seven-member majority. Presidents of the Supreme Court would be selected with an absolute majority.[22]

Because of the requirement for opposition and Supreme Court justice support for some appointments, on a cursory look the bill seems to offer less control to the government than the previous bill; in fact, though, the government tailored it narrowly to gain quick control over the courts. As the government knew that two Supreme Court justices would retire in October 2023 upon reaching the mandatory retirement age of 70 (one of whom being the

[18] First Reading Bill (n 1) s 1(1).

[19] ibid s 1(2).

[20] Bill to Amend Basic Law: The Judiciary (Amendment No 3) (published 27 March 2023) (in Hebrew) (Second Reading Bill).

[21] ibid s 1(1).

[22] Second Reading Bill (n 20) s 1(3).

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President of the Supreme Court), the bill would allow the government to replace them with justices of its choosing. Members of the parliamentary coalition also stated that they would select the next President of the Supreme Court according to the government's will, even from among the two new justices it would select in October, and not according to the current rule of seniority.[23] With a President of the Supreme Court of its choosing, loyal to the government, the government would quickly obtain control over the selection of judges for the rest of the lower courts, as well as over all of court governance. In other words, the bill is an attempt to capture the courts.

4. The rationale of the current selection system

When established in 1948, Israel essentially retained the British Mandate system of appointing judges: namely, the government (the High Commissioner of Palestine during the Mandate period), according to the proposal of the Minister of Justice, had the power to appoint judges, adding to the Mandate system the need for the approval of the Knesset in the case of appointments to the Supreme Court.[24] Israel instituted the current system for appointing judges in 1953 in place of this older system, a reform that the government had explicitly advanced to strengthen judicial independence.[25] The inspiration for the composition of the Selection Committee was the judicial councils of France and Italy.[26] While having fewer court governance functions than other European judicial councils,[27] the Selection Committee still shares with some of them three major functions of judicial selection, promotion, and removal.

Indeed, the rationale of the composition of the Selection Committee is similar to that of the varied memberships of judicial councils or judicial appointment commissions or boards.[28] Namely, by including representatives of the three branches of government as well as the legal profession, in a single body, this selection system aims to fulfil the principles that stand at the basis of the judiciary's ability to achieve its ends, particularly those of judicial

[23] Minutes of the Constitution, Law and Justice Committee of the Knesset, 19 March 2023 (in Hebrew); Minutes of the Constitution, Law and Justice Committee of the Knesset, 20 March 2023 (in Hebrew).

[24] Courts Ordinance (Transitional Provisions) 1948, s 1(c) (in Hebrew).

[25] Eli Salzberger, 'Judicial Appointments and Promotions in Israel: Constitution, Law and Politics' in Kate Malleson and Peter Russell (eds), *Appointing Judges in the Age of Judicial Power: Critical Perspectives* (University of Toronto Press 2006) 241.

[26] Guy Lurie, 'The Judicial Selection Committee', Israel Democracy Institute, 1 August 2019, 19–21 (in Hebrew).

[27] On the competences of European judicial councils see Anne Sanders, 'Comparative Overview of Judicial Councils in Europe', Council of Europe, March 2022.

[28] On these various bodies see Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (The University of Chicago Press 2015); David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016); Samuel Spáč, 'Recruiting European Judges in the Age of Judicial Self-Government' (2018) 19 *German Law Journal* 2077; David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' (2018) 19 *German Law Journal* 1567.

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independence and judicial accountability.[29] Including a majority of legal professionals on the Selection Committee ensures that professional or merit considerations receive primacy in selection, promotion and removal decisions, thus ensuring the protection of the principle of judicial independence. Including elected officials ensures fulfilment also of the principles of judicial accountability and democratic legitimacy in these decisions, as well as other considerations in selection decisions, such as judicial diversity and transparency. Thus, the rationale of the balanced composition of the Selection Committee is to fulfil these principles and alleviate possible tensions between them.[30]

The rationale of fulfilling both of these principles, and giving primacy to professional considerations and a majority to legal professionals on the Selection Committee, thus ensuring judicial independence, are particularly important in the wider contexts of court governance in Israel, its weak institutional protection of judicial independence, and the feebleness of Israel's system of checks and balances, to all of which we now turn.

4.1. Judicial independence and court governance

The importance of the principle of judicial independence in judicial selection in Israel – reflected in its current system of selection, promotion and removal – is underscored by the weakness of the protection of judicial independence in other contexts in Israeli law. Israel does not have an entrenched constitution, but rather Basic Laws. These enactments mainly are not entrenched and could be changed even by a regular majority in the Knesset. This holds true for Basic Law: The Judiciary, which enshrines judicial decisional independence, the tenure of judges, and the ways of removing them from office. In other words, institutional protection of judicial independence is already weak, and could be revised and threatened by any regular parliamentary majority.[31]

Furthermore, the threat of court capture through the government's proposal with regard to judicial selection is particularly ominous because of Israel's court governance system.[32] Democracies have various institutional mechanisms to insulate judges from external interference through court governance, while keeping the judiciary accountable to the public.[33] In Israel, the executive already has far-ranging powers to influence the administration of justice in the courts, such as through courts' budgets or through changing the number of justices on the Supreme Court bench (decided by the Knesset through a regular majority, thus at the discretion of the parliamentary

[29] Garoupa and Ginsburg (n 28) 102–04; van Dijk and Vos (n 7).

[30] For this argument on similar court-governance bodies see Garoupa and Ginsburg (n 28).

[31] Compare with the indicators for judicial independence described in van Dijk and Vos (n 7) 10.

[32] On the definition of 'court governance' or 'judicial governance' see, eg, Pablo Castillo-Ortiz, *Judicial Governance and Democracy in Europe* (Springer 2022) 2.

[33] Guy Lurie, Amnon Reichman and Yair Sagy, 'Agencification and the Administration of Courts in Israel' (2020) 14 *Regulation and Governance* 718, 720. The European judicial-council model is one of the mechanisms to realise both judicial independence and accountability. For comparative court governance models see Castillo-Ortiz (n 32); Garoupa and Ginsburg (n 28).

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coalition[34]). The Minister of Justice holds various powers in court governance, such as establishing courts,[35] determining the number of judges in lower courts,[36] and establishing civil law procedure regulations.[37] Some of the Minister's powers are tempered by the powers of the President of the Supreme Court and the Director of Courts. For instance, while the Director of Courts is responsible before the Minister for implementation of the administrative arrangements in the courts, the Minister appoints the Director with the consent of the President of the Supreme Court.[38]

The rule of seniority in the appointment of presidents of the Supreme Court is usually seen as important because it prevents the influencing of sitting justices to vie for the presidency, thus risking their judicial independence. However, the rule of seniority is also important in Israel because of the President's role in court governance. Thus, the proposal to allow the government to ignore that convention by acquiring a majority on the Selection Committee is dangerous. Beyond the judicial roles that the President holds (such as deciding appeals on decisions with regard to recusal of judges[39]), the President's role in court governance is based on the assumption of a detachment from the Minister of Justice, which allows checking ministerial powers and preserving judicial independence. As shown directly below, the President holds these powers either alone or at times through shared responsibility with the Minister.

First, the President has important independent roles in respect of judicial careers. The President is not only a member of the Selection Committee, but also has the power to nominate candidates for judicial office (as do the Minister of Justice or three Selection Committee members acting jointly);[40] similarly (again, in conjunction with the Minister and three Selection Committee members), the President has a significant role in deciding which magistrate courts judges to nominate to the Selection Committee for promotion to the district courts (based on the recommendations of a committee of two former judges who assesses candidates' professionality). The President also consents to various ministerial appointments in the judiciary, including the presidents of courts.[41]

Second, the President has roles in enforcing ethics and disciplining judges, sometimes with the consent of the Minister of Justice (for instance, they need to agree on their nomination of the Ombudsman of the judiciary, who is then selected by the Selection Committee[42]), and sometimes alone or with the

[34] Courts Law (n 13) s 25.

[35] ibid ss 33, 43.

[36] ibid ss 35, 45.

[37] ibid s 108.

[38] ibid s 82. For Israel's model of court governance, the important powers of the Minister and the important roles of the President of the Supreme Court and the Director of Courts, see Lurie, Reichman and Sagy (n 33); Yair Sagy, Guy Lurie and Amnon Reichman, 'A History of the Administration of Courts in Israel' (2023) 40 *Journal of Israeli History* 355.

[39] Courts Law (n 13) s 77a(c).

[40] ibid s 7(b).

[41] ibid s 9.

[42] Ombudsman of the Judiciary Law, 2002, s 3(b) (in Hebrew).

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bench of the Supreme Court (in establishing a disciplinary court for judges,[43] in suspending a judge under criminal investigation,[44] or in setting rules of ethics[45]).

Third, the President is responsible for various issues in the day-to-day management of the judiciary. For instance, the President consents to the appointment of the Director of Courts by the Minister of Justice, and the Director in many ways is subject also to the President (and not only to the Minister, as specified in law[46]); the President issues directives on the administration of all courts; and supervises, through the Director of Courts, the day-to-day functioning of judges (such as monitoring delays).[47]

Fourth, as with any court president, the President of the Supreme Court is charged with running that court. Thus, the President is authorised to decide on the allocation of cases,[48] even though in practice such decisions are made primarily via an automated system save for a few exceptional cases.[49] Finally, and not least importantly, the President is informally recognised as the leader of the judiciary, representing it and defending its status and independence.

To sum up this point, the government already has significant powers in court governance, with which it could already, for instance, increase the number of judges in the courts, thus allowing it to pack the courts. Going beyond that and giving the government a majority on the Selection Committee and allowing it to select a president whom it controls will offer the government a quick path to capturing the courts, through essentially taking over the court-governance functions of the President and removing this check on the government's powers in court governance. Taking over court leadership has been one of the tactics of court capture in other democracies, such as Hungary.[50]

4.2. Israel's weak system of checks and balances

The importance of the principle of judicial independence in judicial selection in Israel is underscored by Israel's weak system of checks and balances. Israel not only lacks a constitution; it also lacks other institutional checks that democracies have on the power of the government. As shown by Amichai Cohen, Israel is exceptional compared with other democracies in lacking any of the following institutional checks: bicameralism (in which the legislature's powers are divided into two bodies); a presidential system (in which the legislature and the executive are independently elected and check each other); a federal system (in which the federal and state governments check each other); electoral districts; and membership of international organisations. As Cohen shows,

[43] Courts Law (n 13) s 17.
[44] Basic Law: The Judiciary, s 14.
[45] Courts Law (n 13) s 16a.
[46] ibid s 82.
[47] Lurie, Reichman and Sagy (n 33).
[48] Courts Law (n 13) s 27.
[49] Letter of the Freedom of Information Act Officer of the Judiciary to the Author, 12 December 2022 (in Hebrew).
[50] Chronowski and others (n 8); Kovács and Scheppele (n 8).

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judicial review of independent judges is the only effective institutional check that Israel shares with other democracies.[51] In this context, the current balanced judicial selection system, with a minority of representatives of the executive and legislative branches on the Committee, is particularly important for the courts to remain an effective check on governmental power. In attempting to undermine this system and taking over judicial selection, the government reveals itself as attempting to capture the only institution that effectively checks its power.

4.3. Interim summary

Each democracy must find a way to maintain the principles of judicial independence and accountability according to its own distinct constitutional order and legal and political traditions.[52] The rationale of the current system of judicial selection is to fulfil the principles of judicial independence and accountability, taking into account the government's already overly strong influence over court governance, which is checked by the independent role of the President of the Supreme Court, the otherwise weak institutional protection of judicial independence and the feeble system of checks and balances. From this perspective, increasing the power of the government in judicial selection – to the point of granting it control over the process – and in the appointment of the President of the Supreme Court would allow it to capture the courts.

5. Changes in the selection system over the past two decades

The proposed vast increase in the power of the government in the judicial selection process should be understood as an attempt to capture the courts also from the perspective of the government's increased influence over judicial selection during the past two decades. Thus, rather than more influence, which it had already gained, what the new governmental proposals seek is total control. The Knesset and the government pushed forward the changes of the past two decades explicitly in order to increase judicial accountability and democratic legitimacy, particularly of Supreme Court justices. They promoted these changes in the light of the increased role held by the Supreme Court since the 1990s in the public life of Israel, for example, through the Court's jurisprudence in opening its doors to public petitioners and to more political questions by limiting the scope of the doctrines of standing and justiciability, and because of its role in conducting judicial review of legislation.

First and foremost, since a 2008 legislative reform, the law requires the Selection Committee to choose justices for the Supreme Court by a majority

[51] Amichai Cohen, *The Constitutional Revolution and Counter-Revolution* (Israel Democracy Institute and Kinneret Zmora Dvir 2020) (in Hebrew).

[52] John A Ferejohn and Larry D Kramer, 'Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint' (2002) 77 *New York University Law Review* 962, 975–76.

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of seven of its nine members. This requirement gives the government and its parliamentary coalition effective veto powers in the selection of Supreme Court justices (as it gives effective veto powers also to the three justices on the Committee). This requirement, in other words, necessitates reaching a consensus on the Selection Committee, and it has given the government more influence in the selection of Supreme Court justices than in the past (previously, only a regular majority of the Selection Committee was required to select justices for the Supreme Court).

Other changes in the manner of selecting judges have given the government more influence in the lower courts as well. For instance, recent years have seen elected officials on the Committee conducting informal background screenings of judicial candidates.[53] These unsanctioned screenings underscore a dramatic change in the selection process. Now, it is not only clearly considerations of merit that drive selection, as in the past, but also considerations of the views and background of candidates, particularly their legal philosophies (namely, whether they are so-called 'liberal' or 'conservative'). As former Minister of Justice Ayelet Shaked said, reflecting on her term as chair of the Selection Committee (2015–19), she managed to achieve a 'conservative revolution' in the composition of the Supreme Court, as well as in lower courts.[54] She achieved her claimed success through this process of screening candidates. What her claim signifies, more than anything else, is the impression of this former Minister of Justice that she had tremendous influence in selecting judges.

Finally, in April 2022 the Selection Committee decided that in the future it will televise live the interviews it conducts for Supreme Court candidates. The Committee decided on this move in order to increase the accountability and democratic legitimacy of the selection process by increasing its transparency.[55] This decision has yet to be implemented, as there has been no judicial selection for the Supreme Court since then. All of these changes call for the following questions: Why does the government seek more control over the selection process, in the light of these recent changes? Why else, except to acquire complete control over the selection process and to capture the courts?

6. The government's proposals in comparative perspective

A further perspective that starkly shows the government's proposals as attempts to capture the courts is the comparative trends in judicial selection. An argument put forward by the government is that the Israeli judicial selection system is exceptional in international comparison, because of the involvement of judges in judicial selection. Yet, the government did not only attempt

[53] Tomer Avital, 'A Day with Simcha Rothman: "I've Met Candidates for the Supreme Court in Secret Apartments because Hayut Does Not Allow It"', *Shakuf*, 13 December 2021, https://shakuf.co.il/28751 (in Hebrew).

[54] Ayelet Shaked, 'Speech on the 100 Days Plan', *YouTube*, 20 March 2019, https://www.youtube.com/watch?v=-fQ_dCF_rN8 (in Hebrew).

[55] Guy Lurie, 'Televising the Interviews of Candidates to the Supreme Court: Is the Move Desirable?' (2022) 46 *Tel Aviv University Law Review Forum*, https://www.taulawreview.sites.tau.ac.il/post/lurie (in Hebrew).

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to remove the justices' effective veto powers in judicial selections for the Supreme Court (granted in 2008 through requiring a majority of seven members of the Selection Committee to select Supreme Court justices), while preserving the rationale of the current system that prevents unilateral governmental selection, and necessitates cooperation with parliamentary opposition and legal-professional members of the Selection Committee, thus ensuring the primacy of merit considerations and protection of judicial independence. The government wanted to take control over the selection process. How does this feature of the government's proposals compare with trends in judicial selection?

There exists, of course, a wide variety of systems for judicial selection, and they differ among common law and civil law jurisdictions, as well as within jurisdictions between constitutional courts and ordinary courts. That said, one could identify some trends that show the exceptional character of the Israeli government's proposals.

6.1. Constitutional courts and high courts

Selection systems for constitutional courts, which have exclusive powers of judicial review of legislation, often give elected officials considerable power in the process. Yet, there are various models that seek to prevent one-sided control of either the government or the parliamentary coalition. These models could be grouped into three dominant mechanisms:[56]

(1) each of the three branches of government selects a number of the judges, such as in the Constitutional Court of Italy;
(2) the parliament selects the judges through a wide majority such as two thirds, which necessitates the consent of the opposition, as in the case of Germany;
(3) two branches of government, or more, need to cooperate in the selection – for instance, the president nominates the candidate and the parliament approves.

Of course, the Israeli Supreme Court is not a constitutional court, but rather a supreme court, and indeed functions also as a first-instance appellate court, adjudicating thousands of criminal, civil and administrative cases a year.[57] Judicial selection systems of supreme courts also show a tendency to prevent

[56] Amichai Cohen and Guy Lurie, 'Appointment of Judges to High Courts in Democratic Countries: A Comparative Study', Israel Democracy Institute, 4 April 2023, https://en.idi.org.il/articles/48993; Katalin Kelemen, 'Appointment of Constitutional Judges in a Comparative Perspective – With a Proposal for a New Model for Hungary' (2013) 54 *Acta Juridica Hungaria* 5; Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, 2009) 98–99, 103; Tom Ginsburg, 'Judicial Appointments and Judicial Independence', US Institute for Peace, January 2009, http://comparativeconstitutionsproject.org/files/judicial_appointments.pdf.

[57] Judiciary of Israel, 'Annual Report of the Judiciary 2022', 4 July 2023, updated 27 August 2023, https://www.gov.il/he/departments/news/spokemen_message040723.

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one-sided control of the government, through similar and additional mechanisms. Recent years have seen a trend of democracies adopting selection boards in which judges and legal professionals are given more weight in the decision-making process, and in which elected officials receive less weight, particularly in common law and British Commonwealth countries.[58] A common model is an influential professional body, which vets candidates, either with decisive influence on appointment, or through vetting a shortlist of candidates, or at least having an advisory status on candidates from which the legislature or executive appoints.[59]

In either constitutional or supreme courts, democracies overwhelmingly follow the trend of preventing absolute control of the government or parliamentary coalition. With the exception of democracies going through democratic erosion (such as Poland), the past two decades have seen an overwhelming trend of reform towards limiting control of governments or their parliamentary coalitions through these mechanisms.[60] By proposing to grant the government more control, from this comparative perspective the Israeli coalition is attempting to capture the Supreme Court.

6.2. Ordinary courts

The Israeli government's proposals also go against clear trends in judicial selection systems in ordinary courts, to which the whole judicial system in Israel belongs, both its Supreme Court and lower courts, as Israel lacks a constitutional court.

First, the trend in judicial selection is that selection should be based on merit considerations;[61] this includes ordinary courts in jurisdictions having constitutional courts,[62] and all courts in jurisdictions without constitutional courts. Indeed, many judicial selection systems in democracies are based on professional exams.[63]

Second, the past few decades have seen a clear trend of democracies trying to reduce the influence of the executive branch in judicial selection. More and more jurisdictions in recent decades have adopted versions of the judicial council model, with its relatively large proportion of judges and legal professionals,[64] as well as other types of judicial self-governing body.[65] The Venice

[58] Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (British Institute of International and Comparative Law 2015); Lurie (n 26) 86.

[59] Cohen and Lurie (n 56).

[60] ibid.

[61] European Commission for Democracy through Law (Venice Commission), 'Judicial Appointments', Opinion No 403/2006, CDL-AD(2007)028, 22 June 2007, 8, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e.

[62] OECD, *Constitutions in OECD Countries: A Comparative Study* (OECD, 2022) 133.

[63] European Commission for the Efficiency of Justice, *European Judicial Systems* (Council of Europe, 2022) Part 1, 49.

[64] Garoupa and Ginsburg (n 28).

[65] Kosař (n 28).

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Commission, for instance, sees this model as a 'valid model', particularly when composed of a substantial element or a majority of members from the judiciary elected by the judiciary itself.[66] The Venice Commission also explains that while in some older democracies executives have a 'strong influence on judicial appointments', which allows for an independent judiciary because the executive is 'restrained by legal culture and traditions', in other democracies abuse may result from such an influence. Thus, 'at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse' in the appointment of judges.[67]

The Israeli government's proposal thus goes against these trends in judicial selection, both in implicitly trying to reduce the weight of merit considerations, and in explicitly trying to increase the influence of the executive in judicial selection, without proper entrenched constitutional provisions to safeguard against political abuse and without traditions of political restraint. This comparative perspective points to an attempt by the government to capture the courts through its proposals.

7. Conclusion

The arguments put forward by the government in support of its proposals for judicial selection are that it lacks enough influence. Supposedly in other jurisdictions governments have more influence in judicial selection. As shown in this article, this argument is misleading in several ways. First, the government's arguments are misleading from a comparative perspective, because the Israeli judicial selection system is in sync with current trends, in both constitutional courts and supreme courts (where there are various models attempting to prevent one-sided political control), and in ordinary courts where legal professionals and judges have a considerable say in judicial selection. Rather, the government's proposals would make it extremely powerful from a comparative perspective. Second, the government's arguments are misleading because not only does it have considerable influence in judicial selection, this influence has been increasing over the past 15 years. Third, the government's arguments are misleading because they ignore the rationale of the judicial selection system in Israel, and its attempts to fulfil the principles of judicial independence and judicial accountability, taking into account court governance, the weak protection of judicial independence, and the feebleness of Israel's system of checks and balances.

These perspectives reveal the true nature of the government's proposal. Rather than simply gaining some influence in judicial selection, the government is attempting to achieve total control. Through its proposals the government would be able to select judges who are loyal to it, who will decide in its favour, and would be able to install presidents in positions of court leadership who would be able to control for it the rest of the judges, and even incentivize justices of the Supreme Court to decide for the government if they wish to

[66] Venice Commission (n 61) 7.
[67] ibid 2.

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achieve presidency of the Court. Through the rest of its proposals the government also wishes to reduce the powers of the courts, making them (through judicial selection) not only unwilling to check the power of the government, but also (through curtailing judicial review) unable to do so. In short, in the light of these perspectives, the government's proposal is an attempt at court capture.

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