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**SPECIAL REPORT**

## CONSTITUTIONAL AND ELECTORAL REFORM

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**Prohibit Knesset Seat Defections / Raising the Minimum Threshold / Direct Election of the Prime Minister / Increase the Powers of the Knesset / The Problem with Parliamentary Systems / Electoral Reform Alone is Not Enough / Add Checks and Balances / What Kind of Electoral Reform? / Some Final Considerations**

[Editor's Note: The Jerusalem Center for Public Affairs recently conducted its Second Annual Public Policy Day, featuring Moshe Landau, former President of the Israel Supreme Court; Uriel Lynn, Chairman of the Knesset Committee on Constitutional Law and Justice; and Daniel J. Elazar, President of the Jerusalem Center for Public Affairs. We may learn of the current prospects and details of constitutional and electoral reform in Israel from the following highlights of that session.]

### **Justice Moshe Landau:**

Constitutional and electoral reform is a subject that has been very prominent in Israel, mainly because of the dissatisfaction of the general public with the maneuverings preceding the formation of the present government which were characterized to some extent by some unpleasant practices.

These included the successful extortion by splinter parties and the crossing of party lines by members of the Knesset in return for promises of benefits which smacked of political blackmail, if not worse. There is still a spirit of general disappointment rife within the community, which also made itself felt in various protest movements, and the cry for changing the constitutional and electoral system is being heard. But when these protesters were asked about the direction of any change, they deferred to the academic community for specifics.

The Jerusalem Center for Public Affairs has conducted a series of workshops on these problems. Out of these workshops have grown some tentative proposals for constitutional reform which can serve as a basis for discussion.

There is a long history of attempts

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to change the electoral system which go back almost to the beginning of the State of Israel itself. One of the main questions is proportional representation versus a constituency system or a mixture of both. A second major question concerns the direct election of the prime minister by popular vote and the granting to him of greater powers. There are also proposals which are simpler to deal with, such as raising the minimum quota of votes for a party list to be allowed into the Knesset, and prohibiting the defection of Knesset members from the party list under which they were elected.

#### **MK Uriel Lynn:**

The Israeli democratic system today is, and to a great extent justly so, the laughingstock of the Western world. Why? Because just recently we were trying to put together a new government based on people who were deserting their own parties; the major parties were trying to buy them by giving them all kinds of promises which run counter to every democratic principle.

#### **Prohibit Knesset Seat Defections**

It is simply undemocratic to promise an MK a safe place on his party's Knesset list next time without him having to stand for election within the party. It is also undemocratic and immoral as well to promise someone that he will be made Minister of Tourism or Transportation if he deserts his own party and moves to another. A person was elected to the Knesset in the first place because he was a member of a party. I do not believe that any of these individuals who deserted their party and tried to form a separate faction would have been elected to the Knesset if they would have run separately from their party. For example, if the Liberal party would have run separately, it is estimated that they would have won from one to four seats, not more than that. Running together with the Herut in the Likud framework they have obtained twelve seats based on prior agreement.

The fact that an individual MK can dis-

tort the democratic decision of the electorate and carry his seat into another party as if it were his personal property, using it to extort all kinds of personal benefits, shames our democratic system. All the political parties are to be blamed, though it would be historically exact to say that it started with the agreement Shimon Peres and the Alignment made with Avraham Sharir.

The reason behind the turmoil surrounding the coalition negotiations lies in our democratic system. First of all, we witnessed a very serious dependency on very small political parties. Then we moved on to an absolute dependency on individual MKs who deserted their own factions in order to help form a government.

Everyone agrees that we cannot go on this way. The damage to the morale and confidence of the public in our democratic system has not only eroded, it has been severely shaken. But the question is: what laws can we propose that will give answers to the real problems that we have in our form of government? In the last two months, the Constitutional Law and Justice Committee of the Knesset, which I chair, has been preparing a very comprehensive proposal.

Deserting his faction is not the only way by which an MK can misuse the trust placed in him by the voters. He can also remain in his faction and vote against it, handing control of the government to the opposing side, so a comprehensive legislative answer is needed. We are not going to tell an MK that he cannot leave his faction for reasons of ideology or conscience, but he should not be able to benefit from it. He may not gain a secure place on a party list or monetary advantage or the promise of a high position. He will have to go with his conscience directly to the public in the next elections and not be allowed to be a part of any other list.

#### **Raising the Minimum Threshold**

Today Israel has the purest proportional representation system in the world. Every

political or social ideological stream that has been organized as a political party and manages to get 1 percent of the total vote (about 22,000 votes) is represented in the Knesset. If we raise the threshold for electing MKs from 1 percent to 2.5 or 3.3 percent, it will not make any change at all in the basic problems of our form of government. The only thing it will do is that instead of 15 to 20 political factions in the Knesset, we will have 9 to 12 factions. Yet the basic framework of the different political parties in which everyone has to maneuver in order to form a coalition will not be changed, so changing the threshold does not really answer the basic problem. The almost absolute dependency on small political parties results in the majority giving up some of its basic principles. It means that we pay heavily in money from the public budget to support those political parties. It means that we are going back on our commonly held values, and thereby shaking the confidence of the public in our form of government. This dependency on the small political parties means that the majority must pay a very high price.

Another result is that we cannot form a stable government. We have not had a stable government for the last thirteen years and we are not going to have a stable government. The current Likud government is based on an extortionate agreement with the Modai faction, as well as with four small political parties, any of which can depose this government tomorrow.

#### **Direct Election of the Prime Minister**

One problem that we are seeking to correct involves the status of the prime minister. We have seen how a prime minister who seeks to implement policy on sensitive issues is subject to attack by ministers from his own party. He does not really have the status and the force to effect such policy. Only if he is elected directly by the public will he have a status within his own party that he does not have today.

One of our major concerns is the very fact that the government cannot really be run efficiently under the present system. For example, I have been dealing for a long time with road safety problems and the development of the transportation infrastructure in this country. Yet the basic problem is the division of powers in this specific field among six different authorities or power centers. The Ministry of Transportation does not really control planning and infrastructure in this country because the main power center in this area is in the Ministry of Housing. If we could put all the power together in one ministry, we could do a great deal to help improve the transportation infrastructure. A second example involves the absorption of new immigrants. We have seen how this government has failed in such a major way up to now in trying to meet this challenge. The Minister of Absorption is a very fine person for whom I have great respect; however, I have many doubts about his qualifications to handle the mass immigration of today because he simply does not have the organizational experience. But if the prime minister wants to set up a group of people within the Prime Minister's Office that will coordinate this activity, he cannot do so because it would offend the Absorption Minister. This is the reality and it highlights the inability of the prime minister to run a government efficiently, and this in a country that has to face challenges that are much more serious than perhaps any other country in the world.

We are proposing that the prime minister be elected directly by the public on a personal basis. We know very well that the struggle is going to be between two main candidates, that of the Alignment and the Likud. We want to require the victor to gain at least 50 percent of the total vote. If this is not achieved, there will be a second round of elections.

Under our proposal, the prime minister will have the power to form his own cabinet without needing a vote of confidence from the Knesset. In the past it has been

the vote of confidence that has really created all the coalition problems. We know very well that the prime minister will have to work together with the Knesset. We are not proposing a presidential system because we consciously do not want a presidential system. We want a system that really fits Israel, a parliamentary system whereby the prime minister is elected directly by the public. The parliament will have the power to depose the prime minister, not like in the United States where they do not have this power. Under our proposal, if the Knesset passes a law to disperse itself, then the prime minister will also have to stand again for election.

We know very well that, for example, Mr. Peres would not have tried to overthrow the government earlier this year if he knew he would have had to face new elections. Under the current system, an MK can overthrow the prime minister and substitute another in his place, a situation that only encourages the selling of favors. However, if Knesset members know that if they vote down the prime minister they will all have to face new elections, they will do it more responsibly, only when they really need to, and not for reasons of opportunism.

Back in January 1989, MKs David Libai, Amnon Rubinstein, Yoash Sidon, and myself each separately proposed a reform calling for direct election of the prime minister. After the experience we went through in trying to form a coalition government after the elections to the Eleventh Knesset and the elections to the Twelfth Knesset over a year and a half ago, we realized that this change was the most important and urgent one. Our proposals for direct election of the prime minister passed their first reading in the Knesset by an overwhelming majority of about 60 to 30, and the four of us are now working to prepare one unified draft.

#### **Increase the Powers of the Knesset**

What are the powers of the Knesset in Israel? The first is to legislate, which is

the most important; the second is to oversee the activities of the administration; the third is to depose the government; and the fourth is to enact the budget. We want to increase the power of the Knesset in matters of legislation and to narrow the power of the administration to pass bylaws and regulations. We propose to increase the power of the Knesset to inspect and supervise the actions of the administration by having more power to summon ministers, to get information, and to inspect what they are really doing. Today, if a minister does not want to appear before a Knesset committee, he does not have to. If he does not want to give an answer to the Knesset about what he is doing, he can just disregard the Knesset. On the other hand, we also want to limit the power of the Knesset to depose the government and make it a power to be exercised in a more responsible way.

If we have a directly elected prime minister, some are afraid that we will get a very powerful person who may be irresponsible. But if this should happen, the Knesset should exercise its power to depose this person. Some are concerned that the prime minister will be in constant confrontation with the Knesset and they will not be able to work together. Yet any wise prime minister would seek broad support in order to pass legislation and the budget, so he would naturally try to form a government that would give him a clear majority in the Knesset for good cooperation. Indeed, it is going to be easier for him to do that because the small parties will come to him and he will not have to run after them and try to buy them.

Can the Knesset actually pass these reforms? The truth is that despite the fact that we have considerable support, the interests of the different political parties and sometimes individual interests are so strong that I cannot assure you that the Knesset has the power to do this. However, if I will realize that the Knesset does not have the power to make the change, I will definitely say so publicly.

**Prof. Daniel J. Elazar:**

We are very fortunate in having Uriel Lynn as chairman of the critical committee on this issue. It is not always that in Israel we have the right man in the right place at the right time. He has expressed something which gives me some hope that there may be progress this time, because like so many other members of the Knesset who were not visible during the latest coalition negotiations, he has reflected a certain personal embarrassment over what happened which hopefully will lead to better things in the future.

James Madison, writing in Federalist No. 51, made several important points, among which he said, "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed. In the next place oblige it to control itself." He continued to say: "Dependence on the people is no doubt the primary control on the government. But experience has taught mankind the necessity of auxiliary precautions." Madison then continued: "It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." That, of course, is the issue that anybody who attempts to design a constitution must take into consideration. How do we both rely on the people, create a government that is strong enough to govern and to do what government must do, yet at the same time is checked and balanced in such a way that its stability and strength is balanced by its responsiveness and controlled by the people? So when we discuss this issue of constitutional and electoral reform, we are discussing not only the reform itself, but the auxiliary precautions that must be included in relation to it.

**The Problem with Parliamentary Systems**

In considering these questions, it may help to look also at the larger context of the problem with parliamentary systems throughout the world. The Economist wrote in August 1988: "[The British] Parliament unlike the United States Congress, is not a true legislature. It is a small part of a legislative process dominated by ministries and officials. MPs are self-important because they lack real importance. They look busy because they are not actually engaged in business." Now what is true in Great Britain unfortunately is true in parliamentary systems throughout the world. What happened is that a device that developed to restrain powerful monarchs, now that powerful monarchs are gone, is left having consolidated all powers within itself and then transferred them to what is supposed to be a committee of the parliament, namely the government. So instead of the parliament controlling an independent source of executive power, the parliament ends up being subordinate to a source of executive power that theoretically is responsible to it, but the tail inevitably wags the dog. Why? Because the development of party systems has assured the fact that in response to democratic procedures, control of parliament will fall to the party or parties that can form the government. Once the government sits, the government holds control over the fate of the parliament in its hands. In other words, if the parliament votes no confidence in the government, it effectively dissolves itself, or at the very least the party or parties forming the majority are sent into the minority and lose the controls and the perquisites that they have by virtue of being the governing party or governing party coalition.

Under such circumstances, there is always extreme reluctance for parliaments to act independently vis-a-vis the government. The government controls their reactions by threatening dissolution or no confidence, either explicitly or implicitly by the fact of the reality of the

parliamentary system. This is true throughout the world. As long as there were monarchs who were independent sources of power, parliaments were effective because by having a parliamentary committee that was designated as the official advisers to the monarchs, they restrained the monarch, the government, the prime minister, and the other ministers. There was a system of checks and balances that gave each side certain powers. Now clearly monarchy is not something that the world is interested in fostering as more than a symbolic unifying role.

We have seen a situation in Israel where either the government cannot govern, or it can govern, but in neither case is the Knesset an institution that has sufficient power vis-a-vis the Executive. Part of the task of reform is indeed to recognize this great dilemma with parliamentary systems, a dilemma that has led an increasing number of countries throughout the world to abandon strict parliamentary government and move toward some other system, either as in France which adopted a presidential system, or more modeled on the United States with its system of checks and balances.

In reconsidering its own structure, even for a modified parliamentary system of the kind that seems to be evolving here as an appropriate compromise given the uniqueness and the special characteristics of the Israeli situation, Israel is following a world trend. I quite agree with Knesset Member Lynn that Israel needs to develop a system for itself. We need our own system that suits our own problems. We have our own conditions and our own circumstances, and we need not be bound by what was done in France or the United States or any other country of the world. The fact that we are beginning to move toward some kind of consensus position among reformers suggests that we are beginning to find our way toward a system that may be appropriate for us.

For a long time I believed that the parliamentary system in Israel was more than adequate for Israel's needs and was

not in favor of a directly elected chief executive. I have changed my mind on this subject as a result of observing the world and the local situation.

### **Electoral Reform Alone is Not Enough**

It has become clear that to achieve any of the goals that were outlined earlier, electoral reform is not enough. Electoral reform could bring a different kind and perhaps in some respects a more effective connection between the voter and his or her representative, though the kind of electoral reforms that are presently being proposed most frequently are not likely to do that. Electoral reform could bring a weakening of the party apparatus that creates a top-down situation whereby to get on the ticket one has to have the support of the very top of the party and therefore can never or rarely challenge the leadership of the party if one wants to pursue one's political career. While the electoral reforms that are being proposed do that relatively well, what electoral reform cannot do is create more stability in government.

Ten years ago it was possible to have electoral reform that would have sufficiently changed the outcome of elections. While there still would have been coalition politics, it could still have the possibility of leading to stability in government. Today that is no longer possible because the two most stabilizing forces in the Israeli political system would continue to be represented and hold the balance of power in any electoral system that can be thought of that would be democratic. Even if we went to a pure 120 constituency, winner-take-all system as they have in Great Britain, or to a mixed territorial-proportional system, or if we raised the threshold to some reasonable amount, any system like that or any variation would still leave the ultra-Orthodox parties and the parties representing the Arab voters with the balance of power. Now almost all Israelis agree that these voices need to be represented in the system in some way proportionate to their strength in the population,

just like anybody else. That is democracy. If this is what exists in Israel, this is what should be represented. But it is one thing to give them a vote; it is another thing to give them a veto. It is the necessity to preserve their vote without giving them the veto that makes electoral reform alone insufficient.

Therefore, the procedure that must precede electoral reform is direct election of the chief executive. Once you have a stably elected chief executive for whom the people vote directly and who will be in office unless he runs into the problem of confidence, then it is possible to go to one or another system of electoral reform that will also provide greater connection between the voter and his or her representative, and which can still provide for a broad-based representation in the country. I do not believe that politics in Israel can function with less than five parties and more likely seven represented in the Knesset. We are more like the European system in the sense of the European balance of power, in the sense that there are permanent groups that need direct representation within the legislature, who have to be represented by their own people and not simply have them merged in larger parties. If that is indeed the case, then we need a system that will secure their legitimate representation while at the same time allowing greater stability in government. Direct election of the chief executive will make that possible.

#### **Add Checks and Balances**

However, direct election is not enough. Unless it is accompanied by a proper system of checks and balances, we will not have won half the battle, we will have lost half the battle, and there is a difference. It is gratifying to see the Knesset committee seriously considering and taking steps towards development of the proper checks and balances. The ability to remove the directly elected chief executive along with the dissolution of the Knesset is one appropriate check in the system. Others include strengthening the Knesset,

the Knesset committees, and transferring powers of legislation that are now vested in ministers. Ministers in Israel have great powers that are really more than powers of regulation which every executive branch of government has everywhere. They have the power to act, in effect to enact legislation in certain areas as well. They have generally used that power with restraint, and increasingly with some kind of ratification process by the appropriate Knesset committee. Yet this is a power that needs to be restored to a Knesset that will be more pro-active, that will not simply sit back and ratify or reject. There needs to be a greater Knesset role in the budgetary process. Finally, the Knesset should be required to ratify certain kinds of treaties so that the government cannot commit Israel irrevocably to certain courses of action without getting a response from the legislative voice of the people.

#### **What Kind of Electoral Reform?**

It has been generally agreed in discussions among reformers in Israel that any electoral reform will require some combination of territorial and proportional representation. Very few people today are talking about a strictly territorial system. A somewhat larger number are talking about a proportional representation system, but even here there is increasing movement towards the idea that there should be some territorial dimension to it as well.

The order of the combination is critically important. The tendency has been to find what seems to be an easy compromise of half and half -- elect sixty members of the Knesset from territorial districts of one kind or another and choose the other sixty by some kind of proportional system. I would support a mixed system, but a system in which all members of the Knesset are elected by one means. We should not try to accommodate what usually is accommodated in two separate houses into an electoral system for one house. That means one needs to start with the territorial base and then add the proportional

dimension within that territorial base so that there can be broader representation, but that the connection between the voter and his or her representative will be far more clearcut than it is when it is mediated through a party system alone and not made directly contingent upon the voters voting for specific individuals.

Constitutional reform should never be undertaken lightly and it should never be undertaken simply to solve immediate political problems. Constitutional reform should be undertaken for constitutional reasons. There have to be constitutional problems that require resolution. What we have seen in our immediate political problems, however, is symptomatic of a larger constitutional deficiency and that is why the immediate political problems need to be viewed as catalysts. Even if we cannot expect them to be strictly solved by constitutional reforms, they point us in the direction that we must go if we are to improve Israel's constitutional system.

**Justice Moshe Landau:**

#### **Some Final Considerations**

I would suggest to Mr. Uriel Lynn that while you are discussing the major problem of direct election of the prime minister, the question of raising the threshold for entry of a party list into the Knesset should not be lost sight of. It will not solve the fundamental divisions within the Israeli public, but still it will lead to a concentration of splinter parties which will make any kind of negotiations either before or after the elections much simpler.

You mentioned that having the direct election of the prime minister might only result in shifting the process of political horsetrading from after the elections to an earlier stage. This should be considered a

serious objection because it might lead the two candidates again to give promises which will have to be fulfilled after the election of the prime minister by the winning candidate.

The question of the power of the purse should be addressed quite squarely. The parliament will still retain the power of passing or rejecting the budget, probably by a simple majority. I do not think it can be different. Therefore, a deadlock may be created between the prime minister and the Knesset. How do you propose to solve that deadlock?

Furthermore, giving the prime minister more power leaves out of account the institution of the presidency. Do you intend to leave the presidential powers, which are mainly of a ceremonial nature, unchanged, or will you also give additional powers to the president?

As regards checks and balances, this is obviously agreed on all sides. The question is whether giving the Knesset more power over secondary legislation will contribute to checks and balances. There is a great danger that the legislative process may be impeded by giving the Knesset too much power to legislate on subjects which so far have been left to secondary legislation.

Finally, let me voice one warning about utilizing a territorial base for the electoral process. Please do not forget the danger of what the Americans call jerryandering in the formation of the various electoral districts. And please do not entrust that power to the Supreme Court of Israel, which already is overburdened, be it through its own activism or for external reasons. I would be very apprehensive of that.

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