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ISRAEL AT FIFTY: SOME ISSUES IN BUILDING A PROPER DEMOCRATIC POLITY

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Some Outstanding Issues in Israel's Polity-Building / Learning to Cope with Direct Elections / Needed: A New Kind of Politics / The Supreme Court and Judicial Review / Are Constitutional Limits on the High Court of Justice Democratic? / The Court and Israel's Understanding of Democracy / The Jerusalem Center's Intended Contribution Toward an Attractive Israel for the Next Century

Some Outstanding Issues in Israel's Polity-Building

Israel's political system reflects the many antecedents of Israel as a state. Most immediately it draws upon the European ideas of statism and statehood, specifically as expressed on the European continent and in Central and Eastern Europe at that. That basic strand is modified by another strand drawn from the English parliamentary system, widely admired by the founding fathers and mothers of the Jewish state. These strands are modified or redirected by the political cultures that Jews brought with them from their countries and regions of origin when they settled in Eretz Israel. Underlying all of this is the Jewish political tradition as it survived and developed through the long history of Jewish exile and shaped some of the political ideas and much of the political culture and behavior of the Jewish citizens of the new state.

The end result was that Israel was born with:

(1) a parliamentary system introduced in the pre-state period, expanded and refined with its center in Israel's Knesset, (2) parliamentary (cabinet) government, whereby the "government" is, in essence, the executive committee of the parliament, (3) a centralized hierarchical bureaucracy for the country, (4) a proportional election system to choose the Knesset members through (5) an ideologically-based party system that reflected the different visions of the state developed within the Zionist movement or by those outside of it.

Although Israel did not adopt a constitution immediately upon acquiring statehood, its institutions were rather well set in the prestate period and they and their direction were matters of general consensus. The decision of the Knesset to enact a constitution piecemeal through the writing of Basic Laws whenever a constitutional matter was seen to have a consensus behind it led to the adoption of Basic Laws formally establishing those

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institutions as constitutional ones in the 1950s and early 1960s, albeit with some subsequent modifications.

Aside from the problems involved in building a state that is both Jewish and democratic, in the late 1960s that original consensus was challenged in various quarters. Proposals began to be put forth for modifying the parliamentary system by introducing mechanisms more common to congressional and separation-of-powers systems of government. One change was introduced easily. Unlike "true" parliamentary systems, Knesset committees acquired real functions and even "teeth." They can influence budget-making. They can hold hearings. They can call executive officials to account. They must approve ministerial orders.

Four other proposals have drawn particular attention. One is Knesset electoral reform, to move from strictly proportional elections to district constituencies. While the strict proportionality of the electoral system adopted even prior to statehood has been modified to provide a floor of 1 1/2 percent which an electoral list must attain before being able to enter the Knesset, basic changes in the system beyond that have been unable to muster the necessary support to be enacted.

In the other three matters, significant changes have been introduced. They include: (1) direct election of the prime minister, (2) empowering Israel's Supreme Court to rule on the constitutionality of Knesset legislation, and (3) the introduction of constitutional protections of individual rights into Israel's Basic Laws as part of Israel's emerging constitution.

On Israel's fiftieth anniversary we are in the middle of the first term of a directly elected prime minister. This constitutional change was adopted by the Knesset rather suddenly in 1992, more like a "thief in the night" than a constitutional reform, after a long campaign by several groups of reformers, and was first implemented in the 1996 election. The results led to a great deal of criticism of the change. Most of the vocal criticism came from the Labor opposition to Binyamin Netanyahu's victory at the polls. It was not only partisan but, since most of those who voiced their opposition had opposed the constitutional change in the first place, in many respects it simply reflected a continuation of their earlier views.

One of the problems that the opposition had with the new system was that they were frustrated by continuing to play politics the old way with no success at a time when a new way was required. This requires some examination.

Learning to Cope with Direct Elections

In recent months there has been considerable discussion, pro and con, about the virtues of the new system of direct election of the prime minister and the changes made in Israel's Basic Laws to accommodate it. Not surprisingly, the discussion has been partisan, ideological, and often confused. Not that there is anything wrong with partisan and ideologically-based discussions, but it is always helpful to try to minimize confusion.

Also, not surprisingly, both supporters and opponents of the new system have concentrated their attention on its formal aspects. What has gone unrecognized is that the new system requires a new kind of politics. Close attention should be paid to what really happens in the United States and other countries where the chief executive is elected separately from the legislature or, for that matter, in Israeli local government which for twenty years now has functioned with the direct election of mayors.

Israeli politics is based upon the fact that Israel has been a parliamentary system. Its politicians have grown up within that system and have achieved the positions that they have by learning how to master it. Parliamentary systems are based first and foremost on ruling parties or coalitions and oppositions, that is to say, on the reality that one party or coalition of parties takes control of the parliament by winning the general election or putting together a majority of seats, and after that must maintain party or coalition discipline to stay in power. It loses power when that discipline dissolves and the opposition is able to defeat it in a parliamentary vote on critical issues. The system demands disciplined parties and party or coalition agreements on a comprehensive program which all members of the ruling group will support in parliament and all members of the opposition will automatically oppose, because that is the way the game is played.

Where the chief executive is directly elected, introducing full separation of powers or strong elements of separation in the political system, the whole game is turned on its head. Chief executives are secure in office until the next election but, to be considered successful and to win reelection, they must govern and assume more responsibility for the effectiveness of government. To do this their principal task is not to build a grand coalition at the beginning of their term and then rely upon its fidelity throughout; rather it is to build appropriate coalitions issue by issue, using the

fixed executive term as a bargaining chip to do so.

As every American president quickly learns, if he does not come to office knowing it, a chief executive who thinks that because he has been elected to office for a fixed term he is entitled to rule, which quite frankly is what happened in Netanyahu's case at the very beginning of his term, is sadly mistaken. He is entitled to reign for four years which gives him the opportunity to rule in cooperation with the other branches of government, but he can only do so if he can make the system work. Anyone who knows anything about the American presidency knows that even that powerful office is almost totally contingent upon the effectiveness of the president in using the powers at his disposal to negotiate his program through Congress, guide the bureaucracy, and bargain in the international arena. A chief executive who does not approach his position as one which simply gives him the tools for negotiating soon finds himself in hot water, if not politically fatal trouble.

By the same token, the opposition also has to conduct a different style of politics. In parliamentary systems it is enough for the opposition to oppose, to concentrate its efforts on trying to bring down the government so that the opposition may form a new one at any time in the period between general elections. With that opportunity effectively precluded by the direct election-fixed term system, the task of the opposition is not to call for repeated and meaningless votes of confidence which seem to create a perception among the public that all the opposition is capable of doing is to try to drive the government crazy by niggling confidence votes that distract ministers from their really important tasks. This can, indeed, be disruptive, but it does not win the opposition either power or credit. Rather, the opposition must find ways to selectively cooperate with the sitting government as well as to oppose it selectively. Simply being an opposition no longer is sufficient.

More than that, legislatures can never do more than legislate and oversee the implementation of a legislative program. Executing and administering can only be done by the executive. This is true even in parliamentary systems, which is why in countries like Great Britain a government once installed is free to do almost whatever it pleases, supported by the basic principle of parliamentarism which is party loyalty.

Needed: A New Kind of Politics

This is even more true in certain respects where the chief executive is directly elected. Legislatures that try

to do the executive's job not only fail but do not do their own, either in the realm of legislation or in the realm of oversight. In the United States, Newt Gingrich discovered this in the years after the stunning Republican victory of 1994. Although the Republicans controlled the Congress and he as Speaker of the House of Representatives was seen as the most powerful Republican in Congress, by running Congress as an oppositionist and actually bringing the U.S. federal government to a halt over budgetary disputes, the Republicans gained the reputation of oppositionists rather than effective governors and paid a price for that at the polls in 1996. Since then, Gingrich seems to have learned that the trick is to cooperate in such a way that by negotiating with the chief executive, the program that emerges reflects the opposition's input to a greater or lesser extent, in other words, leads to real achievement and the public credit that brings.

This kind of politics is very foreign to Israelis, including Israeli politicians, but it is the politics that is called for and that works. More than that, it is the politics that makes for more democratic and more effective government. Governments are no longer able to run roughshod over the popular will because of a majority or sometimes a plurality won at a general election that sustains them for four or five years in power, even after conditions have changed, as is usually true in parliamentary systems despite the theoretical power of the legislature to bring governments down. Nor are oppositions able to use all the tricks that Israelis came to know so well to bribe other members of the legislature, either in groups or as individuals, to join with them to bring the sitting government down. Instead, both sides have to look at programs and policies and seek to build support for them, both executive and legislative, and popular as well, to move them forward.

No political system is perfect. One can point to virtues and flaws in both traditional parliamentary and direct election systems. One simply has to try to balance the two to draw one's conclusions as to what is better, but one has to understand, one cannot use the model of one to judge the other. Nor does formal change of a system automatically bring with it an understanding of the new political procedures required to make a different system work.

In our study of mayors and councils in Israel under the direct election system, we discovered that it took about fifteen years for the politicians involved to learn that a new system of politics was required, what it involved, and how to make it work. Perhaps if Israel's

politicians active in the state's governance were to know that there was something for them to learn and that it could be learned, at least in part, from observing how Israel's municipal governments have come to work, they could cut down the length of time that the municipal elected officials required. (This would have the additional advantage of perhaps showing them how municipalities can be used as laboratories for testing new ideas, programs, and procedures in government as well.) But however it is done, the learning must take place.

The Supreme Court and Judicial Review

Israel's Supreme Court began to exercise limited powers of judicial review of Knesset actions as early as 1969 and in the intervening thirty years carefully expanded its exercise of those powers. Still it was not until 1992 that Basic Laws were enacted or amended to explicitly provide for judicial review of legislation on constitutional grounds rather than only on the procedural grounds which had been used prior to that. The Supreme Court has not been bashful in exercising those powers, leading to a new public debate as to how far Israel should go toward becoming a "judicial democracy" in which the high court has the last word in many matters.

Are Constitutional Limits on the High Court of Justice Democratic?

Public debate being what it is, especially when "hot" issues are involved, it is not surprising that the newspapers have been filled with attacks on Israel's present and former prime ministers' agreement with Shas to limit the authority of the High Court of Justice to change matters regarding the religious status quo. Feature writers, columnists, and editorialists have been hot under the collar denouncing the agreement as undemocratic. This is somewhat ironic.

Only a few years ago in Israel any suggestion that a constitutional court could declare actions of the Knesset to be invalid was considered to be the height of "undemocratic," since Israeli opinion-molders had embraced the theory of parliamentary supremacy as the essence of democracy, lock, stock, and barrel. Now we hear just the opposite, that Knesset-imposed limits on the High Court are the height of "undemocratic."

In fact, both judicial review and parliamentary limitations on judicial review are fully in accord with democracy and, indeed, both are necessary to preserve democracy. The preservation of democracy requires that no single source of governmental authority have

full or exclusive powers. Even if in theory the source is the most democratic possible, unless its powers are limited, checked and balanced, in practice, democracy cannot survive. That is why judicial review is important, especially in the field of human rights.

On the other hand, empowering the courts in an unrestricted manner vitiates the role of the people and their representatives, itself a different kind of undemocratic act but just as undemocratic. That is why constitutions and constitutionalism have become the basis of democratic government. Constitutions can both empower and limit the organs of government, executive, legislative, and judicial.

There is nothing undemocratic about the legislature of a state empowering a constitutional court or limiting the power of a constitutional court, as long as it is done in a constitutional manner. Recently the Supreme Court of the United States, the country where modern constitutionalism with checks and balances and judicial review was first designed and effectively implemented, handed down a decision of constitutional interpretation on matters affecting relations between religion and state in that country which alarmed various groups including the Jewish community. The latter combined to press the U.S. Congress to reverse those decisions, which the Congress did. It should be noted that the Court subsequently overruled Congress. Of course there was a debate over whether they should do so or not, but the debate did not hinge on questions of democracy but on the substantive issues involved.

It is agreed in the United States that the Supreme Court has jurisdiction, but in many areas of jurisdiction that jurisdiction can be modified or new legislation can be adopted by Congress that, for all intents and purposes, reverses the Supreme Court's decision or limits the Court's power to decide on constitutionality. The balance between the two is never permanently fixed since the court, to a degree, can review that legislation, but it is limited and it accepts its limitations.

Moreover, the constitution itself is a limiting device. While, for example, the U.S. Supreme Court may interpret its understanding of the system of apportionment of Congressional districts, it has no authority whatsoever to determine how many Senators or Representatives a state may have. Those matters are fixed in the U.S. Constitution and can only be changed by constitutional amendment adopted by a two-thirds vote in Congress and by three-quarters of the states. Those special majorities are considered constitutional protections, not limitations on democracy, by a people that has had over two hundred years of experience living under its

constitution, nearly two hundred more as self-governing colonies developing their democratic principles before they adopted their constitutions, and are heirs to a constitutional tradition that goes back at least to Magna Carta in 1215.

Thus if the Knesset decides by constitutional amendment to limit judicial review, for that is what changing the Basic Law involves, it can do so, just as it could formally empower the High Court of Justice to undertake judicial review without in any respect impairing "democracy."

The Court and Israel's Understanding of Democracy

The real philosophic issue regarding the agreement with Shas is, of course, how to understand democracy. Abroad in the land is a particular conception of democracy as only involving individual rights and a view that Israel's character as a Jewish state should not stand in the way of protecting the rights of individuals to do whatever they please in a whole host of areas in which they have been limited by the effort to preserve the state's special character. Ironically, that character rests upon the world's oldest living constitutional tradition, that of the Jewish people, which has been based upon checks and balances for the past 3,200 years: It is a tradition that had developed elaborate theories of republican government centuries before Magna Carta and had implemented them in practice in Jewish communities throughout the world. It is true that the traditional Jewish understanding of what are today called individual rights is different from the modern understanding. One can choose the latter over the former, a matter which is at the heart of the opposition to the deal with Shas. But that is a matter of competing conceptions of democracy and perhaps competing conceptions of Judaism as well, which is a very different issue.

Many of the Supreme Court's most far-reaching decisions deal with the protection of individual rights under the two recent Basic Laws dealing with Human Dignity and Liberty and Freedom of Occupation. Religious and other traditional practices and restrictions on practices have been challenged by individuals under these Basic Laws and brought before the court, which has rather regularly ruled against the status quo and on behalf of new extensions of freedom of choice. In almost every case efforts are then made in the Knesset to amend the Basic Laws to restore the status quo ante. Sometimes these succeed as in the recent case of extending the ban on the importation of non-kosher meat, which had previously been legislatively forbidden

but which the Supreme Court had ruled was not possible for the Knesset to prohibit under the Basic Law dealing with Freedom of Occupation. In other cases the Knesset has been unable to change Court decisions as in the case of the decision allowing a Reform woman representative member to take her seat on the Netanya Religious Council.

Israel's democracy, like all others, has its imperfections, some stemming from the environment from which most of the Jews now in Israel or their forbearers originally came, while others may be related to flaws in Jewish culture. Still, Israel is undoubtedly a democracy and quite a successful one at that. After 1948, because Israel was an outpost of Western democracy in an undemocratic Eastern sea, it not only wisely turned westward to the United States for its security and as a model for so much of what it sought to learn from the outside, but it also continued and strengthened its identification as an eastern outpost of Europe. This was natural enough given the situation and the fears on the part of Israel's established Ashkenazim of "Levantinization." In truth, the Eastern European majority in Israel was far less "European" than it understood itself to be and most of the so-called Levantinization that took place in Israel in those first decades of the state's existence were really manifestations of the eastern patterns from Eastern Europe rather than the Middle East — the north's east rather than the south's.

We are still living with these tensions and realities. They offer Israel a chance to reshape itself as part of the Mediterranean-West Asian region, once again becoming a world crossroads where Europeans, Asians, and Africans meet on their own grounds. Israel's commitment to Europe was unrequited as the European states preferred the Arabs and their oil. More recently Israel has joined with another Asian state with unrequited European aspirations — Turkey — and with Jordan whose king has similar aspirations, to begin to build a democratizing coalition in its own region which could turn out to be a great service for Israel and for the world.

The Jerusalem Center's Intended Contribution Toward an Attractive Israel for the Next Century

On the one hundredth anniversary of the Zionist movement (1997), the fiftieth anniversary of the State of Israel (1998), and near the end of the twentieth century, Israel is called upon by its history, its present circumstances, and its public to adapt itself to the emerging new realities of the world. It is a certainty that it will have to adapt in order to survive. It can do

so in one of two ways, either by simply being borne along by the tides of change, moving this way and that as a result of accident or force, or its leaders and public can consider its situation and decide which directions to take on the basis of reflection and choice.

At present we seem to be buffeted along by the winds and tides, entering the world of globalization with no serious consideration of how Israel should adapt to it. Witness the indiscriminate introduction of foreign ownership of high-end, medium-tech enterprises and the instruments of globalized consumerism including fast food, shopping malls, and the like. Consider the introduction of masses of foreign workers based upon short-term needs without giving thought to long-term problems. Most of all there is the rush on the part of many Israelis to abandon everything distinctively Jewish about Israel even for cheap, kitschy, or counterfeit "Western" substitutes on the mistaken assumption that this will make them more acceptable to the larger world.

The Jerusalem Center for Public Affairs sees its contribution as part of the effort to replace the old socialist-centralized system of Israel's first eighty years with a more open, nonhierarchical, market-oriented system of choice, whose basic Jewish norms are reinforced by a culture and an educational system that will help encourage those who enjoy this valuable freedom of choice to make the right choices. Eliminating the old system brings with it its own dangers, but our commitment to human freedom, not to speak of the fact that the Israeli public insists upon greater freedom,

means that other options are more or less foreclosed to us. But what must be available formally must be shaped by instilling the right "habits of the heart" in new generations of Israelis. Thus the Jerusalem Center seeks, on one hand, to replace the old system and, on the other hand, to build an appropriately normative new one.

This means that the work that we do through our studies, seminars, conferences, and publications are designed both to develop appropriate understandings and to recommend courses of action for the future. Much of what we do may seem "descriptive," but even moderately careful reading will show that it is designed to advance an understanding which has been absent as a result of the all-encompassing, socialist-centralized system of the past, and to point people toward a new, more open, nonhierarchical understanding.

The Jerusalem Center operates on the assumption that we are speaking to intelligent people. Intelligent people, if they have the proper understanding, can draw their own conclusions and those conclusions will be reasonable. This is what we have tried to do during our first twenty years with some notable successes. It is what we will continue trying to do to the best of our ability, changing the specifics of our agenda as the times and the circumstances require.

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