

The Primaries System and Its Constitutional Effect: Where Is the Revolution?

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INTRODUCTION: REVOLUTION SKEPTICISM

The voluntary adoption of the primaries system by political parties in Israel¹ during the 1990s has been described by Eyal Benvenisti² as a change that had revolutionary significance for Israeli constitutional law. This comment will suggest a critical evaluation of this description. Benvenisti's argument, as restated here, although an interesting one,³ seems much overstated.

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1 The voluntary nature of the move towards adopting the primaries system in Israel must be seen against the background of American elections law. In the United States, the states enacted mandatory primaries laws, starting at the beginning of the twentieth century, in order to democratize the process of selecting election nominees. Today, with the primaries system an established fact in the United States, the relevant legal controversies center on legislation that takes a stand on the matter of the choice between "closed" primaries (only those with party affiliation can participate) and "open" primaries. See, e.g., Note, *Developments in the Law — Elections*, 88 Harv. L. Rev. 1111, 1151-1217 (1975); Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117 (1984); David Lubecky, Comment, *Setting Voter Qualifications for State Primary Elections: Reassertion of the Right of State Political Parties to Self-Determination*, 55 U. Cin. L. Rev. 799 (1987); Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office; The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*, 36 Tulsa L.J. 59 (2000); Aimee Dudovitz, *California Democratic Party v. Jones: The Constitutionality of Blanket Primary Laws*, 44 N.Y.L. Sch. L. Rev. 13 (2000).

2 Eyal Benvenisti, *Israel 1992: An Accidental Constitutional Reform Created by the Introduction of Party Primaries*, 3 Theoretical Inquiries L. 175 (2002).

3 Thus far, the flourishing and relatively new economic analysis of elections law has tended to center on the significance of the choice between alternative models of general elections, rather than on the effects of the political parties' internal election

According to Benvenisti, due to the introduction of the primaries system, every individual Knesset (Parliament) Member (hereinafter "MK") is now required to foster his or her own unique role in the Knesset, and the result is a more active Knesset, which does not necessarily serve the interests of the leaders of the two major parties anymore. Moreover, argues Benvenisti, the personal interest of every MK in attracting attention usually outweighs other considerations, and again, the byproduct is an independent Knesset and a corresponding complete change in the power relations between the government and legislature. Finally, he argues that the independent MKs may join forces with their counterparts in rival parties when this could win support from their constituents and that such cooperation is a potential source of power for secular politics, which could never have developed when the individual MKs were selected by a party committee and were therefore afraid to support initiatives of rival parties.

There is no doubt that individual MKs who have the incentive to be reelected in their party's primaries will try to attract voter attention and will not be particularly obedient to the instructions of their party leaders — political bosses who no longer have absolute power over them. I am skeptical, however, whether this is a source of any qualitative change in the relationship between the government and legislature. This comment will outline my skepticism, based on theoretical considerations as well as empiric observations.

I. THEORY: COLLECTIVE ACTION CONCERNS

On the theoretical level, I am doubtful as to whether the inclination of many MKs to be legislatively active necessarily produces a powerful legislature.

First, it is important to realize that the relative independence of MKs subject to a primaries system can be obstructive to both the government and the opposition leaders in the Knesset. The coalition may be harder to control (from the government's perspective), but a similar problem may be

procedures. See, e.g., Symposium, *Law and the Political Process*, 50 Stan. L. Rev. 605 (1998); Symposium, *The Law and Economics of Elections*, 85 Va. L. Rev. 1533 (1999). In this sense, Benvenisti's argument brings to the forefront a new and interesting perspective for research. It should be noted that Issacharoff and Pildes have pointed out that public choice theory has devoted too little attention to the role political parties play in a democracy. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 711 (1998).

faced by the Opposition: MKs from parties that do not officially support the government may surprise their leaders and vote for government initiatives that are beneficial to their constituencies. In other words, there is a real possibility that the Opposition, too, may have to contend with a severe collective action problem.

For the same reason, the argument pointing to the new prospects for the development of secular politics should be seen as a double-edged sword. It may be true that popular secular MKs may not hesitate to refrain from supporting pro-religious initiatives their party leaders would have sought to promote in order to gain the support of the religious parties. However, this mechanism also can operate in the opposite direction: a secular agenda promoted by a party's leaders (most likely from the Labor Party) will not necessarily enjoy the immediate support of all that party's MKs, who may have contradicting sentiments and inclinations. These could include, among others, Arab MKs who occasionally share interests with the ultra-orthodox Jewish parties, most notably in the matter of exemption from mandatory military service. Moreover, whereas backbenchers may not hesitate to infuriate the religious parties, politicians seeking to promote their political careers will need to earn also the religious vote. This is especially true if they aspire to ever run as candidates for Prime Minister.

It should be added that MKs from ruling parties may have yet another incentive to obey their leaders. Party discipline is a basis for ministerial positions as well as for appointments to chair parliamentary committees and other influential positions. This incentive must be weighed against the counter-incentive to be independent in order to attract attention from voters, to score points towards the next primaries, which may be a few years in the distance.

Even assuming that the Opposition could effectively block government initiatives, its ability to unite to support a significant legislative initiative requiring a continuous effort for a relatively long period of time is doubtful. Many MKs would prefer to be involved in less-demanding legislative initiatives that will produce quick, though not necessarily significant, political victories. They would prefer bills that are newsworthy, but do not have any real prospects of changing reality. In other words, a "hyperactive" Knesset is not necessarily an effective one vis-à-vis long-term and less glamorous projects. The collective action problem strikes again.

II. FACTS: NON-CONCLUSIVE FINDINGS

I believe that close observation of real politics in Israel supports the doubts I raise above.

A. Legislation or Effective Legislation

Many of the new laws originating in private legislation bills are not of much practical effect. The implementation of many social laws (such as the Public Housing Law (Purchase Rights), 1998⁴) has been postponed as part of coalition deals made to get the new budget law passed at the end of every budget year.⁵ Many MKs who gave their support to the original bill are more content to "rest back" on their symbolic victory of the past and less interested in securing the actual implementation of the bill. Other celebrated laws, such as the Pupils Rights Law, 2000,⁶ are more declarative than operative in nature. The Pupils Rights Law, for example, is comprised of provisions that are mainly a consolidation of existing provisions from other statutes or long-recognized case law principles. The Mandatory Tenders Law, 1992,⁷ an example of the Knesset's new tendency to enact laws that limit the executive, is also an example of the symbolic, as opposed to efficacious, nature of many new laws. While the Law does impose a general duty on government organs to conduct a public tender for contracts,⁸ in actuality, even prior to its enactment, the government conducted public tenders as a policy rule, which was enforced by the courts.⁹ Moreover, the new Law's declarative significance notwithstanding, it provides the relevant ministers with wide authority to exempt contracts from the tender process,¹⁰ an authority that has been very leniently exercised from the government's perspective.¹¹ The

4 S.H. 2. This Law provides for the right to buy government-owned housing at subsidized prices.

5 *See, e.g.*, Regulation of State Economy Law (Reaching Goals for Year 1999), 1998, § 37, S.H. 90; Regulation of State Economy Law (Legislative Amendments for Achieving the Goals of the Budget and the Economic Policy for the Fiscal Year 2001), 2001, § 23, S.H. 227.

6 S.H. 42.

7 Mandatory Tenders Law, 1992, S.H. 114.

8 *Id.* § 2

9 *See, e.g.*, H.C. 4422/92, *Afran v. Israel Land Admin.*, 47(3) P.D. 853.

10 Mandatory Tenders Law §§ 4-5.

11 *See, e.g.*, Mandatory Tenders Regulations, 1993, §§ 3, 25, K.T. 89, 826; Mandatory Tenders Regulations (Defense System Contracts), 1993, § 3, K.T. 89, 841.

MKs who celebrated the law were not particularly interested in putting their shoulders to the less glamorous task of criticizing the text of the proposed exemptions. It is worth noting that many of the laws enacted since the primaries system was first introduced in 1992 and which Benvenisti considers significant in the context of the balance of power between the government and the Knesset did not result from legislative initiatives of MKs from the two major parties. Notable examples are the basic laws enacted in 1992 that provide for the protection of human rights,¹² the Mandatory Tenders Law, also enacted in 1992,¹³ and the Freedom of Information Act, 1998.¹⁴

B. Only a Partial Move towards Primaries

Another fact of relevance to the claim that Israeli politics underwent a constitutional transformation following the introduction of the primaries system is the relative significance of the parties that adopted this system. Although it is true that the primaries system was adopted first by the two major parties and, in this sense, may appear to be of transformative significance, it should nonetheless be noted that at present, these two parties combined form less than 50% of the Knesset; more specifically, they hold only about one-third of the seats.¹⁵ The question then arises whether such a partial change has real potential to transform the operational patterns of the Knesset.

The possible impact of the primaries has been even further diluted by the continued practice in the two major parties of guaranteeing places on their party lists to candidates elected outside the general primaries process — candidates elected in a regional election process and sectoral representatives (Arabs, new immigrants under the Law of Return, and women), who are guaranteed a realistic place on the party list, in terms of being elected to the

12 Basic Law: Freedom of Occupation, 1992, S.H. 114, and Basic Law: Human Dignity and Liberty, 1992, S.H. 150, were both enacted as a result of the political initiative of MK Amnon Rubinstein from the Meretz Party.

13 This was the result of a private bill initiated by Meretz MK Mordechai Virshovski in 1991 (Draft Bill: Tenders Law, 1991, H.H. 196).

14 S.H. 226. This Law was enacted as a result of the Draft Bill: Freedom of Information Act, 1997, H.H. 397, proposed by the government. While it is true that it was the legislative activism of certain individual MKs that pushed the government to initiate this bill, the overriding majority of those MKs were not from parties using the primaries system. For example, the Draft Bill: Freedom of Information Act, 1996, H.H. 608, which preceded the government bill from 1997, was submitted by MKs from five parties: Meretz, Labor, Zomet, Mafdal, and Likud.

15 These data apply to the Fifteenth Knesset, elected in 1999.

Knesset, if their results in the primaries cannot ensure this. These candidates are more easily controlled by the party leaders due to the latter's influence on the place they are given on the party's final list of candidates for the Knesset.

C. The Absence of Unique Patterns of Activity among MKs Subject to Primaries

Another empiric inquiry that could contribute to this discussion would be a comparison between the patterns of political action of MKs from parties with primaries and MKs from parties without this system. Are MKs of the latter type more inclined to be "submissive" and less headline-seeking? No comparative data of this kind are available, but my initial prediction would be that no significant discrepancy would be found between the two types of MKs. Knesset members are all inclined to seek personal attention, with no direct relation to their prospects of facing primaries in their parties. It may be noteworthy that MKs from the ultra-orthodox Jewish (*Haredi*) parties, for example, are extremely politically and legislatively active even though they do not face primaries and there is not the slightest chance of their parties ever adopting such a process.¹⁶ There are two main reasons for this. First, all parties, even those without primaries, have the incentive of drawing voters by having attractive and popular candidates on the party list; second, the expansion of the media and communication channels in Israel (private radio stations, private television stations, etc.) has led to a greater audience potential, which, in itself, constitutes an incentive for political figures who enjoy publicity to seek exposure through independent political initiatives. In fact, most of the prominent legislators in the Knesset are MKs from the smaller parties, which have not taken part in the move towards primaries.

A preliminary survey I have conducted comparing the average output of the various parties in terms of parliamentary activity has established my initial predictions regarding the absence of unique patterns of activity among MKs subject to primaries.¹⁷

16 The ultra-orthodox parties follow a tradition of Rabbis, their spiritual leaders, selecting the party candidates.

17 Data on the average number of parliamentary actions by the various parties:

A. Thirteenth Knesset (1992-1996)

1. Legislative Bills:

Ranked 1st — Mafdal (religious party) (no primaries) (50.66 per MK) [304 bills by 6 MKs];

Ranked 2nd — Hadash (communist party) (no primaries) (50 per MK) [562 bills by 12 MKs];

D. The Democratization of the Parties prior to the Introduction of the Primaries System

It is important to note that when the primaries system was first introduced into Israeli politics, the two major parties, Labor and Likud, had already

Ranked 3rd — Meretz (Zionist left-wing party) (no primaries) (46.8 per MK) [150 bills by 3 MKs].

2. Enacted Laws:

Ranked 1st — Hadash (9.33 per MK) [28 laws by 3 MKs];

Ranked 2nd — Meretz (6.25 per MK) [75 laws by 12 MKs];

Ranked 3rd — Mafdal (4.16 per MK) [25 laws by 6 MKs].

3. Questions Posed to the Government:

Ranked 1st — Yahadut Hatora (ultra-orthodox party) (no primaries) (78 per MK) [312 questions by 4 MKs];

Ranked 2nd — Mada (Arab party) (no primaries) (69.5 per MK) [139 questions by 2 MKs];

Ranked 3rd — Shas (Sephardic ultra-orthodox party) (no primaries) (58.83 per MK) [353 questions by 6 MKs].

4. Proposals for Discussion in Knesset:

Ranked 1st — Mada (46.5 per MK) [93 proposals by 2 MKs];

Ranked 2nd — Moledet (right-wing party) (no primaries) (44.33 per MK) [133 proposals by 3 MKs];

Ranked 3rd — Mafdal (44 per MK) [264 proposals by 6 MKs].

*These data do not include the last two sessions of the Thirteenth Knesset, for which there were no detailed records in the official documents, but these missing data could have no effect on the conclusions from the data presented here, from four years of sessions.

B. Fourteenth Knesset (1996-1999):

1. Legislative Bills:

Ranked 1st — Meretz (114.22 per MK) [1028 bills by 9 MKs];

Ranked 2nd — Hadash (104.4 per MK) [522 bills by 5 MKs];

Ranked 3rd — Mada (54 per MK) [216 bills by 4 MKs].

2. Enacted Laws:

Ranked 1st — Meretz (10.44 per MK) [94 laws by 9 MKs];

Ranked 2nd — Hadash (7.2 per MK) [36 laws by 5 MKs];

Ranked 3rd — Labor (primaries) (4.5 per MK) [153 laws by 34 MKs].

3. Questions Posed to the Government:

Ranked 1st — Hadash (67.2 per MK) [336 questions by 5 MKs];

Ranked 2nd — Mada (58.75 per MK) [235 questions by 4 MKs];

Ranked 3rd — Shas (53.3 per MK) [533 questions by 10 MKs] and Yahadut Hatora (53.25 per MK) [213 questions by 4 MKs].

4. Proposals for Discussion in Knesset:

Ranked 1st — Moledet (53 per MK) [106 proposals by 2 MKs];

Ranked 2nd — Hadash (43 per MK) [215 proposals by 5 MKs];

Ranked 3rd — Mada (40.5 per MK) [162 proposals by 4 MKs].

abandoned the system of the party's candidates for elections being selected by a small group of party bosses. Several years prior to the introduction of primaries, these two parties adopted more democratic forms of candidate selection, mainly by a vote in the central organs, which comprise a few thousand members. Thus, the incentive of MKs to attract public attention, even at the price of being less popular with their party leadership, existed during this period as well, as the members of the party's voting body were also inclined to support MKs with notable activities. Admittedly, the parties' central organs were more easily controlled by the party leaders, in contrast to the voters in the primaries, but this control was only partial.

E. Signs of Secular Politics?

The dynamics of religious politics in the Knesset clearly show that the relative strength of the religious lobby did not dwindle with the introduction of primaries. The most telling finding in this context is the total suspension of the project of enacting basic laws guaranteeing human rights.¹⁸ The central reason for this freeze has been the religious parties' fierce opposition to the project, developed when its potential threat to religious-oriented legislation emerged in the Supreme Court's constitutional jurisprudence.¹⁹

Furthermore, while it is true that the Knesset did not unite to support formal legislation of the long-standing exemption from military service granted to the ultra-orthodox, this omission cannot be considered a vote of silence in favor of canceling the practice of exemption (on the assumption that the government will follow the Supreme Court's precedential holding that such an exemption may be legal only if statutorily arranged).²⁰ A bill providing for this exemption is still going through the long process of drafting,²¹ but as an intermediate solution, the Knesset has enacted laws

18 Since the enactment of Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty in 1992.

19 H.C. 3872/93, *Meatrael v. Prime Minister*, 47(5) P.D. 485.

20 H.C. 3267/97, *Rubinstein v. Minister of Defense*, 52(5) P.D. 481.

21 During the first year and a half of the Fifteenth Knesset, before the resignation of Prime Minister Barak (which led to the election of Ariel Sharon as Prime Minister in special elections for Prime Minister held on February 6, 2001), the Labor leadership, which headed the coalition, did not give its full support to the initiative to enact the exemption. Labor's motivation was to discipline the ultra-orthodox parties with the "threat" of military service because they were inclined to support the Opposition right-wing parties.

extending the validity of the prevailing administrative arrangements, which, in fact, amount to exemptions for the ultra-orthodox from military service.

In the year 2000, the Knesset passed a law giving extra national insurance payments to large families,²² which applies mainly to the Jewish ultra-orthodox community. Some MKs who supported this bill openly admitted that they did so in order to win the political support of the religious parties. It is interesting to note that this amendment was supported also by Arab MKs, who realized its potential benefit to their constituents, proving, once again, that the independence of MKs can work not only to the advantage of secular politics.

III. WHEN TWO REVOLUTIONS CONVERGE

Paradoxically, the potential of the primaries system to effect significant political change was wasted because of the changes in the elections system produced by Basic Law: The Government, enacted in 1992, the same time at which primaries were adopted by Israeli political parties.²³ The system of direct elections for Prime Minister under the Basic Law gave the Israeli voters the option of splitting their vote: they could now vote for a candidate for Prime Minister from one party and then vote for another party for the Knesset. This new system weakened significantly the two major parties, because it enabled voters to support sector parties, yet still elect the country's leader. Had the Knesset continued to be dominated by two main parties, the effect of the primaries could have made a significant mark on Israeli politics. However, in light of the current size in the Knesset of the parties that did adopt the primaries system, the revolution, if we are to accept, for argument's sake, that one really did occur, has become very limited in scope. The growing power of the small parties, which have been strengthened by the new split-vote system, has been the major factor for the rise in sectoral legislation, and this change should be considered of more revolutionary importance than the legislative independence of the MKs from the two major parties since the introduction of primaries.

As this comment is being written, the Knesset has abolished the reform rendered by the 1992 Basic Law: The Government, which provided for

22 National Insurance (Amendment No. 41) (Assistance to Families Blessed with Children) Law, 2000, S.H. 2.

23 This Basic Law was first implemented in the elections to the Fourteenth Knesset in 1996, but affected the political system even prior to this.

direct elections for Prime Minister, and has replaced it with an old-new version of the Basic Law²⁴ that sets forth a traditional parliamentary system, under which the Knesset elects the Prime Minister. This change may breathe new life into the discussion of the impact of the primaries system on Israeli politics, in the event that the major parties decide to continue electing their candidates by this method.

24 Basic Law: The Government, 2001, S.H. 158.