International Perspective

THE CONSTITUTIONAL DEBATE IN ISRAEL

David Kretzmer

In order to understand the present debate over constitutional reform in Israel one must have some knowledge of the historical background to Israel's present constitutional system.

Israel's Declaration of Independence of May 14, 1948 stated explicitly that the new state would have a formal constitution drawn up by a special constituent assembly. The constituent assembly was duly elected, but even before its election a debate had broken out over whether the time was indeed ripe for adoption of a formal constitution. The first prime minister, David Ben-Gurion, who headed the Mapai labour party, the dominant party at the time, saw very little reason for adoption of a constitution whose main objective would be to place limits on the powers of government. He argued that drawing up a constitution was premature, as only a small proportion of the Jewish people were in Israel and that those who were there could not decide on a constitution that would bind the Jewish state for all time. The opposition parties of the right and centre, who were to come to power in 1977, fully supported adoption of a formal constitution which they thought would provide some safeguards for the protection of their position in the fledgling democracy. But as always in Israeli politics there was a third force involved in the debate and this force was utterly opposed to any limits on the notion of parliamentary sovereignty. This third force was made up of the two main religious party groupings: the non-Zionist Agudat Yisrael party and the Zionist Mizrahi movement. The former argued that the Jewish people already had a constitution, the torah (meaning, in its wide sense, rabbinic law), and that it would therefore be presumptuous to call another document a constitution. The latter was afraid that adopting a constitution would inevitably place power in the hands of the judges, most of whom came from a secular-liberal tradition, and that this would upset the status quo in matters of state and religion, namely, the exclusive jurisdiction of the religious courts of the various communities (Jewish, Muslim and Christian) in matters of marriage and divorce and sabbath observance laws. The result of this debate was a compromise worked out in the constituent assembly, which had transformed itself into the first Knesset, Israel's parliament. According to this compromise, set out in a resolution known as the Harari resolution, Israel would have a formal constitution. However, that constitution would not be drawn up immediately in one document, but in a series of "basic laws" that would be prepared by the constitution and law committee of the Knesset and submitted to the Knesset for its approval.

On the strength of the Harari resolution a number of basic laws have indeed been enacted by the Knesset. These laws refer to the Knesset, Government, Judiciary, President, State Comptroller, Economy, Army and State Capital. However, two fundamental laws are missing: a bill of rights and a law defining the relationship between the basic laws and ordinary legislation. In the absence of the latter the Supreme Court has held that basic laws have no inherent superior status. It has also held, however, that the few entrenched clauses in the basic laws (i.e., clauses that expressly state that they may not be revoked or amended without a special majority) must be respected, and that legislation passed without the required special majority that is inconsistent with an entrenched clause is therefore invalid.

The two main attempts at constitutional reform that have caused controversy in Israel of late relate to adoption of a bill of rights and reform of the electoral system.

Over the years a number of proposals for a bill of rights have been submitted to the Knesset. The most recent was a bill drawn up by officials in the Ministry of Justice, who received some inspiration from the Canadian Charter. In an attempt to forestall expected political opposition, the bill included a number of concessions to expected opponents that most proponents of a bill of rights found hard to accept. First, while the bill provided that all parliamentary legislation would in theory be subject to judicial review, this would only apply to legislation passed after enactment of the bill. In other words, all existing parliamentary legislation would be immune from review. Second, the bill would not affect laws relating to marriage and divorce.

In spite of the above concessions, the bill met with fierce opposition from the same political forces that had objected to adoption of a formal constitution in 1948, namely the religious parties. Their main concern was not with the details of the bill, but over the whole notion of judicial review of parliamentary legislation. Much of the legislation favoured by these parties, such as legislation strengthening the jurisdiction of the religious courts and bolstering sabbath observance laws, can only be passed by making support for such legislation a condition for joining the parliamentary coalition needed for one of the larger parties to govern. The religious parties realise that the mere existence of a vehicle for judicial review, such as the proposed bill of rights, could enable the secular majority on the Supreme Court to overrule such legislation.

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In the present political climate in Israel, in which both of the major parties, the Likkud on the right and Labour on the centre-left, are totally dependent on the religious parties for any prospective parliamentary coalition, the political opposition of the religious parties ensured that the bill would not be passed. When the Minister of Justice agreed not to present the bill to the Knesset in order not to alienate the religious parties, the same bill was submitted as a private member's bill by an opposition member. The bill passed the preliminary reading required for all private member's bills, but under a political deal reached between the Likkud Minister of Justice and the religious parties it has since been frozen in committee.

The second point on which there has been demand for constitutional reform, especially in recent months, is the electoral system. The present system is the proportional representation system that existed in the Zionist movement in the pre-state era, and that once was fairly prevalent in some European countries. Voting in Knesset elections is for party-lists. Each list which receives at least 1% of the vote is entitled to a share in the 120 Knesset seats proportionate to the number of votes it received. This has meant that as many as fifteen parties are represented in the Knesset. No one party has ever received an absolute majority and every government has had to rely on a coalition in which the smaller parties, generally the religious parties, have an inordinate say relative to their proportion of votes.

The present system is entrenched under the Basic Law: the Knesset. This means that an absolute majority is required for all three readings of any bill amending the system. Attaining such a majority has proved formidable. The main opposition comes from the smaller parties, which have everything to lose and nothing to gain by changing the system, even if, as suggested, the new system were to be a mixed system along the lines of the German system rather than the constituency system of Britain or Canada. Although both of the large parties theoretically favour electoral reform, they cannot afford to alienate the religious parties by supporting it. Furthermore, many of the politicians in the larger parties are reluctant to support electoral reform which may weaken their personal chances of being elected. It seems, therefore, that the chance of change in the electoral system in the near future is not high.

With all this said and done, I should point out that it is by no means certain that changing the electoral system would free the system of the present need to rely on coalition governments. There are three main forces in Israeli politics: the Likkud and satellite parties of the right; the Labour and satellite parties of the left; and the religious parties. Support for Labour and Likkud is more or less equal and neither has a chance of achieving a parliamentary majority without support of the religious parties. Unless the system were amended in such a way as to destroy the religious parties, which would be regarded as unacceptable as it would deny a sizeable proportion of the public of representation, the religious parties would probably retain their strategic strength under the new system. While deputies elected by voters in a given district might prove to be more responsive to public opinion than at present, the change in the system would probably not radically alter the weaknesses in Israel's political system. These weaknesses are more a function of the schisms in Israeli society itself than of the particular electoral system.

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