

# Presidential Elements in Government

## Experimenting with Constitutional Change: Direct Election of the Prime Minister in Israel

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A constitutional experiment in which a parliamentary system of government under proportional representation was combined with the direct election of a prime minister – The system prior to 1992 – The political context of the 1992 reform – The unintended consequences of the reform in practice – The return to a pure parliamentary form of government, combined with a constructive vote of no-confidence and a prime-ministerial power to dissolve parliament.

### INTRODUCTION

The first half of the year 1992 was a momentous time in Israeli constitutional history. The narrow coalition of Prime Minister Yitzhak Shamir had come apart at the seams, and the *Knesset*, Israel's parliament, had passed legislation for early elections. The government no longer had much control over parliament, and parliamentarians both from former coalition partners and opposition parties used the window of opportunity to advance legislation that was deemed popular with the public but had met resistance from governing coalition parties in the past. In the period preceding the elections, the *Knesset* enacted two *Basic Laws* on human rights, ushering in what later became termed the 'constitutional revolution'.<sup>1</sup> In the same period, the *Knesset* also enacted a new version of the *Basic Law: The Government*,<sup>2</sup> which introduced direct election of the prime minister.

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<sup>1</sup> For a description of these Basic Laws and the constitutional revolution they created, see David Kretzmer, 'The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?', 14 *Netherlands Quarterly of Human Rights* (1996), p. 173.

<sup>2</sup> Under a resolution passed by the *Knesset* soon after the State of Israel was established, the young country's formal constitution was to be drawn-up bit by bit, in a series of Basic Laws. After some hesitation regarding the status of these Basic Laws, in 1995 the Supreme Court of Israel held that they are to be regarded as chapters in Israel's constitution. Even though they are enacted by the *Knesset* they have a preferred normative status to other legislation enacted by that body.

Proponents of direct election of the prime minister were convinced that the new system would help to cure many of the ills of the existing electoral system, a hyper-representative system which was perceived as being largely dysfunctional.<sup>3</sup> They argued that direct election of the prime minister would weaken the hand of smaller sectarian parties, thereby enhancing governability.<sup>4</sup>

The system of direct election of the prime minister remained in force for less than a decade. Three sets of elections were held under this system – two for both the prime minister and the *Knesset*, and one only for the prime minister – before the *Basic Law* that introduced the system was revoked, and Israel returned to the previous system. My intention in this paper is to recount the story of what must now be termed a ‘constitutional experiment’. As we shall see, the results of the experiment were quite different from those anticipated by those who promoted it.

## THE SYSTEM PRIOR TO DIRECT ELECTION

### *Electoral system*

Israel is a parliamentary democracy, along the lines of the English model. The *Knesset* is elected by direct universal suffrage. The prime minister must be a member of the *Knesset*, and the government is responsible to the *Knesset*. As the *Basic Law: The Government* declares:

3. The government rules by virtue of the confidence of the *Knesset*.
4. The government faces joint responsibility towards the *Knesset*...

While the system of parliamentary democracy is based on the Westminster model, the electoral system could not be more different from the British first-past-the-post plurality system. Israel’s system is an extreme proportional representation system in which voters cast their votes for closed national party-lists of candidates. Each party-list that passes the low exclusion threshold receives a proportion of the 120 seats in the *Knesset* proportionate to its share of the vote.<sup>5</sup> The elected candidates from each party are determined by their order on the party-list. This system,

<sup>3</sup> See Matthew Soberg Shugart, ‘“Extreme” Electoral Systems and the Appeal of the Mixed-Member Alternative’, in Shugart and Wattenberg (eds.), *Mixed-Member Electoral Systems: The Best of Both Worlds?* (Oxford, OUP 2001) p. 25, 47.

<sup>4</sup> See 1990 *Divrei HaKnesset* (Knesset debates), 3438. Also see Emanuele Ottolenghi, ‘Choosing a Prime Minister: Executive-Legislative Relations in Israel in the 1990s’, 10 *Journal of Legislative Studies* (2004), p. 263, 265.

<sup>5</sup> The original exclusion threshold of 1% was raised to 1.5% in 1991. In 2004 (after the last elections) the threshold was raised to 2%.

adopted when the state was established in 1948, reflected the system that existed in Zionist bodies in the pre-state period.<sup>6</sup>

Each *Knesset* is elected for a four-year term. Elections are held on a date fixed in the *Basic Law: The Knesset*. Until the changes that will be discussed here, the *Knesset* could be dissolved only by special legislation that set an early date for elections.

### *Formation of government*

After the elections the largely figure-head State President is required to consult representatives of lists elected to the *Knesset* and thereafter to request a member of the *Knesset* to form a government. If that member succeeds in putting together a government, he or she must present it to the *Knesset*. Only after the *Knesset* has approved the government in a vote of investiture does the new government assume power.

Members of the *Knesset* may at any time propose a vote of no-confidence in the government. If such a vote is carried, the government falls and the State President must go through the procedures for choosing a *Knesset* member to form a new government. The outgoing government becomes a transition government that continues to fulfill all the functions of government until a new government has received the approval of the *Knesset*.

No party list has ever gained an absolute majority in the *Knesset*. Hence, all governments formed since the establishment of the State of Israel have been coalition governments, in which three or more parties have participated. Such governments rest on a coalition agreement, or on a series of such agreements, between the various parties that are part of the coalition. These agreements set forth the basis for the policies of the government and the division of ministerial and other executive and parliamentary positions between the parties.<sup>7</sup>

<sup>6</sup> Dan Horowitz and Moshe Lissak, *The Origins of the Israeli Polity* (Tel Aviv, Am Oved 1977) p. 305.

<sup>7</sup> Since the early eighties the Supreme Court has, on a number of occasions, dealt with the constitutional status of coalition agreements and the legality of certain types of provisions included in such agreements. The Basic Law: The Knesset and the Basic Law: The Government also include provisions prohibiting certain clauses in coalition agreements and mandate publishing these agreements. For a discussion of some of these issues, see the symposium in 26 *Israel Law Review* (1992) p. 407-558.

## POLITICAL DEVELOPMENTS LEADING TO ADOPTION OF DIRECT ELECTION

*Coalition politics*

From the establishment of the State until 1977, the Labour Party (in one form or another) was always the largest party in the *Knesset*.<sup>8</sup> Given the split between left and right, no other party could have put together a coalition representing a majority in the *Knesset*. The Labour Party was the dominant political force, and until 1967 it enjoyed what has been termed 'majoritarian-like executive power'.<sup>9</sup> Its members held all the major cabinet posts and the smaller parties in the coalition had to play largely to its tune.

The hegemony of the Labour Party was broken in the days preceding the 1967 Six Day War when public opinion forced Labour's leaders, against their better judgement, to broaden the government by bringing in representatives of the centre-right GAHAL bloc, and by appointing Moshe Dayan as minister of defence.<sup>10</sup> Nevertheless, it remained the largest party and retained power for another decade.

The Labour Party lost the elections in 1977, and a new government was formed, the head of which was the leader of the GAHAL. While GAHAL (subsequently the Likud) was the largest party in the *Knesset*, it did not enjoy the strategic position enjoyed by the Labour Party in its heyday. The shaky coalition was dependent on the continued support of a new centrist party, many of whose members leaned more towards the policies of the defeated Labour Party rather than towards those of GAHAL, especially in matters relating to the Israel-Arab conflict and the future of the West Bank and Gaza. Smaller religious parties, some of which had previously been partners in all coalition governments headed by the Labour Party, became the mainstay of the Likud coalition.

Major changes in the political system occurred in the 1980s when the two largest parties, Labour and Likud, achieved virtual parity. This led, in the years 1984-1990, to a grand coalition between these two parties. Labour and Likud together commanded a significant parliamentary majority and could easily have formed a coalition from which other parties were excluded. However, both preferred to include other smaller, sectarian parties in the coalition, mainly in order

<sup>8</sup> The present Labour Party is actually made up of a conglomeration of parties that were usually members of a coalition with the main party, Mapai, which formed the backbone of the present-day Labour Party. For a number of years, Mapai combined with two other socialist parties in a joint Knesset list known as the Alignment.

<sup>9</sup> See Peter Y. Medding, 'From Government by Party to Government Despite Party', in Reuven Y. Hazan and Moshe Maor (eds.), *Parties, Elections and Cleavages: Israel in Comparative and Theoretical Perspective* (London, Frank Cass 2000) p. 172.

<sup>10</sup> Together with Israel's first prime minister, David Ben-Gurion, and some of his followers, Dayan, a former army chief-of-staff and cabinet minister, had left what was then the Mapai party to form a splinter party, Rafi. Rafi subsequently joined up with Mapai and another party to form the present Labour Party.

not to alienate these parties as future coalition partners in a narrower coalition.

During the first two years of the grand coalition, unity was needed in order to achieve two major tasks: reducing inflation that had reached catastrophic levels, and extricating the Israel Defence Forces from most parts of Lebanon, in which they had been stuck since the Lebanon War of 1982. Having succeeded in these tasks under the leadership of Shimon Peres, the cracks in the grand coalition began to show. These intensified after the first *intifada* began in 1987, when the differences in the policies of the two large parties on the future of the West Bank and Gaza, came to the fore.

In 1990 the leader of the Labour Party, Shimon Peres, at that time Deputy Prime Minister and Minister of Finance, was led to believe that if the grand coalition government fell he would be able to put together a narrow government led by Labour and supported by two of the ultra-orthodox religious parties in the *Knesset*. In the first move, that later became known as the 'odious manoeuvre', Labour supported a vote of no-confidence in the government which led to the fall of the Shamir government.

Although Peres was asked by the President to form the new government, the two largest parties enjoyed similar strength in the *Knesset*, and both began vying for the support of the smaller parties, especially the ultra-orthodox Agudat Yisrael party. The leaders of this party realized they could play the two potential candidates off against each other and 'enthroned' as prime minister the leader of the party which paid the highest price in terms of their political demands. The impression created was that this small party had achieved power that far exceeded its proportional strength, as reflected in *Knesset* seats. The public perception of corrupt government was exacerbated when a few members of *Knesset* agreed to cross party lines in order to become ministers or deputy ministers with all the trappings of power.

Peres' optimism that he could form a new government based on a narrow coalition proved to be misplaced. When the legal time-limit for forming a government expired,<sup>11</sup> he had to concede that his attempts to form a government had failed. The President then called on the leader of Likud, incumbent Prime Minister Shamir, to form the government. After giving in to what were deemed by many to be unreasonable demands by smaller parties, Shamir succeeded in negotiating coalition agreements that would give him a parliamentary majority.

Shamir's narrow-based coalition lasted for two years. His government suffered from endemic coalition problems that came to a head when the ultra-right parties

<sup>11</sup> Basic Law: The Government – 1968 (Original Version), section 7: 'The Knesset Member to whom the President has assigned the task of forming a Government shall have a period of twenty-one days for the fulfillment of such task. The President of the State may extend the period by additional periods not in the aggregate exceeding twenty-one days.'

left the coalition after the Madrid peace conference was convened. Likud and Labour negotiated a date for early elections. After the *Knesset* had enacted the legislation necessary for the early elections, there was a breakdown in party discipline in the *Knesset* as members vied for high-visibility activity that would enhance their chances of popular support within their parties, now needed in order to be included on the party-list for the new elections. This opened the window of parliamentary opportunity for political reform in February and March, 1992.<sup>12</sup>

The 'odious manoeuvre' and subsequent wheelings and dealings around the coalition agreements had led to a public outcry. There were massive demonstrations against what was perceived as government corruption and calls for reforms of the system. Two extra-parliamentary groups organized an intensive lobby in favour of reform. In the subsequent *Knesset* debates on the proposals for the system of direct election, many of the proponents cited public support as a factor in favour of the reform, while other parliamentarians expressed concern that constitutional changes were being implemented because of populist demand.<sup>13</sup>

#### *Attempts at electoral reform*

The idea of reforming the electoral system was not invented in 1992. Over the years many proposals had been raised to change what many regarded as a dysfunctional system, which sacrificed efficiency and governability to hyper-representativeness. The perception was that the smaller religious parties wielded political power that was disproportionate to their public support, and that they used that power to 'extort' political concessions from the large parties that were anathema to the majority of the electorate.<sup>14</sup>

The prime supporter of electoral reform was Israel's first Prime Minister, David Ben Gurion. Ben Gurion believed that a two or three-party system would make for more stable government, and that such a system could only be achieved by abandoning the system of proportional representation in favour of a system similar to the Westminster model. Most other proposals focused on modifying the extreme nature of the one-constituency proportional representation system by moving to a system of multi-seat constituencies or a mixed system.<sup>15</sup>

A number of parties included electoral reform in their party platform and numerous attempts were made to promote legislation in the *Knesset* that would re-

<sup>12</sup> A full description of the political events leading to the reform can be found in Gideon Rahat, 'The Politics of Reform in Israel: How the Israeli Mixed System Came to Be', in Shugart and Wattenberg, n. 3, p. 123.

<sup>13</sup> See 1990 *Divrei HaKnesset* 3443. Also see Rahat, n. 12.

<sup>14</sup> See, e.g., 1990 *Divrei HaKnesset* 3445 and 3449.

<sup>15</sup> For presentation of the various proposals raised over the years for electoral reform in Israel, see Rahat, n. 12, p. 124-128; Emanuele Ottolenghi, 'Why Direct Election Failed in Israel', 12 *Journal of Democracy* (2001) p. 109, 111-113.

form the existing system. Under the *Basic Law: The Knesset*, the system of elections is entrenched.<sup>16</sup> The entrenchment is not very strong – all that is needed is an absolute majority of the members in the *Knesset* in all three readings on a law changing the system (as opposed to the simple majority of the votes required for ordinary legislation), but the entrenchment nevertheless proved to be a formidable obstacle against changing a system, which many politicians and parties (especially the smaller ones) believed to be in their favour. The only real chance of reform lay in agreement between the two largest parties, Labour and Likud. After the 1988 elections, these two parties, joined together at the time in a grand coalition, established a committee to examine private members' bills for reform of the electoral system that had passed first readings in the *Knesset*. The committee recommended a mixed system of proportional representation, in which 60 *Knesset* members would be elected in 20 constituencies and 60 at the national level. The Labour party supported this recommendation but the Likud did not. After the Likud formed a new narrow government in 1990, the recommendation was shelved.<sup>17</sup>

The idea of direct election of the prime minister, without reform of the electoral system for the *Knesset*, grew out of the realization that such reform had proven to be politically impossible.<sup>18</sup> The direct election was, in effect, an attempt at second best, although some proponents of the system thought that it would be more successful than electoral reform in reducing the power of the smaller political parties.<sup>19</sup>

#### *Proposals for direct election of the prime minister*

Proposals for reform of the political system were not confined to parliamentary circles. In 1986 a group of law professors from Tel Aviv University published a draft constitution for Israel and set into place a campaign for adoption of a formal constitution.<sup>20</sup> The draft included a bill of rights and proposals for changes in the political system, including changes in the electoral system. It also included a proposal for direct election of the prime minister.

The idea of direct election of the head of government was not new in Israel. In the 1970s the law regulating local government was amended so as to provide for direct election of mayors alongside the elected municipal councils. This system of local government had generally been regarded as a success story, as it freed heads

<sup>16</sup> Section 4 of the *Basic Law: The Knesset* states: 'The Knesset shall be elected in general, national, direct, equal, secret and proportional elections, according to the Elections for Knesset Law; this section may not be amended except by a majority of Knesset members'.

<sup>17</sup> Rahat, n. 12, p. 126.

<sup>18</sup> See Ottolenghi 2001, n. 15, p. 112; Rahat, n. 12, p. 126.

<sup>19</sup> Rahat, n. 12, p. 126.

<sup>20</sup> See *The Constitution for the State of Israel* (Tel Aviv, Faculty of Law, Tel Aviv University 1987).

of local government from the whims of small factions in fractionalized municipal councils.<sup>21</sup>

In the past, proposals had also been advanced for a radical change in the system of central government, and for adoption of a mixed parliamentary-presidential system similar in some ways to the French system. The proposal for direct election of the prime minister raised by the Tel Aviv law professors did not involve abandoning the parliamentary system of government in favour of a presidential model, or even a mixed French-type model. The fundamental idea was to free the prime minister from what were perceived as the exaggerated demands of potential coalition partners, especially the smaller religious parties. Proponents of the system assumed that if the identity of the prime minister were determined by the electorate, the smaller parties would not be able to play off the two large parties against each other, by promising their support to the party which would pay them the higher political price. Faced with the choice of remaining in opposition or joining a coalition headed by the elected prime minister, their bargaining power would be severely curtailed.

A number of private members' bills proposing direct election were submitted to the *Knesset* after the 1988 elections.<sup>22</sup> As private members' bills, they had to pass a preliminary reading before being sent to Committee to be prepared for a first reading. It was only after the 'odious manoeuvre', which had caused public disgust and strengthened public demand for constitutional change, that the bills were actually presented to the *Knesset* plenary for the preliminary reading. Four of the bills passed this stage and were returned to the plenary for first reading after minimal discussion in the Constitution and Law Committee.<sup>23</sup> The *Knesset* members who had proposed the bills were from four different parties ranging across the political spectrum.<sup>24</sup> While there were some significant differences between their proposed bills, after they had passed first reading, the four *Knesset* members submitted a joint draft for discussion in the *Knesset* Constitution and Law Committee.<sup>25</sup>

<sup>21</sup> Rahat, n. 12, p. 135. In one of the bills for direct election that was later submitted to the *Knesset*, the *Knesset* member who proposed the bill cited the success of the direct election of mayors in support of his proposal: Basic Law Bill: The Executive Branch, 1990 *Hatzaot Hok* p. 142.

<sup>22</sup> See Rahat, n. 12.

<sup>23</sup> See Basic Law Bill: the Government (No. 5), 1990 *Hatzaot Hok* p. 154-156; Basic Law Bill: the Government (No. 6), 1990 *Hatzaot Hok* p. 157-159; Basic Law Bill: the Executive Branch, 1990 *Hatzaot Hok* p. 159-164; Basic Law Bill: the Government, 1990 *Hatzaot Hok* p. 164-170.

<sup>24</sup> One was from Labour, one from Likud, one from the centrist Shinui party, and one from the right-wing Tzomet party. Two of these *Knesset* members had been professors of law at Tel Aviv University before being elected to the *Knesset*.

<sup>25</sup> See *Changing the System of Government in Israel: Proposed Basic Law: the Government*, Joint proposal by David Libai, Uriel Lynn, Amnon Rubinstein, Yoash Tsidon, with preface, explanations and editing by Rhanan Har Zahav (Jerusalem, The Jerusalem Center of Public Affairs 1990).



The proposed system was controversial both in political and academic circles. It was supported by a number of leading experts in constitutional law, but strongly opposed by a minority of constitutional lawyers and most of the country's leading political scientists, who argued that its effects would be quite different from those expected by the proponents. The leading public force behind the bill was an organization called 'Constitution for Israel' founded by the head of the Tel Aviv University law professors who had originally suggested the draft constitution that incorporated the direct election proposal. After the first reading, the Labour Party faction in the *Knesset* decided to support the bill; the Likud decided to oppose it.

## THE DIRECT ELECTION LAW

### *Enactment of the law*

The final bill for direct election of the prime minister took the form of a new version of the *Basic Law: The Government*. It passed its final reading in the *Knesset* in March, 1992, on the last day of the *Knesset* session before the pending elections. Besides the provisions regarding direct election, the new version of the Basic Law included a number of constitutional amendments, including tighter control over states of emergency and the powers of the executive branch of government to promulgate emergency legislation. As opposed to the previous version, the new Basic Law was entrenched and could only be amended by an absolute majority of the members in the *Knesset*. This later proved to be a significant obstacle in the way of abolishing the new system, after many members of the *Knesset* had become disillusioned with it.

The Basic Law was enacted after legislation had been passed for early *Knesset* elections in June 1992. One of the compromises that proponents of the bill made during the legislative process was that the new system would not apply in the forthcoming elections, and would only come into force at the time of the elections scheduled by law for 1996. So it was that the first elections held after the Basic Law had been enacted were still held under the prevailing single-ballot system.

### *The dual-ballot system of direct election*

The fundamental change effected by the new Basic Law involved introduction of a dual-ballot system of elections. Each voter would cast two votes: one for a party-list under the existing *Knesset* electoral system, which remained unchanged, and the other for the prime minister.

Candidates for prime minister had to head a party-list in the *Knesset* elections. Any party (or combination of parties) running for election in the *Knesset* elections

which had at least 10 members in the outgoing *Knesset*, could nominate a candidate for prime minister. So could any other party running for election if its candidate was supported in writing by at least 50,000 registered voters. In order to be elected a candidate for prime minister had to obtain at least 50% of the valid votes cast. If no candidate received this portion of the votes, there would be a second round run-off election between the two candidates who had received the highest numbers of votes.

*Knesset* elections would always be accompanied by elections for prime minister. In certain cases there could also be 'special elections' for prime minister that were not accompanied by *Knesset* elections. Such special elections would be held if the elected prime minister resigned or died, if he were impeached or if the number of ministers in the government dropped below a minimal level. The candidates for prime minister in such elections would have to be members of the *Knesset* nominated by a party, or combination of parties, which had ten seats in the *Knesset*.

While the previous version of the *Basic Law: The Government* had declared that the government rules by virtue of the confidence of the *Knesset* and is jointly responsible before the *Knesset*, the new provisions declared that the government is comprised of the prime minister and ministers and that the prime minister rules by virtue of being elected in general, national, direct, equal and secret elections. It included no specific provision relating to joint parliamentary responsibility of the government.

The original bill prepared by proponents of the new system and based on the Tel Aviv proposal did not require parliamentary approval for the government appointed by the elected prime minister. The elected prime minister would take office after presenting his or her government to the *Knesset*. This part of the proposal was amended during the second reading. Under the final version adopted in the new Basic Law the prime minister would appoint the ministers, but this appointment required parliamentary approval. Rejection by the *Knesset* of the prime minister's proposal for the composition of the government would be regarded as a vote of no-confidence, with the consequences to be described below.<sup>26</sup>

<sup>26</sup> Changes made during the second reading led to a number of anomalies in the final version of the Basic Law that provided fruitful ground for legal opinions and discussions in constitutional law classes. The original provision regarding assumption of power by the new government remained unchanged. Thus Art. 14(a) of the Basic Law stated: 'Within 45 days after publication of the election results the elected prime minister will appear before the *Knesset*, present the ministers in his government, the division of functions among them and the principles of the government's policy, and the prime minister and ministers shall assume their posts...' No mention was made of the need for a vote of *Knesset* investiture. On the other hand, Art. 3(c) of the Basic Law stated that the ministers would be appointed by the prime minister and that their appointment required *Knesset* approval. The combination of these two provisions was taken to mean that only on approval of the ministers' appointment by the *Knesset* would the government assume power. Art. 3(c) did not require a special majority for approval of the ministers appointed by the prime minister. Seemingly,

The final version of the Basic Law differed from the bill on another major point. The proponents had accepted that the elected prime minister would be subject to a no-confidence motion in the *Knesset*, but proposed that such a motion would require a parliamentary majority of 70 out of the 120 members.<sup>27</sup> They assumed that this would weaken the hold of smaller parties over the elected prime minister, who would generally have sufficient core support of his own party to enable him to stand up to threats of support for no-confidence motions by smaller coalition partners. During the legislative process the majority required for a no-confidence motion was reduced to an absolute majority of *Knesset* members, namely 61 of the 120 members. As this is the minimal number of *Knesset* members required for a working parliamentary majority, the implication was that a crisis in the coalition between the prime minister's party and smaller parties could more easily lead to a successful no-confidence motion in the *Knesset*. Unless the prime minister put together a broad coalition he might constantly face the threat of support for a no-confidence motion by disgruntled members of the coalition.

As a counter-balance to the threat of hasty no-confidence motions the Basic Law contained a significant disincentive against support for such motions. A successful no-confidence motion would lead not only to new elections for the prime minister, but to dissolution of the *Knesset* itself and new elections for the *Knesset*. The assumption (which, it would seem, proved to be correct) was that even parties or individual members of the *Knesset* who were radically opposed to the prime minister's policies would refrain from supporting a no-confidence motion if they considered that it was not in their political interest to hold new *Knesset* elections. This opened up the path to a political situation in which the elected prime minister would remain in power even though he had little to no parliamentary support, let alone a parliamentary majority.

The proponents of the bill had foreseen the situation of a 'contrary' *Knesset*. The Basic Law therefore contained an innovation in Israeli constitutional law: dissolution of parliament by executive decision. Article 22 of the Basic Law stated that if the prime minister came to the conclusion that a majority in the *Knesset* opposed the government, and that, as a result, the possibility of proper functioning of the government was being prevented, he could dissolve the *Knesset*. In order

the conclusion should have been that only a simple majority was required (as opposed to a majority of *Knesset* members). However, under Art. 3(d) rejection of the prime minister's proposal for the composition of the government was regarded as a vote of no-confidence in the prime minister. Under Art. 19 of the Basic Law a vote of no-confidence required an absolute majority. Did this apply only after the investiture of the government, or would only an absolute majority voting against approval of the ministers appointed by the prime minister be regarded as rejection of his government?

<sup>27</sup> The proposal of the Tel Aviv law professors had been that a vote of no-confidence would require a majority of 60% of the *Knesset* members, plus one (in effect 73 members of the *Knesset*).

to avoid abuse of this power and its use for party political reasons rather than to solve a constitutional impasse, the prime minister's decision to dissolve the *Knesset* required the agreement of the State President.

Lest the reader assume that the new system was similar to a presidential system, it is important to stress that while the elected prime minister would seemingly derive his or her political legitimacy from direct election by the public, the Basic Law gave the elected prime minister almost no executive powers. The government, rather than the elected prime minister, remained the executive branch of the state. The government, rather than the prime minister, was empowered to make decisions and take executive action. It was given the residuary power to act on behalf of the state when no other body was empowered by law to do so; to initiate a declaration of emergency by the *Knesset*; to promulgate emergency legislation and to decide to go to war. The powers of the prime minister were restricted to the composition of the government and the division of responsibility between its members. The system bore no resemblance to a presidential system, even of the mixed presidential-parliamentary type adopted in the constitution of the Fifth French Republic.

The government could never have less than eight members, including the prime minister. If the number of ministers dropped to eight, the prime minister was not permitted to dismiss a minister. If it dropped below this number and the prime minister failed to appoint a new minister or new ministers within 72 hours, there would be special elections for prime minister.

In a situation in which a government does not enjoy a parliamentary majority, but remains in power because the *Knesset* refrains from voting no-confidence, government proposals for legislation necessary to carry out its policies could be frustrated by the contrary *Knesset*. Conceivably the *Knesset* could even prevent the government from operating by refusing to approve the annual budget law, required under Israeli constitutional law in order to authorize government expenditure. The Basic Law provided that failure by the *Knesset* to approve the budget law within three months of the end of the financial year would be regarded as if the *Knesset* had decided to dissolve itself before its term ended.<sup>28</sup>

The Basic Law also included provisions for impeachment of the prime minister. If the prime minister was convicted of an offence involving moral turpitude, the *Knesset* was empowered to remove him from office in a resolution supported by a majority of its members. The *Knesset* also possessed the general power to remove the prime minister from office without a conviction, by a resolution supported by 80 of its members. While the intention behind this provision was obvi-

<sup>28</sup> According to Art. 3B of the Basic Law: State Economy, if the budget law has not been approved before the beginning of the financial year, the government is authorized each month to spend one twelfth of the budget approved for the previous year, linked to the cost of living index.

ously to allow impeachment of the prime minister because of his personal conduct, rather than political objections to his policies or actions, the provision itself did not restrict the grounds for use of this power. From the *Knesset's* point of view, the advantage of impeachment over no-confidence was that successful impeachment would lead to special elections for the prime minister and not dissolution of the *Knesset*.

### *Philosophy behind the direct election*

The proponents of the direct election claimed that the new system would have a number of positive political consequences. In the first place, they assumed that as the prospective candidates for prime minister with any real chance of being elected would be from the large political parties, these parties would enjoy a coat-tail effect.<sup>29</sup> Voters who would otherwise have voted for smaller parties would vote for the large party whose candidate for prime minister they supported. This would lead to an increase in the size of the larger parties, making for more stable government and less dependence on coalitions with a range of smaller sectarian parties, each with its own interests and agenda.

Secondly, the direct election would weaken the bargaining power of the smaller parties in coalition negotiations.<sup>30</sup> Such parties would be faced with a *fait accompli* regarding the identity of the prime minister, and would not be able to play the large parties off against each other by offering their support to the party which would meet more of their demands. The possibilities of raising demands that were regarded by many as forms of 'extortion' by small sectarian parties would end, or would at least be seriously reduced. Finally, having a direct mandate from the people would strengthen the prime minister and enable him to appeal to this mandate when resisting attempts of political parties in the coalition to subject him to unreasonable political demands. The executive branch of government would be able to set a coherent policy and follow it without being constantly subjected to coalition threats. At the same time, relieving *Knesset* members from persistent coalition pressures would allow them to concentrate more seriously on their parliamentary duties.

## THE EXPERIMENT IN OPERATION

### *Election results*

The 1992 elections took place after the new version of the *Basic Law: The Government* had been passed. As the entrance into force of the Basic Law was postponed,

<sup>29</sup> See Ottolenghi 2001, n. 15.

<sup>30</sup> See, e.g., Explanations accompanying Basic Law Bill: the Executive Branch, 1990 *Hatzaot Hok* p. 159-164.

these elections were still held under the old, single-ballot, system. It does seem, however, that the philosophy of direct election may have had some effect on the parties, and possibly on the voters, too.

The election campaign of the main parties focused largely on the choice of candidates for prime minister: Yitzchak Rabin, the leader of the Labour Party, and the incumbent Yitzchak Shamir, leader of the Likud. The perception was, it would seem, that if one favored one of these two potential candidates for prime minister, one should vote for his party, rather than for a smaller party that could support either candidate. The results in the elections were telling. The largest party, Labour, received 44 seats in the *Knesset*, and the second largest party, the Likud, received 32 seats. Thus the two largest parties between them had almost two thirds of the members of the *Knesset*. Together with parties to the left of it, Labour had achieved what was termed a 'preventive bloc', i.e., a parliamentary situation in which a majority would frustrate any attempt to form a right-wing government. The Labour Party was the only game in town. The leader of the Labour Party, Yitzchak Rabin, was duly asked to form the government.

While faced with endemic coalition problems as he tried to juggle between a left-wing secularist party and a sectarian religious party, the 'preventive bloc' allowed Prime Minister Rabin to remain in power for three and a half-years, during which time his government effected a radical change in policy, recognizing the PLO and signing the Oslo Accords and subsequent agreements. Tragically for the country, this policy led to Rabin's assassination.

The first elections under the new system for direct election of the prime minister were held in 1996, six months after Rabin's assassination. The two candidates for prime minister were Benjamin Netanyahu, who had succeeded Shamir as head of the Likud, and Shimon Peres, who had been elected head of Labour after Rabin's assassination.<sup>31</sup> On the choice of prime minister the electorate was split down the middle, with the winner, Netanyahu, receiving only 50.5% of the vote. But when it came to the results of the *Knesset* elections the position was quite different. There had been a significant drop in the support for the large parties. The Likud, now the largest party in the *Knesset*, had only 34 seats, up until that time the lowest number of seats held by the largest party in the *Knesset*.<sup>32</sup> The two largest parties together had only 66 seats, the lowest number they had held since 1961.<sup>33</sup>

<sup>31</sup> The effect of the new law on the election campaign is discussed by Reuven Y. Hazan, 'The Electoral Consequences of Political Reform: In Search of the Center of the Israeli Party System', in Arian and Shamir (eds.), *The Elections in Israel – 1996* (Albany, SUNY Press 1999), p. 163.

<sup>32</sup> See Ofer Kenig, Gideon Rahat and Reuven Y. Hazan, 'The Political Consequences of the Introduction and Repeal of the Direct Elections for the Prime Minister', in Asher Arian and Michal Shamir (eds.), *The Elections in Israel – 2003* (New Brunswick (U.S.A.) and London (U.K.), Transaction Publishers 2005) p. 33, at p. 48.

<sup>33</sup> *Ibid.* In 1965 the dominant left and right-wing parties both created election alignments which have been maintained in one form or another until the present time, creating the original basis for today's Labour and Likud.

Netanyahu's government, plagued by coalition crises and allegations relating to his personal conduct, lasted only three years before the *Knesset* passed legislation for early elections. The elections in 1999 became presidential in nature, with all focus placed on the two leading candidates, Netanyahu and Ehud Barak.<sup>34</sup> The campaigns of both Labour and Likud concentrated almost entirely on their candidates for prime minister, while some of the smaller parties hedged their bets even though their preferences for prime minister were fairly well-known.<sup>35</sup> Barak won the election by a large majority, winning 56.1% of the popular vote, against 43.9% for the incumbent prime minister. However, the picture in the *Knesset* was glum. Labour, reconstructed by Barak as 'One Israel', was the largest party in the *Knesset*. But it had only 26 seats, that is just over 20% of the seats in the *Knesset*. The second largest party, Likud, had received only 19 seats. For the first time since 1961, the two largest parties combined had only 45 seats, just slightly more than the largest party had on its own in the last single-ballot elections held in 1992. The religious parties, which together had received 16 seats in the 1992 elections, now had 27 seats. In this situation, while having been elected by a large majority, the coalition problems of the elected prime minister became virtually unmanageable, especially in the volatile political situation of a country divided on issues of peace and security and negotiations with the Palestinians. As the political crisis deepened after the Camp David summit ended in failure and violence erupted at the end of September 2000, Barak found himself an elected prime minister without a majority in the *Knesset* and without the capacity to govern. Even in this situation *Knesset* members hesitated to bring Barak down by a vote of no-confidence, until eventually, when the chances of such a vote garnishing the required majority loomed large, Barak himself resigned, thus opening the way to special elections for prime minister. These were the 2001 elections which brought Ariel Sharon to power.

### *The experiment's results*

The results of the direct election seem all too apparent and they are very different from those intended by proponents of the system. While the proponents had argued that the dual-ballot system would have a coat-tail effect on the large parties, exactly the opposite seems to have been the case. Whereas in the past voters

<sup>34</sup> See Kenig, Rahat and Hazan, n. 32, p. 42. At the beginning of the campaign there were in fact five candidates for prime minister. But as the campaign progressed the three other candidates withdrew, largely because of pressure not to endanger the candidacy of their preferred 'realistic' candidate, by subjecting him to the necessity for a second round of elections that would be held if no candidate received 50% of the vote.

<sup>35</sup> See Reuven Y. Hazan, 'The Israeli Mixed Electoral System: Unexpected Reciprocal and Cumulative Consequences', in Shugart and Wattenberg, n. 3, p. 351.

who supported smaller sectarian or ideological parties might have cast a tactical vote for one of the large parties in order to ensure that its leader would be asked to form the government, the split ballot allowed them to vote for their candidate of choice for prime minister while supporting another party list. The result seems to have been a significant drop in the size of the two largest parties in the *Knesset* and greater support for smaller parties. While this may have increased parliamentary representation of sectarian and ideological minorities, it certainly did not contribute to greater governability or political stability, the main objects of those who proposed the new system.<sup>36</sup>

Proponents of the direct election assumed that the system would decrease the power of the smaller sectarian parties in coalition negotiations. What seems to have happened, however, is that smaller parties used their power in the pre-election period, trading a declaration of support for a candidate for promises to meet some of their political demands if that candidate were elected. Furthermore, the weakened position of the larger parties in the *Knesset* meant that the elected prime minister was more dependent than ever on the parliamentary support of other parties.

Despite these apparent results of the direct election system, proponents of the system argued that the above features of the political system merely coincided with direct election of the prime minister, and were in fact the result of changes in the demography of the country and long-term political trends.<sup>37</sup> They argued that in all events, the system adopted was not the one that they had originally proposed and that if only that system had been adopted things would have been different. Some academic writers also challenged the assumption that the system of direct election had a general effect on party choice.<sup>38</sup>

It is impossible to assess what the position would indeed have been if the original proposals which made the elected prime minister less reliant on a parliamentary majority had been implemented. The present writer remains skeptical whether it really would have made a difference. But whatever the situation would have been had the original proposal not been tampered with during the legislative process, recent careful research by three political scientists has shown that the system of direct election as adopted did have significant effects on voting patterns.<sup>39</sup>

<sup>36</sup> See David Nachmias and Itai Sened, 'The Bias of Pluralism: The Redistributive Effects of the New Electoral Law', in Arian and Shamir (eds.), *The Elections in Israel – 1996*, p. 269.

<sup>37</sup> See Uriel Lynn, 'The Root of all Evil?', *Jerusalem Post*, 12 Dec. 1998, p. 08.

<sup>38</sup> See Robert Andersen and Meir Yaish, 'Social cleavages, electoral reform and party choice: Israel's 'natural' experiment', 22 *Electoral Studies* (2003), p. 399. The authors argue that class has a major effect on party choice in Israel. They found no evidence that the system of direct election had affected the relationship between social cleavages and support for the Labour Party or of small parties to the left of it. Their results regarding parties on the right were less conclusive and did suggest a possible effect of the new system on voting patterns.

<sup>39</sup> See Kenig, Rahat and Hazan, n. 32. Also see Nachmias and Sened, n. 36.



These effects cannot be ascribed to other factors, such as long-term trends. This research reveals that the effects of the direct election on voting patterns were felt in three ways:

1. The significant drop in the combined strength of the two largest parties was a direct result of the direct elections. When the old system was restored the representation of these parties in the *Knesset* rose, albeit not to the level before direct election of the prime minister was introduced.
2. While there was not necessarily a rise in the number of parties represented in the *Knesset*, there was a significant rise in the effective number of parliamentary parties.<sup>40</sup> The average effective number between 1996-1999 was 7.15, as opposed to 4.46 in the period from 1949-1992. The effective number after the 1999 elections was 8.69, a figure that had only been surpassed before in one country, Papua New Guinea.<sup>41</sup>
3. Rather than weakening the power of the sectarian parties that were perceived to wield excessive power, the dual-ballot system actually strengthened these parties. Whereas the highest number of seats these parties together had held from 1969-1992 was 22, in the 1996 elections they received 34 seats and in the 1999 elections 48 seats.<sup>42</sup> During the same time there was little change in the parliamentary representation of small, non-sectarian parties.<sup>43</sup>

The authors of the above-mentioned research concede that the new system of dual-ballot elections did not create sectarianism, nor was it the sole reason for its growth in parliament. They conclude, however, that

the direct elections had an influence on the strengthening of those parties that represent clearly defined social sectors within Israeli society, since they facilitated the electoral contest faced by these parties. Once they gained significant representation due to the electoral system, they had an incentive to emphasize and sharpen even further their distinct identity ... Put differently, the system encouraged the increased politicization of the cleavages in Israeli society.<sup>44</sup>

<sup>40</sup> The term 'effective number of parties' has been defined as follows:

'An index that indicates the number of hypothetical equal-sized parties that would have the same effect on the fractionalization of the party system as do the actual parties of various sizes.' Glossary, in Shugart and Wattenberg, n. 3, p. 597. See also Arend Lijphart, Peter J. Bowman and Reuven Y. Hazan, 'Party Systems and Issue Dimensions: Israel and Thirty-Five Other Old and New Democracies Compared', in Hazan and Maor, p. 29, 30-33; Dennis C. Mueller, *Constitutional Democracy* (New York and Oxford, OUP 1996) p. 112, note 13.

<sup>41</sup> Kenig, Rahat and Hazan, n. 32, p. 50-51.

<sup>42</sup> Ibid., n. 32, p. 52.

<sup>43</sup> Ibid., n. 32, p. 53.

<sup>44</sup> Ibid.

The system of direct election also had an impact on the positions adopted by the large parties in their election campaigns. Research on this issue shows that these parties tended to converge towards the centre, especially in matters of peace and security, as they sought to attract floating voters in the election for prime minister. They were less concerned in stressing differences with parties whose orientation left them little choice but to support their candidate for prime minister.<sup>45</sup> On the other hand, some of the smaller sectarian parties tended to focus their campaigns on issues that did not play a central role in the campaign for prime minister, 'thereby focusing their campaigns on, and exacerbating, such cleavages as religious-secular, Jewish-Arab, and immigrant-native'.<sup>46</sup>

The proponents of the new system had claimed that the system would enhance the status of the *Knesset*. In reality the power of *Knesset* members *vis-à-vis* the executive was indeed increased, as the government faced problems in parliament that were unprecedented in Israel's political system.<sup>47</sup> Numerous decisions of the government were overturned by the *Knesset*, and the Knesset Finance Committee redrew the annual budgets.<sup>48</sup> This may have made government more representative, but it certainly did not make it more governable or efficient. In other words, the new system seems to have achieved exactly the opposite of that anticipated by its proponents.

## RETURN TO CLASSIC PARLIAMENTARY SYSTEM

### *The previous system restored*

The perceived result of the system of direct election had its mark on the public and on members of the *Knesset*. Although previous attempts to revert to the old system had failed to achieve the absolute majority of *Knesset* members required for amendment of the *Basic Law: The Government*, after Sharon's victory in the special elections for prime minister, the necessary majority was obtained.<sup>49</sup> The *Basic Law: The Government* was once again replaced by a new version, which abolished direct election of the prime minister and reverted to the old system of single-ballot elections for the *Knesset* according to the existing electoral system of proportional representation.

<sup>45</sup> See Hazan 1999, n. 31 and Hazan 2001, n. 35.

<sup>46</sup> Hazan 2001, n. 35, p. 371.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> One body in Israel, the Israel Democracy Institute, had consistently opposed direct election of the prime minister and had lobbied for its abolishment. After the special elections in 2001 it mounted a concerted campaign to gain the parliamentary majority required to abolish the system. It was instrumental in bringing about the change.

The new Basic Law introduced two significant changes in the system of government. First, it instituted the system of a constructive no-confidence motion. Once a government had been formed and had been approved by the *Knesset*, a no-confidence motion would only be effective if it nominated another member of the *Knesset* as candidate for prime minister, and was carried by an absolute majority in the *Knesset*. When the government in power is led by a centrist party, with the opposition divided between right and left (as is the case at the time of writing) the chances of such a motion being carried are negligible.

The second change was to retain the power of the prime minister to dissolve the *Knesset*, introduced as part of the system of direct election. Use of the power, which still requires consent of the State President, is confined to the situation in which the prime minister considers that a majority of *Knesset* members opposes the government, as a result of which the proper functioning of the government is being prevented. Even in this situation, a majority of *Knesset* members can frustrate an executive order dissolving the *Knesset*, by what is tantamount to a constructive vote of no-confidence. If they request the State President to ask another *Knesset* member to form a government, the State President is bound to follow that request. In such a case, only if the named *Knesset* member fails to form a government which receives the confidence of the *Knesset*, will the *Knesset* be dissolved.

#### *Election results under the 'alte-neue' system*

In 2003 elections were held according to the 'alte-neue' system. While all the consequences of the direct election were not undone, there does seem to have been a reversal in the trends mentioned above. The largest party in the *Knesset* gained 38 seats (as opposed to 26 in the 1999 elections) and the two largest parties together received 57 seats (as opposed to 38 in 1999).<sup>50</sup> The effective number of parliamentary parties dropped from 8.69 (in 1999) to 6.17.<sup>51</sup> The number of seats gained by sectarian parties dropped from 48 to 41.

It is too early to tell whether the above reversal in trends will continue in the future. I would hazard a guess that the dual-ballot system may have had some consequences for the political system which may not be that easy to reverse. First and foremost amongst these is the growth in parliamentary representation of small sectarian interests. One legal mechanism that may help to curb this growth is the increase in the exclusion threshold from 1.5% to 2% that will come into effect in the next elections. While this is still regarded as a low threshold when compared to other countries with proportional representation electoral systems, it could force smaller sectarian groupings to join forces with other small groups, or even to join larger parties.

<sup>50</sup> Hazan 2001, n. 35, p. 48.

<sup>51</sup> Hazan 2001, n. 35, p. 49.

## CONCLUSIONS

Political reform is a tricky business. The results of given reforms are often quite different from those anticipated by their proponents. This does not, of course, mean that attempts at reform should be abandoned in favor of the *status quo*, especially when that suffers from serious deficiencies. It does seem, however, that one can draw some conclusions from the Israeli experiment that may be helpful in assessing future proposals for reform, in Israel and elsewhere.

The attempt to mix a pure parliamentary system of government, based as it is on the confidence of parliament in the executive branch of government, with an elected head of executive, such as exists in a presidential system, is probably doomed to fail. The ultimate choice must be between a parliamentary system and a presidential system in which the division of powers between the president and the legislature is clearly defined in a formal constitution that cannot be manipulated by either branch of government. A mixture of the two systems may suffer from the disadvantages of each, and have the advantages of neither.

The divisions and cleavages in Israeli society are not a function of the political system and were not created by it. However, as research cited in this paper has demonstrated, changes in the political system may have an influence on their intensity and their manifestations in the political arena. Political arrangements may provide mechanisms for resolving tensions and forcing differing groups to seek paths to find common ground. Others may exacerbate the tensions and encourage divisions. A system which leads to fractionalization of political parties and groupings is likely to do the latter. Hyper-representation may have negative political and social effects. By promoting break-down of the large political parties and an increase both in the number and parliamentary size of smaller sectarian parties, the new system may well have contributed not only to political instability, but to deepening of existing cleavages.

All this said and done, it must not be forgotten that the problems which proponents of the direct election sought to address were very real ones. The system of extreme proportional representation adopted in Israel does stress representation over efficiency and governability. It did indeed lead in some cases to inordinate power lying in the hands of small sectarian parties, which placed their own interests above those of the general public. However, the only real way to resolve or mitigate this problem is by reducing representation for the sake of enhanced governability. This can only be achieved by amending the electoral system, in a way that will encourage large party groupings rather than small sectarian parties.<sup>52</sup> The proposal for direct election was in fact a second-best, adopted mainly

<sup>52</sup> It is not my intention in this paper to discuss various proposals for amending the electoral system. Such proposals have never been lacking. What has been lacking, of course, is the political

because all attempts to change the electoral system had proved politically unachievable. The problem is that in constitutional and political matters, what appears to be second-best may not be second-best at all. In fact, in some cases it may be worse than the *status quo*. The temptation to go for second-best when the best is unattainable may be great. But maybe in this field it is sometimes better to continue the struggle for the real thing, rather than conducting real-life experiments. When such experiments fail, the damage may be difficult to repair.

Finally, I would venture to mention a point that relates to the place of lawyers in the process of reform. As mentioned above, the initiators and driving forces behind the proposals for direct election of the prime minister in Israel were law professors, including a number of highly respected experts in constitutional law. On the other hand, almost the entire community of political scientists opposed the idea, often basing their objections on predictions that turned out to be not far off the mark. It seems to me that lawyers should be a bit more modest about their fields of expertise. They may be experts on the legal arrangements that exist in various parts of the world and on what the apparent advantages and disadvantages of these arrangements are perceived to be. But this expertise does not equip them with tools to judge what the likely outcomes are of new arrangements, especially those which have never been tried anywhere else (probably for very good reason). When devising far-reaching plans for political proposals for reform, they would be well-advised to incorporate experts from other fields, be it political science, sociology, social psychology or economics. These matters are far too serious to be left in the hands of lawyers.



will to implement them. One of the more interesting proposals is that by Giovanni Sartori to introduce strong majority premiums for the two largest parties: *see* Giovanni Sartori, 'The Party-effects of Electoral Systems', in Hazan and Maor, n. 40, p. 13, 26.