

# Party Primaries as Collective Action with Constitutional Ramifications:

## Israel as a Case Study

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### INTRODUCTION

In 1992, Israel underwent a major constitutional reform, which provided Israel, for the first time in its history, with an effective system of separation of powers between the political branches of government. Until that time, such a system had existed only in the law books. But this reform was not intentional. Rather, it was a side-effect of shortsighted political maneuverings within the two major political parties, the Labor and Likud, a byproduct of the voluntary adoption by these two parties of open primaries as the method for choosing candidates on their lists for election to the Knesset (Parliament). Previously, in both parties, internal committees had appointed nominees at will. But from 1992, in the Labor Party, and 1993, in the Likud, the two parties began conducting primaries in which all the party members, hundreds of thousands of individuals, elected the parties' lists of candidates for the general elections to the Knesset.<sup>1</sup> Since two smaller parties, Meretz and Tsomet, had also opted at the same period for systems of closed primaries, 96 out of the 120 Knesset members in the

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<sup>1</sup> In 1996, 194,788 voted in the Labor primaries and 91,907 in the Likud primaries. Gideon Rahat & Neta Sher-Hadar, *Interparty Selection of Candidates for the Knesset List and for Prime-Ministerial Candidacy 1995-1997*, at 43, 77 (1999) (Hebrew).

Thirteenth Knesset (1992-1996), 80%, faced reelections in the 1996 elections through party primaries.<sup>2</sup>

This reform has not been acknowledged thus far as such, and its scope and long-term ramifications have yet to be appreciated. This lack of appreciation may be due to the fact that this development coincided with the enactment of three basic laws: two new basic laws that prescribe a partial bill of rights and a new version of the Basic Law: The Government, providing for the direct election of the Prime Minister. As basic laws (which constitute parts of the evolving constitution and override ordinary legislation), this legislation drew the attention of both politicians and lawyers. In contrast, the primaries were the product of a change in internal party rules rather than a legislative occurrence, let alone a basic law. Moreover, because the Supreme Court interpreted the first two basic laws as authorizing it to review legislation, legal scholarship focused solely on those laws.<sup>3</sup> But perhaps the main reason for the indifference towards the introduction of the primaries system was the fact that no one, including the authors of this move, acknowledged its constitutional impact. When Yitzhak Rabin, who was elected Labor's chairperson, and hence its candidate for Prime Minister in the 1992 Knesset elections, pressed at that time to conduct primaries in the party, all he was seeking was to eliminate the power of his internal adversaries who controlled the party's appointments committee. When Benjamin Netanyahu was elected Chairperson of the Likud following Labor's victory in the 1992 elections, he initiated the adoption of a similar system for the same reasons. No one realized what fundamental changes these seemingly insignificant internal modifications would bring about.

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<sup>2</sup> Reuven Y. Hazan, *The 1996 Intra-Party Elections in Israel: Adopting Party Primaries*, 16 *Electoral Stud.* 95 (1997).

<sup>3</sup> These basic laws have been described by the current President of the Supreme Court as amounting to a "constitutional revolution." *See, e.g.,* *United Bank Hamizrahi Ltd. v. Migdal Assoc. Village*, 49(4) P.D. 221, 352.

The aim of this Article is to analyze and highlight the constitutional ramifications of the adoption of the primaries system in the two major political parties in Israel. I argue that in terms of the separation of powers between the two political branches of government and the allocation of powers between the majority and minority in the legislative branch, this development amounts to a constitutional reform more significant than the reform introduced by the contemporaneous basic laws. The adoption of the primaries system produced two major changes in the Israeli constitutional and political order. First, it transformed the Knesset into an independent body and, hence, for the first time in Israel's history, provided for a functioning system of checks and balances. Second, it shifted power from the Jewish religious minority to the secular majority and even contributed to the increase in the relative power of the Arab parties.

On a more general level, this Article demonstrates the impact different modalities of pre-selection of party candidates can have not only on the outcome of the elections and on the relative power relations among the parties, but more importantly, on the structure and the functioning of the political system. Once proven, this impact requires public attention: legislative regulation of the pre-selection process may be required, indeed even constitutionally mandated, to ensure political checks and balances. Such regulation becomes particularly timely as incumbent party bosses move to abolish or limit primaries in their parties.

Section I describes the basic rules of the primaries in both major parties. Section II analyzes the effect of the primaries on the output of the Knesset and the increase in its relative power vis-à-vis the government. Section III describes the impact the primaries have had on the relative power of the Jewish religious parties and the Arab parties. Section IV explains the relative indifference in Israel to the ramifications of the new system, and Section V describes

the judicial response to the constitutional change. As the Knesset has become more independent, the Supreme Court has deferred more to its discretion and allowed itself to be less involved in administrative decisionmaking. In addition, the Court has adopted rules that further bolster the Knesset's power vis-à-vis the government by equipping it with tools to monitor the government more closely. Section VI concludes with a few general policy recommendations.

#### I. DESCRIPTION OF THE PRIMARIES SYSTEMS IN THE LABOR AND LIKUD PARTIES<sup>4</sup>

Elections to the Knesset in Israel are based on the system of proportional representation, with the entire country constituting one voting district. Voters vote for parties. The parties have unfettered discretion to appoint candidates on their lists, and each party regulates its own appointment process.

Prior to 1992, under the internal system of appointing candidates in both major parties, the leader of the party enjoyed full control over the political fate of "his" Knesset members, and therefore, party discipline was strict. Recalcitrant MKs were severely punished. Only in exceptional cases did a sophisticated MK succeed in turning a disgraceful dismissal into a political coup and return to the Knesset as leader of a splinter party.<sup>5</sup> But this was the exception that proved the rule. Most MKs were treated by the senior party members almost as puppets. As a result, the Prime Minister, who was the leader of the party with the greatest number of seats in the Knesset (always either the Labor or the Likud), controlled not only the Knesset agenda, but also the votes of the majority of his or her party's MKs. Thus, every government

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<sup>4</sup> Unless otherwise indicated, this section is based on Rahat & Sher-Hadar, *supra* note 2; Hazan, *supra* note 2; Reuven Y. Hazan & Gideon Rahat, *Representation, Electoral Reform, and Democracy: Theoretical and Empirical Lessons From the 1996 Elections in Israel*, 33 Comp. Pol. Stud. 1310 (2000).

<sup>5</sup> Notable examples are the expulsion of Knesset Member Shulamit Aloni from the Labor Party in 1973 and her establishment of the Ratz Party, which won three seats in the subsequent elections. Dani Koren & Boaz Shapira, *Coalition Politics in Israel* 281 (1997) (Hebrew).

from 1948 until 1992 enjoyed a subservient Knesset, and there were no real checks and balances between the legislature and the executive.

Under the new primaries system, MKs from the two major parties are no longer subject to party discipline, in that their political survival and future reelection no longer hinge on their party bosses. The basic characteristics of the primaries system in the two parties are similar. All party members have the right to vote in the primaries. Membership requirements are quite lax: anyone can register as a member and pay the relatively low registration fee. Registration is often conducted by door-to-door or workplace solicitation by party members seeking support for their candidates. Due to ineffective controls, many register as members in both parties. Every member also has the right to put forth his or her own candidacy to be included on the party's election list. Finally, the party members vote by checking off a number of candidates on a form with a list of the names of all the candidates. There is both a ceiling and a minimum on the number of candidates each voter can choose.

Although there is no screening process for the candidates in the primaries, there are two ways in which the parties can influence the outcome of the primaries. One, by establishing voting districts that are dominated by distinct groups of voters, such as farmer associations (*kibbutzim* and *moshavim*) or minority communities (Druze, for example); second, by earmarking places on the party's list. Both parties have guaranteed places to representatives of certain sectors such as women, "young" candidates, and new immigrants. The Labor Party guaranteed a seat on the list for its Secretary-General to ensure neutrality in the Party's administration.

There is only minimal effective regulation over the primaries campaigning process. Both the 1992 Parties Act and the parties themselves impose limits on campaign contributions

and expenditures. The parties also restrict the modes of campaign publicity, for example, by prohibiting use of the electronic media for this purpose. But these restrictions can be easily sidestepped. Moreover, monitoring violations poses a collective action problem. Even the Parties Act relies on the internal supervisory bodies to enforce compliance, having failed to provide for any external supervisory body. Neither party has granted its supervisory body monitoring or enforcement capacities sufficient to discourage direct or indirect violations of these rules. As a result, the self-regulation remains ineffective.<sup>6</sup> With open-access membership and candidacy and minimal effective interference in the campaign publicity, the parties' have little control over the campaign process. This ensures an independent Knesset for reasons discussed in Part II below.

## II. THE EMPOWERMENT OF THE KNESSET

The discussion in Section A below lays out the theory behind the observation that the introduction of the primaries system in the two major political parties in Israel produced constitutional reform, if not a revolution, in the power structure between the two political branches of government. Section B tests the accuracy of the theory in practice.

### A. Theory

The primaries system requires incumbent MKs seeking reelection to attract constituencies and money.<sup>7</sup> To do so, they must enhance their standing in the party relative to other incumbent MKs or to aspiring MKs. They must also be able to deliver public goods such as legislation

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<sup>6</sup> See also Menachem Hoffnung, Party and Elections Financing In Israel 105-07 (1993) (Hebrew).

<sup>7</sup> One of the first to understand the significance of the change was Labor MK Yael Dayan, who has successfully courted the homo-lesbian community. On her reliance on and support of this constituency, see Alon Harel, *The Rise and Fall of the Israeli Gay Legal Revolution*, 31 Colum. Hum. Rts. L. Rev. 443 (2000).

and shares in public resources. The products they offer—legislation, approval of administrative rules, allocation of public resources—must be deemed worthwhile by their supporters. But MKs compete not only with other MKs, but also with the government, as they try to wean interest groups from their dependence on government. Thus, MKs facing primaries have a collective interest in enhancing the role of the Knesset as an institution vis-à-vis the government. Their efforts to contribute to this collective endeavor in themselves reap rewards, in that they serve to bolster their individual reputations as MKs. Accordingly, in the era of primaries, MKs can be expected to grow independent of their parties and more active in their parliamentary work; as more and more MKs face primaries, the Knesset as a whole can be expected to become assertive vis-à-vis the executive. Such a Knesset should tolerate less administrative discretion and should assert its role as the final word on policies, something previously delegated to the executive.

The game-theoretic aspects of the new situation can be described as a collective prisoner's dilemma. The chances of reelection for a given MK are a function of the combined success of the individual MK and the success of his or her party in the eyes of the public. The MK's individual objective is to achieve as high a placing as possible on the party's list for the coming elections, in which voters vote for parties, not for individuals. It is then the entire party's objective to gain as many seats as possible and thereby increase its size within the 120-member legislature. Hence every individual MK has two goals: one, her own success vis-à-vis her colleagues; two, the success of her party vis-à-vis the other parties. The more successful her party, the higher her individual chances of being reelected to the Knesset. For those who are certain to get in as MKs, those high up on the party list, the success of the party should

mean—albeit subject to the Prime Minister’s discretion—lucrative appointments or reappointments as heads of committees or ministers.

Success in elections is, hence, a function of the reputations that both the party and the individual MKs build over time. During her incumbency, the individual MK can divide her energies between cultivating the party’s reputation and her own reputation. But building the party’s reputation presents a collective action problem, because it requires the positive contribution of a sufficient number of MKs. If enough MKs contribute their efforts to the party’s success, the individual MK can take a free ride on those efforts and, at the same time, work to boost her own reputation within her potential constituency (which, given the open-access membership in the parties, may include many outsiders to the party). Thus, in this N-person prisoner’s dilemma, we can identify roughly two groups of individual MKs. One group is more likely to behave like chickens and contribute to the party’s efforts. This would be the group of the established leadership, whose reputation is closely linked to that of the party and whose members are relatively confident in victory in the primaries (and, hence, need to invest less in cultivating distinct constituencies). The other group, the group of the backbenchers, is more likely to defect and concentrate on cultivating their individual reputations and ties with small but effective constituencies. They are less certain of their reelection and will be the biggest losers if collective action fails. In addition, they are less identified with the policies their party adopts and in fact may wish to distinguish themselves from the party line to gain attention and challenge the old guard. As a result, while senior MKs, in any event responsible for the party’s policies, will be associated with their successes and failures, backbenchers will tend to disassociate themselves from those policies. Backbenchers will therefore tend to



contribute to the collective effort of their party only if they see their internal constituencies eventually supporting the leadership's goals.

Note that the particular constituency that our individual backbencher will try to attract has unique interests that may differ from those addressed by the party's general policies. The people comprising this constituency may support the party on general issues of high saliency, such as war and peace, but they may, nonetheless, be more interested in issues that directly affect their lives, such as better care for the elderly, gender equality, recognition of same-sex marriages, or the shifting of public resources from one activity to another. Our backbencher MK is sure to be attuned to these aspirations and, for the above reasons, to advance them against the wishes of the party leadership.

For the party leadership, the chickens, the question is whether there are enough of them to pitch in to cultivate the party's reputation. At times, they will have to pressure the backbenchers to cooperate. There are two strategies open to them. First, they can extol the virtues of the loyal individual MKs and, during the primaries, try to shame the disloyal ones. But the effectiveness of this strategy is limited: the loyal MKs can then use this free publicity for their records to attract members of the distinct constituencies they are courting. Moreover, a sufficient number of voters in the primaries may object to the policies of the leadership and side with the internal opposition. Attempts to shame the disloyal MKs will then backfire and provide them as well with free publicity among a much larger constituency, which seeks an alternative leadership for the party.

The other strategy for ensuring backbencher compliance is to call off the primaries and revert to the old-guard system of internal appointments. The party leadership can either make a threat to that effect or can actually do so: the same leaders who instituted primaries can call

them off almost at their will. This strategy was indeed used by Prime Minister Netanyahu, when he called off the Likud primaries prior to the 1999 elections; in Spring 2000, “aids close to” Prime Minister Barak threatened to take similar action. The uncertainty created by the leadership’s discretion at modifying the election/appointment method has however limited effects. The mere possibility of prospective primaries require MKs, at least backbenchers, to cultivate constituencies well in advance and and maintain sufficient influence to attract potential contributors. Thus they will make sure that as MKs, they have a say on prospective allocation of public resources, and to this end, like squirrels preparing for the long winter, they empower Knesset committees with the necessary supervisory powers over the executive. Although they may cooperate with their party leadership during the first stages of their four-year tenure, they will defect once the threat of calling off primaries is removed. Because the system of election or nomination to the party’s list is usually decided upon well in advance, at least one year, backbenchers have sufficient time to take independent action. This analysis suggests a cyclical pattern of behavior on the part of the individual MKs and thus of the Knesset as a whole, with more independence – less cooperation with the government – as primaries approach.

But there are indications that the threat of calling off primaries becomes less credible as time passes. This may be due to several reasons. First, the current leadership is composed of those who have done well in previous primaries and presumably foresee success in the future as well. Second, the primaries system apparently has appeal among voters who presumably value democratic and open processes. They perhaps are also more attracted to candidates who have succeeded in primaries in the past; or put differently, the successful primarists are better qualified in campaigning on behalf of the party (and themselves) after having succeeded in

securing a good position on the party list. It should be noted that at this post-primaries stage, the hardest and most loyal campaigners will be the backbenchers whose positions on the party list give them only reasonable prospects of getting into the Knesset in the upcoming elections. The Likud party shrank significantly in the 1999 elections, prior to which it held no primaries. Its new leader in the opposition, Ariel Sharon, announced quite early on that primaries would be held before the next elections.

### B. The Theory in Practice

An analysis of MK behavior in the era of primaries conducted by Reuven Hazan indicates that backbencher MKs (whom he calls “constituency-based MKs”), those who profited from the primaries method of candidate selection, tend to focus on the needs of their specific constituencies rather than on national issues. They promote the interests of their constituencies in the spheres of budget allocation, education, child welfare, and unemployment. They prefer to become members of Knesset committees engaged in social matters, leaving to the leading party members the committees dealing with security and foreign affairs. Responding to questionnaires, these backbenchers indicated allegiance to their constituencies more than to their parties, as well as willingness to cooperate across party lines to further their constituencies’ interests. Many have even established bipartisan lobbies to promote joint causes.<sup>8</sup>

Another indication of the shifts in power emerges from comparing the outputs of the Twelfth and Thirteenth Knessets. The Twelfth Knesset (December 1988 to June 1992, 42 months in total, 8 regular Knesset sessions) was the last one to operate under the old system of

internal nominations. The Thirteenth Knesset (July 1992 to May 1996, a total of 47 months, also 8 regular sessions) was the first to which MKs were either elected based on the primaries system (Labor MKs) or faced reelection (in both Labor and Likud). The comparison of the outputs of these two Knessets, which is described below reveals a clear change of attitude on the part of individual MKs and, as a result, in the status of the Knesset vis-à-vis the government. In the era of primaries, the MKs clearly work hard to distinguish themselves from the government and to enhance their personal output. The number of private bills initiated by MKs during the Thirteenth Knesset was 3523, compared to 1495 during the Twelfth Knesset. Of the bills that passed as laws, more than half (213 out of a total of 395, or 54%) were privately initiated by MKs, compared with an average of 15% in previous Knessets. The number of MK queries submitted to the government rose by 20%. The number of private suggestions for the agenda rose by 45%. Debates extended to 56% more hours, and the number of speeches rose by 23%. MKs who were members of the parties forming the governing Labor-led coalition did not defer to the government and, instead, accounted for a large part of this increased Knesset activity. Thus, for example, 42% of the private bills passed during the Thirteenth Knesset were initiated by members of the coalition parties and 24% were sponsored jointly with opposition MKs.<sup>9</sup> Interestingly enough, in the subsequent Fourteenth Knesset (1996-99), the members of the Likud-led coalition initiated only 31% of the private bills passed (with 14% jointly sponsored).<sup>10</sup> One explanation for this decline may be the fact that the primaries system was revoked in the Likud prior to the 1999 elections. Indeed, many of the privately initiated bills were initiated not by the backbenchers of the two main parties but by

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<sup>8</sup> Reuven Y. Hazan, *Constituency Interests without Constituencies: The Geographical Impact of Candidate Selection on Party Organization and Legislative Behavior in the 14<sup>th</sup> Israeli Knesset, 1996-99*, 18 *Pol. Geography* 791, 801-03 (1999).

members of minor parties, some of which did not conduct primaries.<sup>11</sup> But clearly these bills could not have passed—and, indeed, did not pass—in the era of strict party discipline.

Even more telling than the quantitative differences is the changing format of legislation. In the past, statutes usually included provisions that empowered a specific government ministry to issue regulations for the purpose of implementing the statute. Often statutes would delegate wide-ranging authority to government ministries or to other state agencies. The language of these statutes would hardly constrain the discretion of the minister or agency. In short, the typical statutory empowerment of the executive allowed wide discretion to the executive, often almost unqualified authorization to prescribe policies as it saw fit. A subservient Knesset with ineffective opposition could do only that much. This changed in the Thirteenth Knesset, which insisted on retaining supervisory powers over the executive. The number of statutes that required the continued involvement of Knesset committees, in the forms of pre-approval of regulations and of allocation of public resources, rose by 36% compared to the previous Knesset.<sup>12</sup> Since 1999, at the insistence of its Speaker, the Knesset has refused to permit the government to use the opportunity of the passage of the national budget, usually a stormy event, to introduce wide-ranging legislative changes via the omnibus bill.

The contents of the statutes initiated and adopted in the era of primaries also indicate an opinionated Knesset seeking to control executive power. First and foremost are the two basic laws enacted in 1992, which provided, for the first time, a partial bill of rights. These basic laws were adopted during the last session of the Twelfth Knesset, just as primaries were taking place in the Labor Party. At first glance, these Basic Laws constrain the Knesset itself and

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<sup>9</sup> Gideon Rahat & Reuven Y. Hazan, *Candidate Selection Methods: An Analytical Framework* 29 (2000) (unpublished manuscript, on file with author).

<sup>10</sup> *Id.*

<sup>11</sup> See the data presented in Daphne Barak-Erez' comment in this issue.

subject its acts to judicial scrutiny. But a second look reveals that these laws in fact constrain the government, the body usually interested in limiting civil rights. Judicial review offers MKs a good excuse to reject government-initiated bills that limit civil rights. From experience in practice since 1992, we find that MKs, including those in the coalition, refer regularly to these two basic laws as reason to rebuff government-sponsored bills that limit rights enshrined in the basic laws.<sup>13</sup>

Some of the statutes adopted since the Thirteen Knesset interfere with executive discretion in the appointment of members on decision-making bodies and provide for fair representation of different groups such as women and disenfranchised minorities (Arabs—including Druze and Circassian—rather than religious Jews, who comprise a strong minority).<sup>14</sup> Another statute from the same period, late 1992, (which took effect in 1993 after Knesset approval of implementing regulations) requires the government to hold public tenders for government transactions. An important tool for enhancing the Knesset's monitoring capabilities is the Freedom of Information Law, adopted in 1998. The draft bill was introduced by private MKs who relied on the work of a coalition of NGOs.

In 1994, the Knesset restricted the ability of the two major parties to collude—as they did in the past—to allow retroactive increases in the amounts parties were allowed to spend during the previous election campaign. Prior to the 1994 law, the two parties could disregard the limits set under law on expenditures during elections, relying on their prospective cooperation in raising those limits retroactively. The 1994 law delegated this authority to a

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<sup>12</sup> Analysis of statutes compiled by the author, on file with author.

<sup>13</sup> Eyal Benvenisti, *Judicially Sponsored Checks and Balances*, 31 *Mishpatim* [Hebrew U. L. Rev.] 797 (2001) (Hebrew).

<sup>14</sup> These bodies include the Israel Lands Council, where legislation imposed limits on the government's discretion in appointing members on boards of directors of government-controlled companies. In addition, legislation required preference to be given to women in appointments to higher posts in public service.

committee composed of three members: a judge appointed by the President of the Supreme Court and the two other members appointed by the Speaker of the Knesset.

Finally, a circumstantial indicator of the Knesset's growing independence is its resort to non-governmental sources to obtain information. Although no research has been done, NGOs report a significantly larger demand for their input in Knesset deliberations on pending bills or policies.

### III. SHIFT OF POWER WITHIN THE KNESSET

The second impact of the introduction of the primaries system in the two major parties was the diffusion of political power. The primaries diminished considerably the power of the traditional powerbrokers, namely, the Jewish Religious Parties ("JRPs"), and to some extent increased the power of the Arab Parties ("APs"). The JRPs have traditionally formed part of the ruling coalition. Their relative power has increased substantially since 1977, as the two large parties—Labor and Likud—became equal in size and thus had to garner the support of all or most of the JRPs in order to form a coalition government. Thus the JRPs have been coalition-makers since 1977. At the same time, the APs were not (and still are not) considered legitimate partners in a coalition. Thus, there were four groups of political actors in this scenario the two major parties (each with its immediate small satellites), the JRPs, and the APs. With the APs effectively excluded from any coalition, the two large parties found themselves in a prisoner's dilemma: they could either cooperate to form a Labor-Likud large coalition or defect and forge a smaller coalition with (all or most of) the JRPs. Although during the 1980s, the two big parties managed to cooperate at times to form national unity alliances, mutual distrust prevailed and this led to defections. Within a five-and-a-half-year period, between September

1984 and March 1990, the Labor-Likud national unity government reconstituted itself three times and was routinely plagued by crises.<sup>15</sup> It ultimately collapsed upon Labor's attempt to undermine the coalition to which it was party. In this predicament, neither party could forgo courting the JRPs. The latter collected the dividends this strategic position yielded.

At the same time, because the Knesset had less effect than the coalition government and APs were excluded from government, the APs influence on public affairs, in particular on the allocation of public goods, was quite insignificant. A more effective and diffuse Knesset increased their opportunities to participate in policy making, and hence their political influence increased.

The waning power of the JRPs and the growing power of the APs are yet to be fully realized by the public. There are a number of reasons that may explain this failure to appreciate these changes, let alone to realize their roots. Due to demographic change and the ability under the new system to vote for one party's candidate for Prime Minister but for another party for the Knesset, the number of JRP MKs increased substantially between 1992 and today. Superficially, it is easier to focus on the number of JRP MKs rather than assess their actual influence on decisions at both the government and the Knesset. But a careful examination of the political inter and intra-party dynamics, guided by our theoretical predictions that focus on the motivation of individual MKs participating in primaries in the two major parties, can substantiate the arguments concerning the changing effectiveness of both the JRPs and the APs in the political arena vis-à-vis the major parties.

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<sup>15</sup> See Koren & Shapira, *supra* note 6, at 387-89.



## A. Theory

The introduction of the primaries system shifted the Israeli political system from a bipolar political reality—two major actors—to a multipolar system, where power is much more diffuse. Under the previous system, the JRPs, the traditional coalition-makers, easily exploited the bipolar competition. Under the new system, they faced a multipolar game. Power is no longer allocated amongst the two major parties and the small JRP powerbrokers. As the previous analysis of the motivation of individual MKs in Section II(A) suggests, it is quite conceivable for Labor and Likud backbencher to be more interested in their own reputations and political survival than in the survival of the government. Many of these backbenchers are even willing to cooperate across party lines on ad-hoc or even longer-term issue-specific matters (for example, gender or labor issues). Absent effective party discipline, these MKs have incentive to form ad-hoc, anti-JRP (or pro-gender equality, pro-subsidized secular education, etc.) coalitions that will be popular among their predominantly secular constituencies. This suggests that backbenchers now constitute a fifth, albeit looser, political bloc that can join a secular cross-party alliance with either the ruling coalition or main opposition party to obstruct pro-JRP policies or to push through anti-JRP measures. The new diffuse power structure limits the possibilities for the JRP MKs—despite their absolute growth in numbers—to play both main parties against one another.

The end of bipolarity does not necessarily spell the end of JRP influence. Indeed, the religious parties too can use the opportunities provided by the new multipolar system to collaborate with Likud and Labor backbenchers and the Arab MKs against the two large parties. But they no longer hold the veto power they once enjoyed. In this new give-and-take,

they must share the balance-tipping power and support the interests of their parliamentary partners.

While the JRPs have lost their leverage, the Arab MKs are poised to win under the new rules. In a bipolar world, they lost because they could not issue credible threats to the political left, and so the left could take their support for granted. In a multipolar world, although they continue to be denied the opportunity to join the governing coalition (and get government portfolios), it is no longer necessary to join the coalition to secure a better share in the allocation of national resources. They enjoy significant presence as MKs in a multipolar and independent Knesset. They can join the collective logrolling and channel public resources to their constituencies through legislation and participation in Knesset committees.

#### B. The Theory in Practice

While ample evidence supports the theoretical prediction regarding the impact of the primaries on the independence of the Knesset, there is less obvious evidence with regard to the second prediction, namely, a reduction in the power of the JRPs and an increase in APs power in the political arena. While it is relatively easy to assess the output of an independent, as opposed to passive, Knesset, measurement of an anti-or pro-JRP or AP Knesset is a more nuanced exercise, because most JRP/AP-related policies do not involve legislation, but, rather, allocation of public resources. Nevertheless, there are a number of indicators to support our second prediction.

Pro-JRP (anti-AP) policies are reflected, *inter alia*, in the transfer of financial support from the state budget to religious communities and institutions. Three ministries serve as the main conduits for channeling support: the Ministry of Education, the Ministry for Religious

Affairs, and, to a lesser extent, the Ministry of Housing. JRP MKs traditionally controlled these ministries. In the primaries era, however, this arrangement has changed. During the Thirteenth Knesset, Shimon Shetreet, a Labor MK (and political backbencher), was appointed Minister of Religion and embarked on policies directed at transforming the ministry into a transparent and accountable institution for the first time in its history. Not unexpectedly, this move infuriated the JRPs, but also placed Shetreet in the limelight, boosting his reputation among secular voters. Despite the record number of seats won by the JRPs in the 1999 elections to the Knesset, when Labor formed its coalition government (of which all JRPs were members), the Ministry of Education was given to Yossi Sarid, the leader of the secular Meretz Party, who pursued decidedly anti-capture (and anti-JRP) policies. The Ministry of Interior, another post long-held by the JRP, was given to the secular head of the party representing immigrants from Russia. After all the JRPs pulled out of the coalition in the Summer of 2000, the Prime Minister tried to build a bridge to the Likud (or Likud backbenchers), proposing a new secular agenda that would include the drafting of the constitution and the dissolution of the Ministry of Religion.

With regard to legislation, it is noteworthy that the Knesset has thus far refrained from translating the increase in JRP-size to changing the secular-religious status quo through legislation. In fact, the JRP MKs, who constantly deplore what they perceive to be infringements of the status quo by the Supreme Court, fail to counter those decisions with overriding legislation. Their only significant victory was the enactment of a 1994 law prohibiting the import of non-kosher meat (legislation that overruled a Supreme Court order). This achievement should be attributed to the Shas Party, the largest of the JRPs, which succeeded in tying the issue to the peace process with the PLO, then at a crucial stage. By

importing this issue into the context of the traditional left-right debate, Shas was able to issue a credible threat to the dovish Labor-led coalition. In contrast, the Knesset is yet to approve legislation arranging/is yet to enact legislation providing for a general exemption for ultra-orthodox Jews from compulsory military service, as required following the 1998 Supreme Court ruling that only the Knesset, and not administrative officials, can grant such an exemption, thereby abolishing the exemption traditionally accorded to the ultra-orthodox.

At the same time, Arab interests continue to endure disregard and discrimination. Both Labor and Likud governments continue to table national budgets that systematically allocate to the Arab minority a disproportionately low share of national resources relative to its percentage of the population.<sup>16</sup> But in recent years, AP MKs have begun to use the tools available to them as legislators to overcome the political bias against them. Especially on social issues, they form ad-hoc alliances with JRPs, Labor and Likud backbenchers with low-and middle-income constituencies, and either one of the two main parties. Thus, as the data compiled by Barak-Erez indicates, the Communist Party Hadash, which can essentially be classified as an AP, initiated twenty-eight pieces of new legislation during the Twelfth Knesset, ranking first in the MK/bills ratio.<sup>17</sup> A prominent example was the enactment in November 2000 of a statute that significantly increased child-benefit payments for families with more than five children. Thirteen out of the fourteen Arab MKs from all parties entered into an ad-hoc coalition with the JRPs and the Likud against the Labor-led coalition, and voted for a law that increases significantly child benefits.<sup>18</sup> Most noticeably, an Arab Labor backbencher (Noaf Massalkha) and Arab Meretz backbencher (Khussania Jabara) were the key to this outcome, both voting

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<sup>16</sup> See, e.g., David Kretzmer, *The Legal Status of the Arabs in Israel* (1990); Yoram Rabin & Michal Lutsky-Arad, *The Prolonged Budgetary Discrimination of the Arab Sector*, 11 *Hamishpat* [C. Mgmt. L. Rev.] 42 (2001).

<sup>17</sup> Barak-Erez, *supra* note 11. Hadash remained very active in initiating new social legislation also in the fourteenth and fifteenth Knessets.

against their parties' positions; Salakh Tarif, a Labor Arab MK and Deputy Minister of Foreign Affairs, abstained from the vote. Had these three MKs voted against the law, it would have fallen.<sup>19</sup> It is only because of the existence of the primaries system in the two relevant parties, Labor and Meretz, that these MKs could vote as they did, against the party position and in line with the interests of their individual constituencies.

These examples point to the accuracy of the theoretical analysis of the effects of primaries on the diffusion of power in the political arena. The emergence of "free-ranging" MKs in both Labor and Likud has changed Israeli political dynamics and has undermined long-held alliances. Despite their highest-ever showing in the last elections, the JRPs are losing ground, whereas the APs, on the other hand, are faring better than ever. Remarkably, this development has passed unacknowledged. The next section inquires why.

#### IV. THE PRIMARIES IN A WIDER CONTEXT

Thus far, I have presented the argument that the introduction of the primaries system into the major parties affected a constitutional reform in Israel as well as a shift in the political power relations along the religious-secular and Arab-Jewish rifts. What is most surprising is that these significant changes are yet to be acknowledged as such. Several explanations can be offered as to why this reform was accidental and unnoticed. One explanation is that the new primaries system coincided with the enactment of Basic Law: The Government, enacted in 1992.<sup>20</sup> The Basic Law provided for direct elections for Prime Minister, and the first such elections were held in 1996. Under the previous system, the Prime Minister was number one on the list of the

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<sup>18</sup> For the vote count, see Zvi Zrachia, *The Law to Increase Child Benefits Was Approved with Likud Support*, Haaretz, Nov. 2, 2000, at A5.

<sup>19</sup> The bill was passed by a 54:49 majority, with one abstention. The bill would not have passed in a 52:52 vote.

largest party in the governing coalition. Some voters voted for either one of the two main parties, because they sought to influence who would be Prime Minister. Under the new system, with direct elections for Prime Minister, voters can split their votes and choose a party for the Knesset that is different from the party of the candidate they choose for Prime Minister. This new system, which was marketed to the parties and public as a system that would increase the power of the large parties and the elected Prime Minister, in fact reduced the number of seats held by the two main parties in the Knesset, respectively. The possibility of a split vote enabled voters to divide their support between their candidate for Prime Minister and the smaller parties, such as the JRPs, APs, or parties representing diverse (secular) constituencies and interests. Most of the scholarly attention—and much criticism—was directed at this novelty. The main point of criticism was that with fewer MKs at his or her disposal, the Prime Minister's ability to control the coalition was significantly reduced.

Can the new system of direct elections for Prime Minister provide an alternative explanation for the strengthening of the Knesset and the weakening of the JRPs? Not according to my analysis. First, the quantitative and qualitative data analyzed in Section II demonstrate that the shift in the balance of power began already in the Thirteenth Knesset, between 1992 and 1996, as compared to the Twelfth Knesset, from 1988 to 1992. The first direct elections for Prime Minister took place only in 1996, in tandem with the general elections to the Fourteenth Knesset. The new election system for Prime Minister cannot, therefore, explain the shift we are examining, and instead the impact of the introduction of the primaries system is apparent. Second, the new direct elections system for Prime Minister cannot explain the observed tendency of backbenchers to forego party allegiance in favor of the interests of their individual

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<sup>20</sup> Direct elections for prime minister were repealed in early 2001, and the previous system, with minor changes was reintroduced. This may again increase the role of backbencher MKs.

constituencies and their consequent willingness to form ad-hoc bipartisan coalitions against the positions of their party leaders. Third, the evidence also suggests that despite the reduction in the size of the two major parties and the increase in the size of the JRPs, an independent Knesset has weakened the relative power of the JRPs. The new prime ministerial election system cannot explain this change either, but, rather, the backbenchers' new ability to opt for bi-partisan pro-secular policies.

While the primaries can be attributed with the strengthening of the Knesset vis-à-vis the government and for the shift in power within the political arena, direct elections for Prime Minister were not without their impact on the Knesset. Vote-splitting in the 1996 and 1999 elections<sup>21</sup> reduced the number of Labor and Likud backbenchers, as support shifted away from these two parties to smaller, narrowly-focused parties. This increased the incentive of specific interest groups to compete as independent parties rather than as backbenchers. I am not certain that this led to a corresponding increase in the total number of independent-minded MKs (as compared to before vote-splitting was possible). What is clearer, however, is the reduction in the willingness of independent-minded MKs to cooperate with either of the two large parties' leaderships. Likud and Labor backbenchers were willing to cooperate with their respective leaderships on matters of national concern, such as security and foreign affairs, due to their long-term interest in increasing their power and status within the party ranks and their future chances of becoming leader of the party. No such willingness could be expected from total strangers to the party, for whom only short-term interests are at play. Thus, the system of direct elections for Prime Minister increased the number of wild cards in the Knesset and reduced the number of backbenchers. It did not produce a more independent Knesset; indeed, it most certainly produced a more ungovernable, less responsible one.

Finally, two major developments in Israel during the same period served to turn any and all attention away from the revolutionary impact of the introduction of the primaries system: the launching of the peace process with the Palestinians in 1993 and the enactment of two basic laws on human rights in 1992 and their subsequent broad interpretation by the Supreme Court, with the Court asserting, amongst other things, that these laws granted it the power to conduct judicial review of legislation.

The academia completely missed the reform because the two relevant disciplines, law and political science, each focused on one of the two less relevant developments. Legal academia focused on the Supreme Court's new role in second guessing legislation, and thus saw a Knesset whose authority was weakened by the introduction of judicial review. At the same time, political scientists concentrated on the new system of direct elections for Prime Minister. No one noticed or analyze the impact of the primaries on the Israeli political and constitutional reality. Interestingly enough, both disciplines saw a weakened political system: the Knesset weakened by growing judicial assertiveness, one the one hand, and by splinter parties and ungovernable coalitions, on the other. The Supreme Court, in contrast, recognized the emergence of an independent, responsible Knesset.

#### V. A NEW ROLE FOR A REACTIVE COURT

There is evidence to suggest that the Supreme Court reacted to the evolving role of the Knesset by modifying its policies with respect to judicial review of administrative action. Previously, and especially during the period of 1977-1992 (when Likud and Labor were both held captive by the JRPs), the Court conducted rather interventionary review of administrative decisions, often interfering with the outcome of the administrative process. This implies that the Court did

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<sup>21</sup> The system was abolished in 2001.



not trust the Knesset to act as a rein on the government and its bureaucracy. But since 1992, the Court has noticeably deferred to the Knesset. Instead of finding administrative action lacking on its merits, the Court carefully scrutinizes the very authority of the particular administrative agency or ministry. Whenever it finds authority either lacking or too vague, it calls to the Knesset to intervene and provide clear authorization for the agency or set stringent limits on its discretion.<sup>22</sup> In short, the Court's recent jurisprudence suggests that it senses the growing independence and assertiveness of the Knesset.

In a sense, one could claim that the Court's newly asserted power to review legislation based on the 1992 basic laws, rather than undermining the Knesset, has strengthened it vis-à-vis the government. After all, the main role of these basic laws was to curb government infringement on individual freedom. Thus, along the same lines, we could claim that the basic laws also provide MKs with the ability to resist government-sponsored legislation. MKs can now oppose such bills on the ground that they would not withstand Supreme Court scrutiny. MKs—including those who are members of the two main parties and ruling coalition—serving as chairpersons on committees on legislative committees in the Knesset have, on various occasions, solicited legal opinions to determine whether government bills are compatible with the two 1992 basic laws.<sup>23</sup> On several occasions, when these bills were found to be incompatible, the committees rejected them.

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<sup>22</sup> For the analysis of these cases, see Benvenisti, *supra* note 13, at 813-17.

<sup>23</sup> *Id.* at 812-13.

## CONCLUSION

This Article has demonstrated the powerful implications of structuring the elections process on democratic institutions and processes.<sup>24</sup> It shows that “democratic politics are not autonomous of existing laws and institutions” and that “those who control existing arrangements have the capacity to shape, manipulate, and distort democratic processes.”<sup>25</sup> Moreover, the Article demonstrates specifically the impact of different systems of pre-selection of candidates in parties not on inter-party competition, but on the functioning of the political institutions. This demonstration raises a general hypothesis regarding the linkage between candidates preselection methods and the independence of legislatures.

The Article also shows that in analyzing constitutional structure, no less relevant than the actual constitution and the case law are internal party rules—technically, bylaws of private associations—which can influence the constitutional structure more effectively than the constitution itself. This observation leads to the question of to what extent the state should be allowed to interfere in the political parties’ freedom of association and restrict their internal procedures for selecting candidates. Political parties are crucial components of a system of representative democracy, and their proper functioning is the key for the proper functioning of the entire system. The public ramifications of the party’s internal processes justify their regulation by the state when the political market is captured. Party primaries are necessary for

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<sup>24</sup> See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643 (1998); Samuel Issacharoff et al., *The Law of Democracy* (1998).

<sup>25</sup> Issacharoff et al., *supra* note 24, at 2.

the proper functioning of the political process, and if the political market fails to provide them, the state must intervene to ensure them.<sup>26</sup>

Another implication of this observation relates to divided societies. In such societies, the political rifts often follow ethnic or religious fault-lines. As a result, any such minority may be consistently outvoted. Lack of voice leads to a search for exit options, usually through violence or at other exorbitant costs. Thus far, attention has been devoted to the possibilities for enhancing minority voice, for example, by setting, or resetting, voting districts to ensure sufficient representation for minorities. But these solutions are fraught with difficulties. The above analysis suggests that a variance in the systems for pre-selecting party candidates influences the power relations between distinct communities, sometimes empowering minority groups, sometimes reducing their capture opportunities. Careful attention to the election system is crucial for striking a proper balance among different constituency groups. One conclusion from this Article is that an economic analysis of election arrangements can, in theory, result in proposals for different systems of candidate pre-selection or of elections that could counterbalance the numeric inferiority of minorities within a given society.

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<sup>26</sup> It is beyond the scope of this Article to examine which type of party primaries is appropriate. This question, I believe, cannot be discussed in the abstract.