

## Separating Substance from Procedure: How to Address the Israeli Constitutional Crisis

Alon Harel Alon Klement

Many proposals to resolve the current Israeli constitutional crisis have been recently advanced. These include the President's proposal, Friedman & Elbasha's proposal, Stern's Proposal, Barak Medina proposal, and many others'. These proposals, however, appear unlikely to bring about a compromise, not because their content cannot be accepted by the parties involved, but because they do not address their substantive concerns.

Both sides aim to reach a compromise that reflects and advances their ideological goals or constituent interests. In making decisions concerning decision-making mechanisms and the role of the Court, neither side considers whether these mechanisms are good or desirable from a long-term perspective, but only whether they will enable it to further its short-term goals. It is therefore imperative to separate short-term interests related to urgent substantive issues from procedural decisions that shape decision-making mechanisms in order to find a solution.

We propose a framework that, if adopted, can provide a basis for a viable compromise. The framework we propose is based on a strict separation between the urgent substantive issues, such as the conscription of ultra-orthodox, the regulation of public transportation on Saturdays, Kosher laws, etc on the one hand, and determining the mechanisms for decision-making concerning constitutional questions on the other. While with respect to the substantive issues, the interests of the parties are distinct and are based on conflicting ideologies, with respect to the institutional mechanisms of decision-making, there may be greater overlap than seems at first sight. Hence, separating the negotiations about the substantive issues from those about the procedural issues is necessary if a compromise is to be realized.

One way to establish institutional mechanisms for decision-making is to do so behind what is often called in the literature "the veil of ignorance." The term was coined by the political philosopher John Rawls in his important book *A Theory of Justice*. In his view, foundational decisions must be settled in a way that is not influenced by sectarian interests. The normative foundations of a state should ideally reflect the rules that we would have endorsed had we been ignorant with respect to our identity, our social class, our religion, or sexual orientation. These are all central components of our identity, but they cannot provide a basis for constitutional decisions.

Thus if I am a Catholic, I may be voting for a party that promotes Catholicism, but if I vote behind a veil of ignorance, I would not know whether, at the end of the day, I would be a Catholic, a Jew, or an atheist. Hence I may vote for a rule that would guarantee freedom of religion. Similarly, if a heterosexual who dislikes gay couples would vote behind the veil of ignorance, he may vote for gay marriage as he does not know whether, at the end of the day, he would turn out to be gay or not.

While Rawls applied this principle not only with respect to decisions concerning procedure and decision-making rules but also with respect to substantive decisions, we wish to apply this mechanism only to procedural decision-making mechanisms. The real world however, does not provide a veil of ignorance. In the real world, we vote while knowing our socio-economic

status, our religious beliefs, our sexual orientation, etc. How can we guarantee that our decisions concerning the decision-making mechanisms and the status of the Supreme Court do not take into consideration our short-term interests? We believe that while we cannot fully realize this idea, it is possible to make some progress in this direction.

Our proposal is that the different sectors in society, including ultra-orthodox, seculars, traditionalists and Palestinians will specify what their basic, most important interests are. One may presume that the ultra-orthodox will raise the issue of conscription, Kosher food, and additional issues that seems essential to them. The modern orthodox and the seculars would raise other issues. The parties to the negotiations will have to consider accepting such demands with the understanding that once they do so these issues will be removed from the agenda and therefore the decision-making process and the status of the Court may be determined in a way that would only take long term considerations into account.

After an agreement regarding the urgent substantive issues is reached (which we admit is not an easy task), these issues would be entrenched and not be subject to judicial review. Only then would the parties negotiate long-term procedural mechanisms for decision-making. Since the urgent substantive issues would not be affected by the procedural mechanisms, it would be easier to reach an agreement with respect to the procedure. Such negotiations would be easier when urgent substantive concerns are removed from the agenda. For example, it would be easier for the Ultra-Orthodox to agree to judicial review when they know that courts cannot interfere in the decision to exempt them from conscription. Removing the substantive questions from the agenda will facilitate an agreement with respect to the procedure.

The separation between substance and procedure can be done in different ways. It is possible to reach an agreement with respect to the substantive issues and then make determinations with respect to the procedural questions. Alternatively, different committees could simultaneously engage in negotiations concerning procedural and substantive issues.

To conclude, the constitutional crisis results from the fact that the parties to the conflict shape their proposals concerning the decision-making process in a way that is conducive to their short-term substantive interests. The solution should separate the two. Our proposal facilitates such a separation and therefore seems to us promising.