Debate in Israel Over the Power of Judges Echoes in the West

High court has an ambition for judicial authority far beyond anything claimed by the bench in any other serious democracy.

Israelis protest outside the Knesset at Jerusalem, February 13, 2023. AP/Ohad Zwigenberg

by Conrad Black

It was my privilege to have a public discussion in Toronto this week with the eminent Israeli-American journalist Caroline Glick on the immense controversy now raging in Israel over the Israeli government's radical proposals for reforming

the judicial system. That debate raises questions that will have to be addressed by many countries, including Canada.

In Israel, Canada, and elsewhere, there has been a great accretion in the power of the higher courts to curtail legislative and executive authority. Israel adopted in 1992 a new set of “Basic Laws,” which granted the Supreme Court the power of judicial review, vesting it with the authority to intervene in legislative and executive matters and impose the criterion, not just of apparent legality, but of conformity with the underlying ethos of Israel as “a Jewish and democratic state.”

Prime Minister Netanyahu’s conservative coalition is assaulting what it judges to be a judicial usurpation of the legislative and executive prerogatives of parliament and government. The 1992 Basic Laws were to a slight extent based on Canada’s Charter of Rights and Freedoms. In Canada, we have a history of courts ignoring the intention of the legislators and construing laws in idiosyncratic ways that reflect the sociopolitical attitudes of the judges.

Yet the federal and provincial governments have some remedies for this, including the power to appoint judges and some override powers. This is not the case in Israel, where the Supreme Court is even more powerful and largely selects its own appointees.

The State of Israel was established in 1948 as a unicameral, unitary state, with almost unlimited powers if it is supported by a majority in the country’s parliament, the Knesset. There has always been some feeling in Israel that a stronger form of checks and balances is necessary, in the absence of a division of powers with provinces, a second legislative chamber or a presidential veto.

Defenders of the system claim these problems are addressed by representation in the Knesset according to popular vote per

party, rather than constituencies – any party with 3.25 percent of the total vote enters the Knesset. This effectively ensures that all shadings of opinion are represented, and all Israeli governments have been multi-party coalitions.

Israeli judges are chosen by a judicial selection committee composed of three Supreme Court justices, two members of the bar association, two governmental ministers and two other members of the Knesset; appointments of Supreme Court justices must have the support of seven members, giving the three judges effective control over their bench.

The pending legislation would change the composition of the judicial selection committee, ensuring it is controlled by the elected government, and effectively make most laws insusceptible to judicial review. Where judicial review is retained, it will be by the whole Supreme Court, with the vote of at least 80 percent of the judges required to overrule the Knesset.

The most profound change proposed is the specific redefinition of the criterion by which Israeli courts are to judge legislation and executive actions. Jurisprudence since the adoption of the 1992 Basic Laws has recognized both institutional and normative justiciability: whether the matter reviewed is apparently legal, as well as whether it conforms to the general "democratic and Jewish principles" of Israel.

These have been defined by Israel's most eminent jurist, the former Supreme Court president, Aharon Barak, to be acceptable to the "enlightened community" of Israel. This has produced an arbitrary doctrine of "reasonableness," which in practice has been highly collectivist and socialistic. This subjectively determined concept of equity has been advanced and enforced by an ambition for judicial authority far beyond anything claimed by the bench in any other serious democracy.

The present fierce debate is the culmination of 30 years of

escalating friction after adoption of the 1992 Basic Laws over the powers of the judiciary. Among recent controversial decisions are the Supreme Court's arbitrary demand that the Speaker of the Knesset be replaced and its arbitrary disqualification of a proposed incoming minister. A particular flashpoint has been the indictment of the prime minister on charges of fraud, breach of trust and bribery in two cases involving his relations with the media.

After an intensive and indiscreet investigation, no evidence of an actual bribe was unearthed. Instead, the attorney general, who's often described as the most powerful person in Israel, wielded the full power of the State Attorney's Office to persecute Mr. Netanyahu on the absurd assumption that positive media coverage is akin to a bribe. The judicial reform bill would limit the Attorney General's powers by ensuring the state attorney and state prosecution is no longer subordinate to the attorney general.

Mr. Barak, the chief judicial supremacist, has written that, "Where there is no judge, there is no law." The principal western practice has been the reverse, and judges generally applied the law to the facts. There is an inevitable competition in any legal system between the judiciary's obligation to uphold the law strictly, and the temptation to interpret the law indicatively according to the judges' personal sociopolitical opinions.

The American system of equal executive, legislative and judicial branches of government, and the British system of the high court of Parliament, both effectively provide ultimate authority for elected officials. And of course, this is how democratic government must function. President Jackson, supported by the Congress, famously dismissed Chief Justice John Marshall: He "has made his decision, now let him enforce it."

Though a secularist, Mr. Barak and his followers seek the

fulfillment of Israel's proverbial system of judgment through Jehovah's presumed intervention in the lives of such figures as Saul and David: revelation prevails over statutes and public opinion.

This cultural tradition must be respected, but as a system of democratic government, it is nonsense. Judges have no particular talent for public administration, no legitimate mandate for such power and they are tenured and unaccountable, and insulated from the will of democratic society. In democracies, people elect those who rule.

It is difficult and hazardous to predict the outcome of the Israeli debate, but it is likely that the government will achieve at least a substantial part of what it is seeking. In Canada, while there has not remotely been such aggrandizement by the courts, our judges are proving increasingly resistless to the temptation to substitute their own for the legislators' intentions.

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