

Debate Over Separation of Powers

The debate over separation of powers is said to have its origin in a proposal by the French political philosopher Montesquieu, first announced in *De l'esprit des lois*, The Spirit Of The Laws, 1748. English philosopher, John Locke, had written about the division of power between King and Parliament. In the Biblical system, there was always to be a separation between King and High Priest, as well as between King and Prophet. When the Hasmoneans violated the separation of powers, major disruption ensued, until it was restored by Queen Alexandra Salome by the appointment of her brother, Joshua, to be High Priest.

In the United States, there are those who argue that separation of powers has been eroded tremendously. The President can use the proclamation power to override or ignore Congress. Congress passes legislation to permit the President war powers, without there ever being a declaration of war as required by the Constitution. Administrative agencies, the great American bureaucracy, perform legislative, executive and even judicial functions. Entities created by Congress, such as the Social Security Administration, have hearings and make determinations all the time. Even though these "legal" decisions can be appealed to a court of law, the bureaucracy is the final resort.

Israel is undergoing a great debate today as to whether proposals by the new government represent a breach of the doctrine of separation of powers. Although Prime Minister Benjamin Netanyahu's government is often labeled as "Right Wing", the truth is that the Prime Minister has always headed center and center-left governments. His coalition currently is designated by its opponents as "Right Wing" because the center and center-left refused to enter into a coalition with the Prime Minister. In the past, the center and center-left parties joined with BiBi's Likud party to form a coalition majority, but not this past election.

The Israeli system is complicated by its more pure form of democracy than we have in the United States. Due to the existence of many parties, it is virtually impossible for any party to receive a majority in the 120-member Parliament, the Knesset, on its own. Therefore, the successful party may be lucky to have 30 of the 61 seats needed to possess a majority in the Knesset. In order to govern, the party with the most number of seats, therefore must make a deal with other parties.

Those who advocate for change in Israel, claim, with some justification, that they are in admiration of the American model and moving more towards that system of governance.

Let us take a basic look at the proposals, as they currently stand:

1. Judicial Appointments Committee. The makeup of the Judicial Appointments Committee in Israel currently is that it is a nine-member group, including three High Court Justices, four politicians, one of whom is the Justice Minister, and two representatives of the Israeli Bar Association. There needs to be a majority of at least seven votes in order to approve an appointment. There is a tendency, in the Israel system, for the Supreme Court, therefore, to be self-perpetuating; in other words, the majority is going to want Justices just like those who previously served. Some say this

creates a sense of uniformity and continuity. Others say that it is in derogation of democracy, and denies voters meaningful input into who is chosen to sit on the Israeli Supreme Court.

The Attorney General of the governing Israeli majority seeks to replace the two Bar Association representatives with two more politicians, one from the government and another from the Knesset. This would be much more like the American system, where the President nominates and the Senate has a lot to say about whether there will be a confirmation. In many states in the United States, there are elections for judges and justices.

2. Override Clause. A majority of 61 members of Knesset, under the proposed plan, would prohibit the High Court from hearing appeals against Basic Laws. Since Israel does not have the American equivalent of a Constitution, it has basic laws which can be quite detailed in terms of rights and responsibilities. This would enable the governing coalition to override the High Court majority. The only case in which a law would be immune to override would be in the event that all 15 Justices agree to strike it down.

How does this compare to the United States? The United States Supreme Court, for example, has recently ruled that states, or the federal government, may prohibit abortion. Previously, under *Roe v. Wade*, the United States Supreme Court had ruled that the states and federal government could not prohibit abortions during the first two trimesters. Congress, and states, may now pass their own laws concerning abortion, although they cannot rule as to what the federal Constitution may permit or prohibit. Congress has passed legislation in the past depriving the United States Supreme Court of jurisdiction over certain issues, a *de facto* overruling of the Court.

3. Legal Unreasonableness. The third part of the government's current plan is to cancel the "legal unreasonableness" determination, which the High Court can use to cancel decisions made by the government due to being "extremely" unreasonable. In fact, the Israeli Court just did this, in blocking the appointment of a minister who was previously convicted of a crime, but now is said to have rehabilitated himself.

The United States has nothing like this. Although many believe the United States Supreme Court has, in essence, rewritten the antique American Constitution, and really makes decisions based upon reasonableness, we do not literally, in the United States, give the United States Supreme Court that much power. In truth, because the United States Constitution needs to be interpreted, either in a conservative or a liberal way, the test of "reasonableness" is clearly in the minds of the Justices. In Israel, because the Basic Law is so much more detailed, the Supreme Court can find many more reasons to invalidate a law, than in the United States.

The question as to whether the ability to cancel the "unreasonableness" factor is an Israeli internal matter that is certainly subject to great debate.

Fights between the Supreme Court, inherent to separation of powers in a democracy, and elected bodies are nothing new. When the United States Supreme

Court first decided, during the Federalist reign of power, that congressional laws could be struck down by the High Court, there were many who cried foul. Just how much power a court should have, generally unelected in most democracies, is always a matter of contention.

The debate in Israel is not about the difference between democracy and Totalitarianism, regardless of how passionate the voices may seem. In fact, a compromise will ultimately be agreed upon. The Israeli High Court may be regulated somewhat, as a super-legislature looking over the claimed excesses of the Executive and the Legislative Branch, but the institution of democracy will survive in the robust country.

No doubt, the protests will continue and democracy will eventually determine the shape of Israel's present and future.

Israelis can be happy and proud of one thing, they are the only democracy that the Middle East has ever known or will ever know in any of our lifetimes. Israel sets an example to the world as to how important the law really is.

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