THE CANADIAN *CHARTER* AS A MODEL FOR ISRAEL'S BASIC LAWS

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On a number of occasions, Justice Barak of the Israeli Supreme Court has remarked that, in the enactment of its new Basic Laws on human rights, Israel walks in the path of the Canadian *Charter of Rights and Freedoms*.[1] And he has encouraged Israel's judiciary to make reference to the Canadian Supreme Court's purposive approach to *Charter* rights and its rights-forwarding orientation to s. 1 limitation in the interpretation of these new laws. Israeli civil servants, such as Deputy Attorney General Shlomo Guberman, made careful study of the *Charter*'s evolution, text and interpretation in the course of formulating and drafting these laws.

How is it that Canada and Israel share a common approach to rights protection? The vast contrasts in constitutional arrangements, history, economic substructure, demographics, security and political culture are obvious — to say nothing of basic divergences on religion-state questions and problems involving race and national ethnic origin. Such matters are the substructure of rights protection. Is there anything left to share?

The fact that Israel has looked to Canada's Charter experience is incontrovertible. To understand this phenomenon one must look beyond the contrasts: the appeal lies at a deeper, more abstract level.

I do not argue that the Israeli Basic Laws are modelled on features unique to the *Charter*. The attraction is the *Charter*'s membership in the post-World War Two family of rights-protecting instruments.[2] By capturing a coherent national statement of constitutional priorities based on these instruments, and in particular a network of institutionally sound roles, the Canadian *Charter* offers a more attractive system of rights protection than, for example, its American counterpart.

What are the distinctive features of this post-1945 rights-protecting system? First, there is the more generous and more up to date array of protected rights and freedoms. Second, there is the provision of express limitation clauses, which forward both the rule of law and a more abstract commitment to the values that inform the specific rights and freedoms guaranteed. Third, there is provision for judicial review. And fourth, the guarantee and the express limitation, both under judicial supervision, are conjoined to a legislative final say in prescribed circumstances.

Turning first to the guarantees themselves, one sees in the *Charter* recognition of rights that pertain primarily to the person, to individual dignity.[3] The individual is not, however, seen as dissociated from the community or general society. On the contrary, the strong equality clause[4] as well as the clause that requires the entire *Charter* to be read in light of the multicultural heritage of Canadians[5] signals the recognition that individuals flourish in communities to which their link is often forged by birth.[6] Similar commitments inform the new Basic Laws.

The *Charter*'s express limitation clauses shift the onus to the state, upon proof of an infringement of a right or freedom. Before shouldering the onus of justifying the incursion on the right in light of the norms set out in the limitation clause, the state must establish that the incursion is "law," that is, that it possesses the formal characteristics informed by the rule of law such as accessibility and intelligibility. Upon satisfaction of this formal precondition, the state may sustain an infringement that has the formal qualities of "law," despite encroachment upon the guaranteed right or freedom, only if it can establish that it is forwarding the substantive norms of limitation. In the international instruments, such as the International Covenant on Civil and Political Rights or the European Conventions, these norms are listed for various types of guarantees; in the Canadian *Charter*, these norms are set out for all the guarantees in one general formulation, the abstract idea of a "free and democratic society."[7] Similarly, as Justice Barak has pointed out, the new Basic Laws provide express formal and substantive bases for limitation.

The legislature enjoys a limited final say under the *Charter*. Whereas under the international instruments the sovereignty of the member states has given birth to temporary, emergency derogation mechanisms, invoked by formal acts of the executive, and subject to review for proportionality,[8] the *Charter* offers a domestic, non-emergency, non-reviewable legislative override clause. When the appropriate legislature has expressly indicated, in

legislation, that it so wills, the override suppresses the guarantee on a temporary basis.[9] This requirement of express and only temporary departure from *Charter* norms works to impose high political cost. (Similarly, the Knesset may alter *Basic Law: Freedom of Occupation* only by an absolute majority vote and may change *Basic Law: Human Dignity and Freedom* only by an enactment that expressly states that it has this effect.)

These four features supersede simpler arrangements for rights protection embodied in the constitutional recognition of freedoms sheltered from state interference. Rights protection, on this view, inhabited the universe of state incapacity — a model now deemed inadequate to the complex interaction between the individual and the state in the modern, liberal, democratic welfare state.

More to the point is the fact that the new structure has emerged since 1945. It reflects the tragic history of this century. Modern constitutions must address the ultimate cost of enmity: war between sovereign states on a world-wide scale; bloody, intractable civil war; and the Holocaust, in which totalitarian power visited systematic denial of civil rights, torture and mass killing against domestic populations on the basis of race, religion, gender, sexual orientation and physical and mental disability. This history has informed modern notions of constitutionalism by demonstrating the intolerable human cost of political ordering unconstrained by the principles that underlie rights protection, namely individual dignity and equality.

The post-war model of rights protection thus rejects the notion that the state best accommodates human flourishing in its inaction and embraces the idea that the state must be disciplined to the values intrinsic to dignified human life in political community.

The American system of rights protection is not inimical to these principles. As an older system, however, its text embraces neither the substantive values nor their institutional protection as clearly as does the Canadian *Charter*. The American Bill of Rights quite appropriately reflected the concerns of the period that gave it birth: democracy in preference to absolute monarchy; separation of powers and minimal government constraining arbitrary power; local government in place of remote power. Even the Civil War Amendments have ultimately failed to dislodge this conceptual foundation. Moreover, much of the elaborate jurisprudence under the United States Bill of Rights is so rooted in features of American federalism and political and social history that one is hard pressed to unravel the distinctively American features from the universal.

It is therefore not difficult to see why our *Charter* has attracted the notice of other countries in the throes of constitutional development, as is Israel. Created by declaration of the United Nations in 1948 as a homeland for the survivors of the Holocaust and beleaguered world Jewry, and immediately, and then intermittently, besieged by totalitarian states rallied by ethnic and religious enmity, Israel faces a day-to-day struggle to build and maintain a vibrant democracy and to realize the universal ideals developed within Jewish civilization, stated so eloquently by Justice Barak as including love of humanity, the sanctity of life, social justice, human dignity, commitment to the rule of law and the role of the law-maker.

The path to a vibrant, resilient system of rights protection will be difficult for Israel. We can see the difficulties in the early but significant steps already taken. The incremental creation of constitutional protection of rights is painstaking, offering no opportunity to see the whole as informing and tempering the parts and presenting only reduced opportunity for principled compromise.

Moreover, Israel's Jewish identity requires thoughtful responses to questions of the relationship between the state and religion. Questions surrounding state use of religious symbols, sabbath observance, public education, public facilities and services, and so on have vexed many countries.[10] But these questions take on unique complexities in the context of the remarkably diverse demographic make-up of Israeli society, especially its multiple fundamentalist manifestations, in the land that is home to so much religious history and so many sites of religious significance.

Religion also arises as a conservative force militating against other norms, such as equality for women generally and the more specific question of marriage and divorce law reform. This tension has undermined support for the passage of the proposed *Basic Law: Fundamental Rights of the Person*. And, pending a comprehensive peace with Israel's neighbours, religious and ethnic political extremism will impose enormous pressure on the judges who delineate the extent to which democracy must be bridled to constitutionalism as well as the permissible exercise of powers to preserve state security. These issues have dimension in Israel that is all but unfathomable to Canadians.

Canadians have, in the past ten years, lived through not

only unprecedented constitutional renewal but also two cathartic failed efforts at further amendment. This experience means that we can empathize with the transformative nature of the current moment of Israel's political development. It also means that Canadians have had little opportunity to reflect on the growing international respect for the *Charter*, so much so that Israel's study of and respect for the *Charter* may come as a surprise. Given the daunting task of constitution-building now underway in Israel and the impressive care taken to ensure meaningful constitutional reform, Canadians can take pride in the fact that it is so often Canada's *Charter* that has provided an important point of reference.

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1. The two enacted laws are: *Basic Law: Human Dignity and Freedom* and *Basic Law: Freedom of Occupation*. A third enactment, *Basic Law: Fundamental Rights of the Person* is under consideration by the Knesset, the Israeli Parliament. For texts and discussion of the first two see D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 Israel L. Rev. 238. An unofficial translation of the third is available from the author. For background see: A. Rubinstein, "Israel's Piecemeal Constitution" (1966) 16 Scropta Hierosolymitana 202; S. Guberman, "Israel's Supra-Constitution" (1967) 2 Israel L. Rev. 455; A. Shapira & B. Bracha, "The Constitutional Status of Individual Freedoms" (1972) 2 Israel Yearbook on Human Rights 211; B. Bracha, "The Protection of Human Rights in Israel" (1982) 12 Israel Yearbook on Human Rights 110; R. Gavison, "The Controversy over Israel's Bill of Rights" (1985) 15 Israel Yearbook on Human Rights 113; A. Maoz, "Defending Civil Liberties Without a Constitution – The Israeli Experience" (1988) 16 Melbourne Univ. L. Rev. 815.

2. See, W. A. Schabas, *International Human Rights Law and the Canadian Charter: A Manual for the Practitioner* (Toronto: Carswell, 1991); A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992). Contrast the comparatively limited American reliance on such international norms: A.F. Bayefsky & J. Fitzpatrick, "International Human Rights Law in United States Courts: A Comparative Perspective" (1992) 14 Michigan J. of Int'l L. 1.

3. For this reason, for example, property interests are not expressly protected. See R.W. Bauman, "Property Rights in the Canadian Constitutional Context" [1992] South African Journal on Human Rights 344.

4. Section 15 (1) and (2) of the *Charter*.

5. Section 27.

6. This view is supported by the language rights provisions, ss. 16 to 23, the reaffirmation of rights to religious public schooling in s. 29, and the provisions that refer to Aboriginal rights, ss. 25 and 35.

7. See s. 1 of the *Charter*. For an account of the transition from individual limitation clauses to one general limitation clause, see L.E. Weinrib, "Constituting Constitutional Change in Canada: Of Diligence and Dice" (1992) 42 U.T.L.J. 207. For an analysis of s. 1 interpretation see "The Supreme Court of Canada and Section 1 of the Charter" (1988) 10 Sup. Ct. L. Rev. 469.

8. A.C. Kiss, "Permissible Limitations on Rights" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil & Political Rights* (New York: Columbia University Press, 1981); J.M. Ross, "Limitations on Human Rights in International Law and the Canadian Charter" (1984) 6 Human Rts. Q. 180; "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) 7 Human Rts. Q. 1.

9. Section 33 of the *Charter* is applicable only to those rights that do not engage federalism or democratic participation and may be invoked prospectively only. See L. Weinrib, "Learning to Live With the Override" (1990) 36 McGill L.J. 541.

10. For a comparison between the American and Canadian constitutional approaches, see L. Weinrib, "The Religion Clauses: Reading the Lesson" (1986) 8 Sup. Ct. L. Rev. 508.

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