THE CHARTER ... IN THE HOLY LAND?

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As the fifteenth anniversary of the *Canadian Charter of Rights and Freedoms* approaches, commentators delight in assessing the *Charter*'s impact on Canadian law and politics. Whether one believes that the *Charter* has brought bricks or bouquets, it is beyond question that the *Charter* has become a major factor in Canadian law and society. What is perhaps more surprising is that the *Charter* attracts considerable interest in countries such as Great Britain, Australia, South Africa, and Israel. Canadians were involved in the drafting of South Africa's new constitution. British proponents of a bill of rights look to Canada to buttress their argument. That South Africa and Great Britain should consider importing Canadian legal products may be surprising to Canadians who have spent time abroad. Though Canada is often the subject of adulation, rarely does foreign interest in Canada reach the point of motivating Canadaphiles to acquire knowledge of our country in order to make it the subject of emulation. However, as Commonwealth countries with common sources of law, it is understandable that Great Britain and South Africa should show an interest in our *Charter*. But why Israel? How and why did the Israelis develop an interest in Canada and an attachment to its *Charter of Rights*?

MOSES CHOOSES WRONG

An apocryphal story relates how God asked Moses which country he wanted for his people. "Moses," said God, "I will give you any country that your heart desires. Name the land and it shall be yours." Moses gave the idea some thought. In his mind he canvassed all the great lands of the earth. Finally, he came upon a land unrivalled in resources and beauty. A land truly flowing with milk and honey. He knew what he would answer. Now, as those who paid attention in Sunday school will remember, Moses was slow of speech. Stuttering, Moses replied, "Ca-aa-an-aa...." As much as he tried, the great Moses just could not get the name "Canada" off his tongue. Instead, he produced "Canaan." The Lord, a bit surprised, responded to Moses' request, "Canaan it shall be." Thus, the Children of Israel's relationship with Canada was stalled for several thousand years.

ISRAEL'S LEGAL SYSTEM

For several hundred years, the Ottoman Empire ruled most of the Middle East including present-day Israel. The Ottoman Empire extended its system of law to the lands it controlled. After World War I, France and Britain inherited most of the Ottoman territories. Britain administered a League-of-Nations mandate over Palestine and quickly put its stamp on the domestic legal system. During thirty years of rule, the British displaced much of the existing Ottoman law with English law. When Israel achieved its independence in 1948, it inherited a developed common law system parallelling Canada's. In fact, both countries severed formal ties to the motherland at around the same time as Canada abolished appeals to the Judicial Committee of the Privy Council in 1949. Whereas Canadian independence was negotiated between Canada and Westminster, the British returned its Palestine mandate to the United Nations. When the British withdrew, Israel declared independence; then seven Arab countries invaded and the U.N. partition plan collapsed. Today, most remnants of Ottoman law have been abolished. Until 1980, English common law and equity filled the gaps in local law. This is no longer the case as over the course of nearly a half century of existence, Israel has developed new legislation in all areas of legal life. While there have been tremendous developments in the legislative area, Israel has yet to produce a formal, written constitution.

ANOTHER CONSTITUTIONAL SAGA

Israel's constitutional void was not by design. In the May 1948 Declaration of Independence, the founders promised that "a Constitution shall be adopted by the Elected Constituent Assembly no later than the 1st October 1948."[1] Today, such a lofty goal may appear unattainable. After all, in Canada, we are all too familiar with the 1980-82 saga of the *Charter*. In South Africa, negotiators of the interim constitution allotted several years to draft the final constitution. Whether Israel's leaders could have succeeded in putting together a constitution in three and one half months remains uncertain, given opposition to the constitutional enterprise from religious circles and top cadres in the Provisional Government. However, the constitutional subject was pushed into the background immediately upon independence by the imperative of survival in Israel's War of Independence.

As promised in the Declaration of Independence, a constituent assembly indeed was elected. It immediately converted itself into the First Knesset,[2] Israel's parliament. The Knesset busied itself with pressing legislative matters and again put the constitutional issue on the back burner. The whole issue of a constitution raised numerous doubts and difficulties.[3] Prime Minister David Ben Gurion was in no hurry to tie the hands of the Government with a constitution. Religious legislators feared the effect of a constitution on the Jewish values of the State of Israel. In the meantime, the First Knesset passed regular legislation dealing with constitutional-like matters such as the state President, the Knesset, the Government, and the judicial system.[4] In the Harari Resolution of 1950, the Knesset determined that Israel's constitution would be enacted piecemeal in a series of "basic laws." The resolution stated:[5]

> The first Knesset charges the Constitutional, Legislative and Judicial Committee with the duty of preparing a draft Constitution for the state. The Constitution shall be composed of individual chapters, in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work, and all the chapters together will form the State Constitution.

After passing the Harari Resolution, the First Knesset did not adopt any basic laws. Neither did its immediate successor. By 1970, twenty years after the Harari Resolution, the Knesset had enacted just four basic laws: the Knesset (1958), Israel Lands (1960), the State President (1964) and the Government (1968).[6] In the 1970s, the Knesset added two more basic laws: the Economy(1975) and the Army (1976).[7] In the 1980s, legislative activity produced basic laws on Jerusalem, Capital of Israel (1980), the Judiciary (1984), and the State Comptroller (1988).[8] By 1990, Israel had a fairly comprehensive set of basic laws enumerating the structures of the state. However, like pre-*Charter* Canada, it lacked a constitutional bill of rights. First steps in this direction were taken in the last months of the previous Likud administration when the Knesset passed two basic laws on human rights. According to the President of the Supreme Court, Aharon Barak, these two laws amounted to a "constitutional revolution." Unlike the fanfare that accompanied patriation of the Canadian constitution with the *Charter*, Israel's Knesset passed these basic laws quietly with less than half of its legislators in attendance.[9]

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1 Laws of the State of Israel (hereinafter "L.S.I.") 3, 4 (The Laws of the State of Israel are the official English translations of Israeli law published by the Israel Ministry of Justice).

2 *Transition Law*, 3 L.S.I. 3 (1949).

3 See Peter Elman, "Basic Law: The Government (1968)" (1969) 4 Israel Law Review 242 and Amnon Rubinstein, "Israel's Piecemeal Constitution" (1966) 16 Scripta Hierosolymitana 201.

4 See *Law and Administration Ordinance*, 1 L.S.I. 17 (1948) and the *Transition Law*, 2 L.S.I. 3 (1949).

5 5 Divrei HaKnesset 1717, 1743 (Records of Knesset proceedings hereinafter "D.H."). Translation by Asher Maoz, "Constitutional Law" in Itzhak Zamir and Sylviane Colombo, eds., *The Law of Israel: General Surveys* (Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem, 1995) at 7.

6 *Basic Law: The Knesset*, 12 L.S.I. 85 (1958); *Basic Law: Israel Lands*, 14 L.S.I. 48 (1960); *Basic Law: The President of the State*, 18 L.S.I. 111 (1964).

7 *Basic Law: The State Economy*, 29 L.S.I. 273 (1975); *Basic Law: The Army*, 30 L.S.I. 150 (1976).

8 *Basic Law: Jerusalem, Capital of Israel*, 34 L.S.I. 209 (1980); *Basic Law: The Judiciary*, 38 L.S.I. 101 (1984); *Basic Law: The State Comptroller*, Sefer HaHukim (Knesset legislation, hereinafter "S.H.") 1237 at 30 (1988) (Hebrew). English translation for all basic laws are available in Albert P. Blaustein & Gisbert H. Franz, eds., "Israel" *Constitutions of the Countries of the World*, v. xi (Dobbs Ferry, New York: Oceana Publications, 1988).

9 There is no quorum requirement in Israel's Knesset. Much legislation is passed with a vote of less than an absolute majority of Knesset members. Unless there is a specific requirement in a basic law itself, no specific majority is needed to enact or amend a basic law. Thus, the fact that the two new basic laws passed with a vote of less than an absolute majority is not unique in Israel. It is unique when compared to the process of constitution-making and amending in other countries such as Canada.

THE BASIC LAWS

In Canada, patriation and the problem of a domestic amending formula provided the fuel for decades of constitutional debate. In Israel, the comparable issue was the power of the Knesset to pass basic laws that bound future Knessets. For decades, scholars grappled over questions of parliamentary sovereignty and the superiority of basic laws over other legislation.[10] The courts generally approached basic laws as they would ordinary legislation, according them no special status. However, in a November 1995 decision known as the *Gal Law* case,[11] the Supreme Court of Israel stated that the Knesset does have the power to enact constitutional legislation that binds its successors. A plurality of the Supreme Court supported Justice Barak's position that the Knesset maintains the powers of the original constituent assembly to pass constitutional legislation. On the other hand, Justice Shamgar, the former President of the Court, rejected this position but asserted that as a sovereign legislative body, the Knesset could attribute constitutional status to basic laws and restrict its own powers. Thus according to a majority of Israel's Supreme Court, the basic laws attain normative supremacy over ordinary legislation.

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

Israelis are natural comparatists. Surrounded by hostile, undemocratic neighbours, Israel has often turned to western Europe and North America for legal inspiration. Although it inherited an English legal system, Israel was quick to look to North America as a model of rights protection. Early Israeli Supreme Court decisions on civil rights contain numerous citations to US Supreme Court cases.[12] Israeli judges rarely cited Canadian cases, however. The advent of the *Charter* changed the comparative equation. *Charter* decisions created a rich new source of comparative rights jurisprudence to complement and occasionally contradict American jurisprudence.

When Israeli experts drafted their first civil rights legislation they used the *Charter* as a model for some sections. It has been suggested that Israel explicitly adopted "the Canadian model" over European and American models.[13] The "Canadian model" defined rights in absolute terms alongside a general balancing test. Like the rights set out in the *Charter*, the rights in the two basic laws are announced in absolute terms: "Every Israel national or resident has the right to engage in any occupation, profession or trade";[14] and "All persons are entitled to protection of their life, body and dignity."[15] Yet the "Canadian model" has been embraced wholeheartedly without much serious reflection in Israeli legal circles on the *Charter* enterprise.

The *Basic Law: Human Dignity and Liberty* incorporates a balancing test along the lines of section 1 of the *Charter*. Section 8 of the Basic Law states:

> The rights according to this Basic Law shall not be infringed except by a statute that befits the values of the State of Israel and is directed toward a worthy purpose, and then only to an extent that does not exceed what is necessary, or by a regulation promulgated by virtue of express authorization in such a statute.

Compare this with section 1 of the *Charter*:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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10 See e.g. Eliahu S. Likhovski, *Israel's Parliament* (Oxford: Clarendon Press, 1971) at 15-19; Amnon Rubinstein, "Israel's Piecemeal Constitution" (1966) 16 *Scripta Hierosolymitana* 201.

11 Civil Appeal 6821/93 *United Bank of Mizrahi Ltd. v. Migdal Co-operative Village* (unreported, November 1995).

12 See e.g. *Kol Ha'am v. Minister of the Interior* (1953) 7 Piskei Din (Official Reports of Judgments of the Supreme Court of Israel, hereinafter "P.D.") 871, 1 Selected Judgments of the Supreme Court of Israel (Official English translation, hereinafter "S.J.") 90 (freedom of the press); *Jabotinsky v. Weizmann* (1951) 5 P.D. 801, 1 S.J. 75 (justiciability of Presidential acts); *Yosifof v. Attorney General* (1951) 5 P.D. 481, 1 S.J. 174 (prohibition of polygamy and freedom of religion).

13 See David Kretzmer, "The New Basic Laws on Human Rights" in Itzhak Zamir and Allen Zysblat, eds., *Public Law in Israel* (Oxford: Oxford University Press, forthcoming 1996). This article was based on a previous one: see David Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 Israel Law Review 238.

14 See *Basic Law: Freedom of Occupation* (1992), s. 3., S.H. 5754 at 80. English translation taken from *Public Law in Israel*, supra note 13.

15 *Basic Law: Human Dignity and Liberty* (1992), s. 4., S.H. 5752 at 150 and S.H. 5754 at 90. English translation taken from *Public Law in Israel*, supra note 13.

Both clauses state that the only acceptable limits are those prescribed by law. The *Charter* uses the more general term "law" whereas the Israeli Basic Law is more specific, requiring a statute or a regulation pursuant to such a statute.[16] In section 1, the hallmark of reasonable laws are those of "a free and democratic society." In the Basic Law's section 8, the corresponding measure is the "values of the State of Israel." An explanatory section was added to this Basic Law in 1994 to guide the courts in determining what are "the values of the State of Israel." Section 1A of the Basic Law states that "[t]he purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state." If the touchstone of section 1 analysis under the *Charter* is "free and democratic," its parallel in the Basic Law is "Jewish and democratic." Such interpretative clauses can be problematic.[17] Section 1 of the *Charter* provides open-ended language of "reasonable limits" which the Supreme Court interpreted in *R. v. Oakes*[18] to include the elements of a sufficiently important objective, rational connection, least drastic means, and deleterious effects. Section 8 of the Basic Law incorporates elements of the *Oakes* test in its requirement that the infringing law be for a "proper purpose" and "no greater than required."

OVERRIDE CLAUSE

The *Charter*'s notwithstanding clause has become a matter of political controversy, especially given its use by the government of Quebec. The idea of a legislative override however, appealed to Israeli legislators. When they were originally enacted in 1992, neither the *Basic Law: Freedom of Occupation* nor the *Basic Law: Human Liberty and Dignity* contained an override. However, the Knesset inserted an override into the *Basic Law: Freedom of Occupation* after the Supreme Court stated that making the import of meat dependent on its being kosher restricts freedom of occupation.[19] Section 8 of the *Basic Law: Freedom of Occupation* states:

Effect of nonconforming Law

8. A provision of a Law that violates freedom of occupation shall be of effect, even though not in accordance with section 4, if it has been included in a Law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such Law shall expire four years from its commencement unless a shorter duration has been stated therein.

Compare this with section 33 of the *Charter* which states:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

...

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

The Israeli override was first used in the *Import of Frozen Meat Law* of 1994. In comparing the Israeli override clause with its Canadian counterpart, an Israeli scholar has identified several differences.[20] First, under section 33 of the *Charter*, the override provision lasts for five years[21] whereas under the Israeli override the statute containing the override automatically expires after four years. For example, under the Israeli override, the Quebec sign law prohibiting the use of any language but French in outdoor commercial signs would have

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16 See *Basic Law: Human Dignity and Liberty* (1992), s. 8 and *Basic Law: Freedom of Occupation*, s. 4.

17 See Eric S. Block, *Interpretative Clauses: The Virus of Canadian Constitutional Politics* (M.A. Thesis, McGill University, 1995).

18 [1986] 1 S.C.R. 103.

19 See *Meatreal v. The Prime Minister and Minister of Religious Affairs* (1993) 47(v) P.D. 505. Abridged by Asher Felix Landau, "Firm may import kosher and nonkosher meat if it follows rules" *Jerusalem Post* (3 June 1995) 7.

20 Kretzmer, *supra* note 13.

21 Section 33.3. See generally Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992) at para. 36.4.

automatically expired. Instead, the Canadian override expires after five years and then the Government must decide whether to re-enact the override, rescind the earlier law, or defend the law against possible constitutional challenges.

Section 33(4) of the *Charter* expressly states the legislature that passed the overriding provision may re-enact it at the end of the five year period. The Israeli override is silent on this matter. The Israeli courts have yet to speak on this question but scholars have suggested that the override was intended to provide a temporary measure and therefore the offending statute cannot be enacted after it expires.[22]

Under the *Charter*'s notwithstanding clause, no particular parliamentary majority is specified. Section 8 of the *Basic Law: Freedom of Occupation* requires an absolute majority of Knesset members. This may not appear to be a major requirement to Canadians where recent quests for constitutional amendment require special, multiple majorities or unanimity. However, requiring a vote of an absolute majority is a substantial demand in Israel given narrow coalition governments and frequent parliamentarian absences. For example, the two basic laws on human rights passed by votes of 32-21 and 23-0 in a Knesset of 120 members.[23] Thus, the override's requirement of an absolute majority of 61 affirmative votes has real strength.

THE *CHARTER* IN SUPREME COURT OF ISRAEL JURISPRUDENCE

The Supreme Court of Israel is a high profile body, more so than its Canadian counterpart. It is common for Supreme Court judgments to be front page news. Against a background of high public awareness and discussion of Supreme Court of Israel judgments, some decisions in the last year or so stand out because of their importance for and impact upon public life. In some of these cases, *Charter* jurisprudence played an important, albeit supportive, role.

Same-Sex Spousal Benefits

At the end of November 1994, a three-judge panel of the Supreme Court issued its decision in the case of *El Al Airlines Ltd. v. Danilowitz*.[24] Israel's national airline, El Al, had extended certain benefits to its employees and in some cases to their spouses or common law spouses. Danilowitz, a flight attendant, attempted to claim these benefits for himself and his gay partner with whom he lived. El Al refused the claim. Danilowitz petitioned the labour court which supported his claim. After losing an appeal to the National Labour Court, El Al took its case to the Supreme Court. Ordinarily, the fourteen-member Israeli Supreme Court sits in panels of three. At the start, the case appeared to be an ordinary one involving statutory and contractual interpretation. Thus, three judges were assigned to hear the case: then Deputy President and current President (Chief Justice) of the court, Aharon Barak, along with Justices Dalia Dorner and Ya'akov Kedmi.

The Court upheld Danilowitz's claim with Justice Kedmi dissenting. The decision caused an uproar on the Israeli political front. The religious parties in the legislature were less than receptive to acknowledging the legal rights of homosexuals. In Parliament and in the press, religious Members of Knesset (MKs) called for reigning in the power of the Court and spoke out strongly of the need to block Justice Barak's scheduled ascension to the Presidency of the Court.[25] The decision sparked public and academic debate on the proper role of the Supreme Court in Israeli society.

Justice Barak received the most criticism for the *Danilowitz* decision. Yet his decision rested solely on the grounds of contract and employment anti-discrimination legislation. Justice Barak, who is a leader on the Court in the use of comparative law, for the most part restricted the application of comparative law to the question of the proper remedy. Canadian jurisprudence was cited for the proposition that "reading in" is an appropriate remedy for an underinclusive statute.[26]

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22 See 22 D.H. 2293 (March 3, 1992) and 25 D.H. 2793 (March 17, 1992).

23 Kretzmer *supra* note 13 and Maoz *supra* note 5, at 10.

24 (1994) 48(5) P.D. 749, abstracted by Asher Felix Landau, "An equal-rights decision that flies in the face of some beliefs" *Jerusalem Post* (12 December 1994) 7.

25 "Joy and Scorn over Court Ruling on Gay Rights" *Jerusalem Post* (1 December 1994) 2 (quoting Member of Knesset Ba-Gad's statement that the ruling constituted a "black day that could lead to the disintegration of the State of Israel."); "Liba'i blasts attempt to gag High Court" *Jerusalem Post* (8 December 1994) 12 (Minister of Justice defends attacks on the Supreme Court); "Law Committee debates High Court Role" *Jerusalem Post* (13 December 1994)12; "Rabbinical Council Scores Court for upholding gay rights" *Jerusalem Post* (13 December 1994) 12.

26 (1992) 93 D.L.R. (4th) 1 at 12.

The only other English-language passage cited by Justice Barak was a similarly modest account of "necessary remedial operation" by American Supreme Court Justice Harlan in the less than famous case of *Welsh v. United States*.[27] As one of the only English-language passages in Justice Barak's decision, the *Schachter* reference is a rather modest use of *Charter* jurisprudence. Both examples demonstrate how comparative jurisprudence may be used not only for inspiration on emotional issues of fundamental liberties, but also for dealing with nuts and bolts legal problems.

Judges have different approaches to comparative law. In contrast to Justice Barak's modest use of *Charter* jurisprudence, his colleague in the majority, Justice Dorner, looked to the *Charter* for a little more substance. The lone dissenter, Justice Kedmi, made no use of comparative law and focused on the plain meaning of the text. In any case, *Charter* jurisprudence would have been of little help to him in this area as this interpretive style does not often mesh with the dictates of giving the *Charter* a "large and liberal" interpretation.

Justice Dorner is one of the more "creative" justices in the sense that she does not restrict herself to traditional legal sources. In *Danilowitz*, she began her opinion by citing Foucault and made frequent use of foreign jurisprudence. She turned to Canadian jurisprudence no less than three separate times. First, she cited Justice Wilson in *R. v. Turpin*[28] for the proposition that the determination of discrimination requires an examination of the larger social and political context.[29] Justice Dorner then proceeded to explain the legal posture towards discrimination on the basis of sexual orientation. After discussing American and European examples, she returned to Canada and the *Charter*'s equality provision, section 15. She cited *Vriend v. Alberta*,[30] *Egan v. Canada*,[31] and *Haig v. Canada*[32] for the proposition that section 15 has been interpreted to protect individuals from discrimination based on sexual orientation. Justice Dorner then stated that, despite recognizing sexual orientation under section 15, courts have rejected petitions extending rights held by married couples to homosexual ones. Justice Dorner cited *Haig v. Canada*[33] and *Layland v. Ontario*[34] for the reasoning that, since the purpose of marriage is raising children, the differential treatment of homosexual couples does not constitute infringement of the *Charter*. She then examined the relationship and legal attitude towards same-sex couples. After stating that differences exist between homosexual and heterosexual couples, Justice Dorner attempted to determine which differences were relevant ones which justify differential treatment. To this end, she quoted the decision of Justice L'Heureux Dubé in *Canada v. Mossop* stating that "family status" is broad enough "that it does not prima facie exclude same-sex couples."[35]

Women in Combat

Whereas *Danilowitz* produced a somewhat unexpected public reaction, the public eagerly awaited the decision in the *Miller* case. Alice Miller petitioned the Supreme Court to compel the air force to let her enter its pilots' training course. Ms. Miller obtained a civilian pilot's license in her native South Africa and upon coming to Israel and joining the Israeli air force she wanted to be a pilot. The Israeli Defence Forces (IDF) drafts men and women into its army, but women are excluded from combat positions. The Association for Civil Rights in Israel took on Ms. Miller's cause, which immediately attracted national and international attention.[36] The Supreme Court usually sits in panels of three, but the President has the discretion to expand the size of the panel to any uneven number, a discretion he usually exercises only for very important matters where it is necessary to clarify the law. In the *Miller* case, the President expanded the panel to five judges.

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27 398 U.S. 333 (1969) cited by Justice Barak at 48(5) P.D. 749 at 765.

28 [1989] 1 S.C.R. 1296 cited by Justice Dorner at 48(5) P.D. 749 at 779.

29 It is perhaps a tribute to Justice Wilson and the growing influence of Canadian jurisprudence that Justice Dorner chose to quote Justice Wilson whereas Lord Denning received only a "see also" in support of Justice Wilson's assertion.

30 [1994] 6 W.W.R. 414 (Alta. Q.B.), rev'd (1996) 132 D.L.R. (4th) 595 (Alta. C.A.) (non-inclusion of sexual orientation in *Individual's Right Protection Act* violated s.15(1) of the *Charter*).

31 (1993) 103 D.L.R. (4th) 336 (Fed. C.A.).

32 (1992) 94 D.L.R. (4th) 1 (Ont. C.A.) (absence of sexual orientation as a protected class in Canadian Human Rights Act violates s. 15 of the *Charter*).

33 *Ibid.*

34 (1993) 104 D.L.R. (4th) 214 at 231 (Ont. Ct. (G.D.), Div. Ct.) (rejecting claim that s.15 requires acknowledging same-sex marriages).

35 [1993] S.C.R. 554 at 560.

36 See e.g. "Israeli Woman Sues for Chance to be Combat Pilot" *New York Times* (3 November 1994) A12; "Female IAF officer is fighting for the right to fly" *Jerusalem Post* (23 June 1995) 9; "Ruling Expands Women's Roles in the Israeli Military" *New York Times* (3 January 1995) A5; "High Court opens IAF Pilots Course to Women" *Jerusalem Post* (9 November 1995) 12.

In *Miller*, each judge contributed an opinion. Writing for the majority, Justice Mazza delved into the issue of women in combat by examining much American material but nothing on this issue from Canada. The state defended its decision not to train women as pilots on budgetary grounds. Here, Justice Mazza cited the Supreme Court of Canada's decision in *Singh*[37] rejecting cost as a possible justification for limiting a *Charter* right.

Justice Strassberg-Cohen looked to Canadian and American authorities for support. She spent time discussing the American courts' treatment of Shannon Faulkner, the would-be cadet in The Citadel, an all-male military academy in South Carolina.[38] Turning to Canada, Justice Strassberg-Cohen discussed *Re Blainey and the Ontario Hockey Association*[39] where twelve year old Justine Blainey sought to play on a boy's hockey team. Justice Strassberg-Cohen noted that the Ontario Court of Appeal balanced the values of acquiring sports training and having male-only sports teams and struck down the restriction.

Justice Dorner wrote the longest opinion in the case. When it came to comparative law, she preferred our southern neighbours, devoting more than five pages to examining the equality rights under the Fourteenth Amendment in the United States. After discussing the varying levels of scrutiny in American equality jurisprudence, Justice Dorner noted that under the *Charter* the Supreme Court has developed only a single level of scrutiny. Now this may be true formally, but the Supreme Court of Canada has certainly "relaxed" its application of the single-level of scrutiny *Oakes* test in certain circumstances.[40] Justice Dorner attempted to explain the *Oakes* test but stumbled. She stated that the test requires that the impugned legislation advance a proper purpose. However, she defined a proper purpose as one that achieves a societal need of "fundamental importance" (these words appear in English in the judgment). The language of the Supreme Court of Canada's opinion in *Oakes* is "sufficiently important" which the Court explains as "pressing and substantial." Justice Dorner correctly explained that the next prong of the *Oakes* test requires the restriction to be no more than is necessary to achieve the objective. Here she cited the three prongs of the proportionality test from *Oakes*.

Justice Dorner is an enthusiastic comparativist. She looks to Canada as one of many countries that can assist in solving Israeli legal problems. To her, Canada sets important examples not only in the substance of rights (such as in section 15) but also in the process of constitutional adjudication (section 1 balancing). Her analysis demonstrates the caveat that encapsulating section 1 jurisprudence into a single paragraph may be difficult and inaccurate at times. Mistakes in explaining tests under section 1 should not be dismissed as mere "technical" errors. The jurisprudence of every country contains technical terms that act almost as symbols for a whole body of jurisprudence that flows from such phrases. It is important to present these terms precisely.

Criminal Procedure

Arguably, the area where the *Charter* has had the most effect, certainly on a day-to-day basis, is in the area of criminal procedure. In the same month as it decided *Miller*, the Court examined existing procedures for retaining suspects in custody. In *Geneimat v. State of Israel*[41] a seven-judge panel held that designating a crime a "national plague" was not enough to justify remanding a subject until the end of the proceedings. The then President of the Court, Justice Meir Shamgar, examined the law of bail and detention in three countries: Canada, England, and the United States. These are the three "naturals" in Israeli comparative analysis. Justice Shamgar looked to section 11(e) of the *Charter* which states: "Any person charged with an offence has the right not to be denied reasonable bail without just cause."

Comparing this provision to the Eighth Amendment of the US Constitution[42] on which section 11(e) was modelled, Justice Shamgar explained that in Canada an accused is entitled to remain free on security. Citing the Supreme Court of Canada in *R. v. Morales*,[43] he explained that detention on the grounds of public interest infringes section 11 whereas detention on the grounds of public safety is constitutional. Justice Shamgar further elaborated that in *R. v. Braig*[44] the Ontario Court of Appeal held that switching the burden

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37 *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422.

38 See H.C. 4541/94 *Miller v. Minister of Defence* (1995, not yet published) (per Justice Strassberg-Cohen) discussing *Faulkner v. Jones*, 51 F. 3d 440 (4th Cir. 1995) and 10 F.3d 226 (4th Cir. 1993).

39 (1986), 54 O.R. (2d) 513 (C.A.).

40 See *R.* v. *Edward's Books and Art*, [1986] 2 S.C.R. 713 and *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

41 Further Hearing (Criminal) 2316/95, Miscellaneous Applications (Criminal) 537/95 (unreported 1995).

42 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

43 [1992] 3 S.C.R. 711.

44 (1983), 40 O.R. (2d) 766 at 799 (C.A.)

of proof of detention of an accused murderer is not unconstitutional. Justice Shamgar specifically noted that the Canadian comparison was relevant because section 515(10) of the *Criminal Code of Canada* parallelled the Israeli criminal procedure law under examination.

COMPARATIVE LESSONS

The use of comparative law is not without its costs. Justice Dorner's examination of sexual orientation jurisprudence under section 15 in *Danilowitz* is indicative of some of the pitfalls of the practice of comparative law. All the cases cited by Justice Dorner support the proposition that sexual orientation is a protected category under section 15. However, a closer look at *Egan* v. *Canada* reveals that it is a case quite analogous to *Danilowitz*. In *Egan*, a homosexual couple living together for forty years petitioned for "spousal benefits" under the Old Age Pension Plan. The court held that the distinction between spouse and non-spouse did not implicate the analogous ground of sexual orientation. This case would have provided a good retort to Justice Barak's analysis. If *Egan* were applicable law in the jurisdiction, one would be forced to distinguish it. In the world of comparative law, judges can cite a case in their favour even though the case may partially undermine the judge's asserted position. By its nature, the use of comparative law in judgments can only provide a snapshot of the applicable law in a foreign jurisdiction. A judge may make use of comparative law to buttress her arguments while law exists in the same jurisdiction contrary to her position. A full-fledged analysis of the applicable case law including distinguishing opposing cases is usually far beyond the scope of the judgment. Furthermore, as Canadians are aware from attempts applying American case law to Canada, the use of comparative law has an important caveat. Different social, political, legal, economic, and cultural backgrounds exist among countries whose jurisprudence is subjected to comparison. A sentence or even a paragraph can never succeed to traverse and elucidate these differences. They are the subjects of Ph.D. dissertations and books.

Despite the universal problems in the application of comparative law, the Supreme Court of Israel's use of comparative jurisprudence must be applauded. In today's global village, comparative law is essential to a strong legal system. In the economic sphere, a country cannot consider pursuing an isolationist policy. However, in the legal sphere such insularity persists. Yesterday's legal beacon, the United States, is steadily losing its primacy as other nations look to the likes of Canada for legal inspiration. The greatest value of comparative law lies in informing decision makers of different approaches to a legal problem. Israel's highest court strongly embraces this value. Led by judges such as Justices Barak and Dorner, the judges of Israel's Supreme Court employ comparative law to permit consideration of the full breadth and depth of legal issues before them. The Israel academy must engage in more comparative research in order to provide the judiciary with the detailed comparisons and analyses which are necessary for the comparative enterprise.

CONCLUSION

The *Charter* has played an meaningful role in Israel's emerging constitution as a model for constitutional legislation and jurisprudence. Canadian law has moved to the front of the comparative law stage. However, there are significant caveats. First, no serious reflection has been undertaken in Israel on the benefit of the *Charter* to Canada or its suitability as a model for Israel. Second, not all judges engage in comparative law. The dissenters in *Danilowitz* and *Miller* and six of the seven judges in *Geneimat* stuck solely to domestic law. Third, the practice of comparative law contains pitfalls because of the likelihood of superficial examination and cross-national differences.

These days it seems as if all Canadians are doing is fretting over the future of their country. At times of reflection over the *Charter* and of Canada's destiny, Israel's interest in the *Charter* is yet another reminder of international appreciation to which many Canadians seem oblivious.❑

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