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FROM MARGINALIZED DISCOURCES TO TENDER EMBRACES: BUILDING A NEW FREEDOM OF EXPRESSION JURISPRUDENCE IN SOUTH AFRICA

Carl F. Stychin

With the enactment of the Interim Constitution (pending the coming into force of the final version), South Africa has entered a new political and legal era. The Bill of Rights, for example, opens the door to the judicial review of legislation for its compatibility with guarantees of individual and group rights. A Constitutional Court has been appointed to carry out this task, and it has embarked upon this work with a recognition of the radically changed place of the judiciary in the Republic. Not surprisingly, the demands on Parliament's time have been extraordinary during the last two years, due in no small measure to the process of drafting the permanent constitution. As a consequence, South Africa currently has both a system of judicial review based upon a Bill of Rights as well as numerous statutes still on the books which were enacted during the apartheid era. The government clearly intends to repeal many of these laws for both political and legal reasons but, in the mean time, those statutes may well be subjected to searching judicial scrutiny. The decision of the Constitutional Court in *Case and Another* v. *Minister of Safety and Security*; *Curtis* v. *Minister of Safety and Security*[1] is a product of this current dynamic, in which one of the two statutes that served historically to regulate expression in South Africa was struck down.

FACTS

The applicants to the Constitutional Court, Patrick and Inga Case, and Stephen Roy Curtis, were charged with contravening section 2 of the *Indecent or Obscene Photographic Matter Act, 37 of 1967*.[2] Two of the applicants, the Cases, were charged based on possession of 150 video cassettes containing sexually explicit matter seized from their Johannesburg home in 1993. Cassettes in the possession of Curtis were seized by police in a shopping centre parking lot in Johannesburg. The applicants successfully applied for the two sets of proceedings to be postponed pending an application to the Constitutional Court regarding the constitutionality of section 2(1) of the *Act*.

At issue was whether the provisions of section 2(1) were inconsistent with Chapter 3 of the Interim Constitution (the Bill of Rights) and, in particular, with the rights to equality, privacy, freedom of conscience, freedom of speech, expression and artistic creativity, and administrative justice.

SIGNIFICANCE OF THE CASE

Although new legislation dealing comprehensively with the regulation of obscenity and hate speech currently is in the South African legislative process, the decision in *Case* remains important as it presented an early opportunity for the Court to examine the rights of freedom of expression and privacy (as they are articulated in the Interim Constitution). The analysis reveals a good deal about approaches both to constitutional interpretation, generally, and to the expression and privacy guarantees, specifically. The decision is also

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1 (1996) 5 BCLR 609 [hereinafter *Case*].

2 [hereinafter the *Act*]. Section 2(1) of the Act provided that: Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Section 1 defined "indecent or obscene" as including: photographic matter or any part thereof depicting, displaying, exhibiting, manifesting, portraying or representing sexual intercourse, licentiousness, lust, homosexuality, lesbianism, masturbation, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality or anything of a like nature.

important as an indication of how new legislation dealing with the regulation of film and publications likely will be scrutinized by the Court. Finally, for students of comparative rights jurisprudence, the decision presents an opportunity to expand their horizons in the South African direction, in a field which has been so dominated by the North American and European experiences.

FREEDOM OF EXPRESSION

The Bench rendered two principal judgments. The first, delivered by Mokgoro J., and concurred in by only one other member of the Court of eleven (Sachs J.), analyzes the constitutionality of section 2(1) in terms of the guarantee of freedom of expression in section 15(1) of the Bill of Rights.[3] By focusing squarely on the expression issue in considerable detail, Mokgoro J. may have succeeded in setting the framework of constitutional analysis for future freedom of expression cases.

In a sophisticated judgment, Mokgoro J. holds that it is appropriate for the judiciary to adopt a broad, inclusive approach to the expression right, given the presence of an explicit constitutional provision which allows for legal limitations on rights.[4] In this way, the state will carry the burden of justification for any limitation on the widely defined right. Thus, "sexual expression" is protected by section 15(1), a point on which all of the Justices appear to agree. Mokgoro J. then finds that section 15 protection extends, not only to the articulation of speech, but also to the right to receive and possess constitutionally protected expression.[5] She reaches this conclusion by looking to the purpose of the right, which she characterizes as an "entitlement to participate in an ongoing process of communicative interaction."[6] Importantly, Mokgoro J.'s analysis focuses on the importance of analyzing speech within a social context and she recognizes that rights may be "interrelated and mutually supporting articulations" of constitutional values.[7]

Having determined that section 2(1) of the Act limits the constitutional right to receive and possess sexually expressive material, Mokgoro J. turns her attention to whether such a limit can be justified pursuant to section 33 of the Interim Constitution.[8] She appears receptive to the argument accepted by the Canadian Supreme Court in *R.* v. *Butler*,[9] that obscenity justifiably can be prohibited under the criminal law based upon the rationale of avoiding harm to society in the form of encouraging of violence and reinforcing gender stereotypes.[10]

Indeed, all of the Justices seem to agree that some expressive material can be regulated and prohibited on the basis of content (for example, child pornography). But, in a nuanced analysis, Mokgoro J. also acknowledges the difficulties inherent in any future application of the *Butler* harm principle, specifically that it may provide "a cover for *de facto* deference to morality-based evaluations."[11] In this regard, she finds that often "culturally subordinated groups" bear the brunt of regulation through the suppression of "marginalised discourses that lack a powerful political constituency."[12] Moreover, Mokgoro J. recognizes that statutory exemptions for works of art may themselves create "the danger that judicial evaluations of artistic value will involve class-based and culturally discriminatory determinations."[13] This dicta suggests that the government may need to tailor very carefully any legislation to ensure that it withstands judicial scrutiny.

Mokgoro J. thoroughly interrogates the legislation and she sends a strong signal to Parliament that she will not be reluctant to strike down statutes tainted by

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3 Section 15(1) of the Interim Constitution reads: "Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research."

4 *Case*, para. 22. The limitation provision in section 33 of the Interim Constitution reads in part:
(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation — (a) shall be permissible only to the extent that it is — (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question.

5 *Case*, para. 25.

6 *Case*, para. 27.

7 *Case*, endnote 39. For example, Mokgoro J. recognises, but leaves undecided, the question whether the singling out of representations of homosexuality and lesbianism for prohibition in the Act could withstand constitutional scrutiny in terms of the guarantee of equality on the basis of, *inter alia*, "sexual orientation" in s.8(2) of the Interim Bill of Rights (*Case*, endnote 97).

8 *Case*, para. 37.

9 [1992] 1 SCR 452.

10 *Case*, para. 47.

11 *Ibid.*

12 *Ibid.* Mokgoro J. cites the American decision in *Luke Records, Inc. v. Navarro* 960 F.2d 134 (11th Cir. 1992) [music performed by the African American rap group *2 Live Crew* as a whole lacked artistic value and was obscene] (*Case*, para. 41). She also refers to the targetting of feminist, lesbian and gay material by customs authorities and the police in Canada following the decision in *R.* v. *Butler* (*Case*, endnote 83).

13 *Case*, endnote 115.

apartheid. She examines the history of obscenity regulation in South Africa, using, for example, statements from both Hansard and the government-appointed Cronje Commission into Undesirable Publications (whose report was published in 1956).[14] These sources demonstrate that the motivations behind obscenity laws included unacceptable reasons grounded in racial and gender stereotypes.

In the end, Mokgoro J. has no hesitation in concluding that the scope of section 2(1) of the *Act* includes "a vast array of incontestably constitutionally protected categories of expression," and that the sweep of regulation is "entirely disproportionate to whatever constitutionally permissible objectives might underlie the statute."[15] The terms of the *Act* are sufficiently broad on their face to include commercial advertising, artistic expression, safe-sex materials, a public service brochure dealing with sexual assault, or a "photograph of persons of the same gender in tender embrace."[16] Such a law is "*ipso facto* not *reasonable*,"[17] especially in a society with the history of censorship which has characterized South Africa.[18] Finding the law incapable of being severed or "read down" to avoid unconstitutionality, Mokgoro J. refuses to exercise her discretion to suspend a finding of invalidity pending correction of the defect by Parliament.[19] She holds that, unless constitutionally challenged, the field will be adequately regulated by the *Publications Act, 42 of 1974* (the principal legislation dealing with obscenity in South Africa).[20] Thus, no regulatory lacunae is created as a result of her order to strike down section 2(1) of the Act.

THE RIGHT TO PRIVACY

In a very different judgment, both in terms of the substantive right employed and the style of analysis, Didcott J. concurs in the order of Mokgoro J., but for completely different reasons. His focus is exclusively upon the privacy right found in section 13 of the Interim Constitution.[21] Didcott J. emphasizes the simple fact that the *Act* deals only with the *possession* of obscenity and, in that regard:

> [w]hat erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which section 13 of the Interim Constitution guarantees that I shall enjoy.[22]

Didcott J. consequently finds it unnecessary to consider the freedom of expression issues raised by the *Act*.

This sweeping characterization of the right to privacy is later qualified in the judgment by a recognition that possession might be a constitutionally permissible criminal act in some circumstances, because "the production of pictures like those, and of further types equally depraved, is certainly an evil and may well deserve to be suppressed."[23] In this passage, Didcott J. appears to employ a morality-based justification, as opposed to the harm approach favoured by Mokgoro J.

As for justifiable limitations on the right, Didcott J. does not wish to preempt Parliament in its consideration of new legislation. He simply finds that the *Act* criminalizes possession of material which is "sometimes quite innocuous" and therefore cannot be justified.[24]

Other members of the Court concurred in the judgment of Didcott J., although some did so only after explicitly disassociating themselves from his absolutist characterization of the right to privacy.[25]

ANALYSIS

The significance of the judgments in *Case* is, first, that they set the stage for future disputes dealing with freedom of expression and privacy. In particular,

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14 *Case*, paras. 6-12.
15 *Case*, para. 61.
16 *Case*, para. 59.
17 *Case*, para. 61.
18 *Case*, para. 63. On the egregious history of state censorship in South Africa, see generally Christopher Merrett, *A Culture of Censorship: Secrecy and Intellectual Repression in South Africa* (Macon: Mercer University Press, 1994).
19 *Case*, para. 84. This power is granted to the Court by s.98(5) of the Interim Constitution.
20 *Case*, para. 85.
21 *Case*, para. 92. Section 13 of the Interim Constitution reads: "Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."
22 *Case*, para. 91.
23 *Case*, para. 93.
24 *Ibid.*
25 Case, para. 99, per Langa J.; para. 102, per Madala J.

Mokgoro J., although not commanding a majority of the Court in this instance, may well have articulated the terms of the debate around both the scope of freedom of expression and the extent to which Parliament can limit that right. The Canadian approach seems the model that South African judges are likely to follow, although Mokgoro J. (rightly, in my view) expresses skepticism about the ability of judges and bureaucrats to apply the harm principle and to divorce it from considerations of "morality".[26]

Furthermore, Mokgoro J.'s emphasis on the interlocking character of rights suggests that she may be receptive to arguments that one justification for the regulation of expression is the impact that some speech — such as obscenity or hatred — may have on the equality rights of others. Here again, the Canadian approach, as articulated by the majority of the Supreme Court in *R.* v. *Keegstra*,[27] may be influential.

By contrast, the judgment of Didcott J. is confused on the scope of the right to privacy. He oscillates between an absolutist conception of the home as a domain of unfettered privacy, and a more balanced approach which recognizes the possibility of a justifiable state interest in invading that domestic sphere. Given the centrality of privacy doctrine in the legal histories of many jurisdictions, the Constitutional Court likely will have to take more seriously the determination of the scope and purpose of this right, and what might constitute a justifiable limit.

Also of interest to an international audience is the role played by comparative constitutional jurisprudence in the reasons of Mokgoro J. Not only does she canvass a wide array of jurisdictions, including North American, African, European, and Indian jurisprudence, she also *critically* appraises how other countries have developed their free speech doctrines. International law also is applied.

Finally, the differing styles of constitutional reasoning of Mokgoro J. and Didcott J. are significant. The latter adopts a very conservative approach, going no further in his analysis than necessary. Thus, Didcott J. leaves, for another day, the examination of an issue which was no doubt central to the arguments in Court. By contrast, Mokgoro J. deploys a more wide ranging and liberal approach and takes this opportunity to begin the process of developing a body of jurisprudence dealing with freedom of expression. The contrast between judicial restraint and activism is stark, and the majority of the Court concurs with the former. That conservatism may simply reflect an awareness that Parliament is comprehensively reshaping the law in this area. As a consequence, there may be no need to spill large quantities of judicial ink on a statute which can be disposed of more simply on privacy grounds.

CONCLUSION

As South Africa embarks upon a new era of constitutionalism, it does so without being indebted to a national tradition. That fact creates a space in which the Constitutional Court can creatively weave a new constitutional tapestry, pulling together an assortment of domestic and international strands, and generating a new discourse of rights. This unique opportunity deserves the attention of an international audience. In the area of obscenity law, the word "censorship" has a particular ignominious record in South Africa. Yet, despite this history, constitutional actors seem unpersuaded by a simple free marketplace-of-ideas analysis of speech. Rather, South Africans appear to be developing an approach which recognizes both the centrality of free expression for individual and collective self-realization, as well as the importance of contextualizing the right. How that dynamic ultimately will unfold remains to be seen.❑

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[26] I discuss this point as it arises in Canadian law in *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 76-90.

[27] [1990] 3 SCR 697 [upholding *Criminal Code* provisions which criminalise hate speech as a reasonable limit on the right of free expression].

THE CHARTER ... IN THE HOLY LAND?

Adam M. Dodek

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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CANADA'S PROSPECTS
AVENIRS DU CANADA

The Centre for Constitutional Studies is pleased to announce the launch of a new paper series, **Canada's Prospects/ Avenirs du Canada**. The papers in this series will appear episodically in forthcoming issues of *Constitutional Forum constitutionnel*. The object of the series is to explore the issues arising out of Canada's uncertain future, from interdisciplinary perspectives. The series begins in this issue with John Whyte's paper examining the June 1996 First Ministers' discussion of Canada's process for constitutional amendment.

Le Centre d'études constitutionnelles a le plaisir d'annoncer le lancement d'une nouvelle série d'articles, **Canada's Prospects/ Avenirs du Canada**, qui seront publiés périodiquement dans *Constitutional Forum constitutionnel*. Cette série se propose d'explorer les problèmes que pose l'avenir incertain du Canada dans des perspectives interdisciplinaires. La série commence dans le présent numéro avec un article de John Whyte consacré aux débats de la Conférence des premiers ministres de juin 1966 sur le processus de modification de la Constitution du Canada.

"A CONSTITUTIONAL CONFERENCE ... SHALL BE CONVENED ...": LIVING WITH CONSTITUTIONAL PROMISES

John D. Whyte

...our period is obsessed with the desire to forget, and it is to fulfill that desire that it gives over to the demon of speed.

Milan Kundera, *Slowness* (1995)

THE JUNE 1996 FIRST MINISTERS' MEETING

The First Ministers' Meeting held in June 1996 was neither auspicious in conception nor of great consequence in result. It is difficult to pinpoint the reason for it being held. One of the reasons given in the February 1966 Throne Speech was to allow first ministers to consider the new blueprint for federal-provincial co-ordination over social programs that had been devised by provincial ministers responsible for social services.[1] But the proposed shift from conducting federal-provincial relations through the spending power to a system involving intergovernmental consent will inevitably be slow to develop and, as might have been predicted, it was impossible to discern the contribution that June's meeting made to this process.

It is probable that the real reason for the Prime Minister overcoming his apparent antipathy to meeting with premiers may be found in the quiet release of the agenda for the meeting. It was announced that a very short period would be dedicated to a discussion of Canada's process for constitutional amendment. At first glance, the topic— and the time allocated for it — seem bizarre elements in the meeting's planning. Nothing raises such fundamental questions about a nation's understanding of its basic structures and its statecraft values than its procedure for constitutional amendment. The process for obtaining consent about how governmental power is to be organized, divided and constrained will reflect a nation's defining categories and divisions. Changing the process requires both deep and widespread national consideration and a firm grasp of which communities of interest are foundational.

Such conditions — the conditions of "high politics" — were manifestly absent last June. It is true that the period since the Quebec referendum in late October 1995 contained a number of constitutional flashpoints. For example, there was the federal government's sub-constitutional tampering with both the amending rules[2] and recognition of Quebec as a distinct society.[3] This was followed by its speculation over the need for extraordinary majorities in secession votes and, then, the possibility of conditioning Quebec's secession on partition of the province. However, no national discussion over how best to structure national consent for constitutional change was initiated in this period. Not only is the topic seemingly beyond the intellectual aspirations of national leaders, it is widely sensed that the topic would prove destructive to whatever spirit of unity exists within Canada. Furthermore, the disinterest of the current Quebec government in reforming any Canadian institution, including its amending formula, makes discussion about changing the constitutional amending rules an exercise that cannot lead to realization.

Yet the constitutional amending process was on the agenda and was possibly the real reason for convening the first ministers. As Prime Minister Chretien said at the press conference following the First Ministers' Meeting: "...to satisfy the legal advice I had received, it was on the agenda."[4] The legal advice given to the Prime Minister was that he was obliged to convene a constitutional conference by mid-April 1997 to discuss

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1 Canada, *H.C. Debates* (27 February 1996) at 5.

2 Constitutional Amendments Act, S.C. 1996, c.1.

3 Motion for Recognition of Quebec as a Distinct Society, found at Canada, *H.C. Debates* (29 November 1995) at 16971 adopted at Canada, *H.C. Debates* (11 December 1995) at 17536.

4 Transcript of Press Conference with the Rt. Hon. J. Chrétien, Prime Minister of Canada, Ottawa, June 21, 1996, 7.

constitutional amending rules. Section 49 of the Constitution Act, 1982 states:

> A constitutional conference composed of the Prime Minister and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

The "Part" referred to in this section is Part V of the 1982 Constitution which is entitled "Procedure for Amending Constitution of Canada."

The Prime Minister evidently wished to avoid holding anything so grand — and so visible — as a constitutional conference. A conference of that sort would trigger demands for participation by leaders of national aboriginal organizations, could interfere with the timing of the next federal general election, would generate unrealizable expectations of constitutional reform, would open the door to Quebec political leaders claiming that constitutional politics is in disarray and would buttress allegations that the conference's failure demonstrated that constitutional adjustment is not possible. The Prime Minister was, therefore, in the uncomfortable position of receiving legal advice that the constitutional obligation to hold a conference on the amending formula by April 1997 had not been satisfied while at the same time not wishing to engage in any serious way in constitutional politics. The expedient adopted was to convene a first ministers' conference for other, less volatile, reasons and, in the course of that meeting, satisfy the section 49 obligation.

As it happened, only a few minutes were given to the matter of the constitutional amending process at the meeting of first ministers. The discussion seems to have consisted of several comments from premiers directed to stopping any such review before it began. Nevertheless, at the press conference following the meeting, the Prime Minister declared that the constitutional obligation had been satisfied.[5] What is not at all clear from the Prime Minister's statement is why he felt that the section 49 obligation to review Part V of the Constitution Act, 1982 was satisfied by a session consisting of a handful of comments that took only minutes. Clearly no review of the provisions of Part V was actually conducted. There are three possible bases for the Prime Minister's declaration. First, he may have believed that the heart of the section 49 obligation is the convening of a meeting to conduct a review and is not the actual process of reviewing the provisions of Part V. Second, he may have believed that since Premier Bouchard of Quebec left the first ministers' session as soon as this agenda item came up, the review could not take place; the constitutional obligation was, in effect, frustrated. Indeed, in his post-meeting statement, Prime Minister Chretien said: "[The discussion] was necessarily very short because as we need unanimity, already when we started to talk about it, Mr Bouchard quit."[6] Third, some premiers took the view both before the first ministers assembled, and at the meeting in Ottawa, that the review mandated by section 49 had been satisfied by the discussions about changes to the amendment formula during the 1992 constitutional reform process that resulted in the Charlottetown Accord.[7]

None of these explanations for the Prime Minister's conclusion that "the obligation had been discharged" is convincing. The essential commitment made in Section 49 is to review the operation of Part V. The section's most obvious reading is that a meeting must be convened at which a review takes place. The obligation cannot be met through calling a meeting and then not conducting it. Likewise, the decision by one or more premiers not to participate can neither excuse the constitutional obligation on the others to conduct a review, nor block proceedings that are designed to satisfy that obligation. The logical way to read section 49 is that the convening be directed to all premiers and that the meeting that results from that convening (with or without every first minister) shall engage in a review of the provisions of Part V. Finally, if the Prime Minister's legal advisors decided in early 1996 that section 49 had not been satisfied, the claim by two or more premiers that it had been met in 1992 should not alter that underlying legal assessment. Of course, legal opinion can change on the basis of new argument but there is no indication that federal legal officers altered their opinion, or were even consulted before the Prime Minister made his statement. Rather, in the face of some provincial opposition, he chose to ignore the advice he received. In any event, the historical record of 1992 constitutional meetings, of which only two were meetings of first ministers (held in late August, 1992 in Ottawa and Charlottetown), does not disclose a review of the provisions of Part V but, rather, the introduction of new amending provisions in response to specific political concerns.

THE ORIGINS OF SECTION 49

Section 49 calls for a review of the provisions of only Part V of the 1982 Constitution. That Part contains formulae for eight different amending contexts. (The

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.* at 15-16.

Part is not, however, exhaustive of the Constitution's amending rules; Part II of the 1982 Constitution created further standards with respect to amendments that relate to the constitutional interests of Aboriginal peoples.) It is the complexity of Part V and the nature of the political compromises that went into its construction that allows one to see the underlying purpose of section 49.

The framers of Part V sought to reconcile seemingly competing goals. They wished to remove the privileged position of some large provinces through not granting any specific province, or provinces, the capacity to veto constitutional amendments. They also tried to meet the historic aspiration of Canadian federalism not to allow national majorities to weaken or eradicate provincial powers vital to sustaining the essential character of minority communities, especially Quebec. An amending plan that achieved the first purpose, and went a long way to guaranteeing provincial integrity was unveiled in April 1981 by eight provinces[8] — the eight provinces that were opposed to Prime Minister Trudeau's plan to have the Canadian constitution amended by the U.K. Parliament on the basis of a unilateral request from Ottawa. In the provinces' plan amendments could be effected by the consent of any seven provinces with a combined population representing a majority of Canadians. In this way the plan realized the values of federalism and democracy. In order to capture the added element of protecting the vital interests of individual provincial communities, the amending process also allowed provinces to opt out of amendments that would erode provincial powers and proprietary rights. A further device for protecting essential provincial interests in national arrangements was the introduction of a list of matters that would require the approval of all provinces as well as approval at the federal level. Also included were other rules concerning time limits, bilateral amendments, unilateral amendments, overcoming the opposition of the Senate to an amendment and the matter of making compensation to provinces that opt out of constitutional amendments.

This amending scheme was the one adopted by the Prime Minister and premiers of nine provinces in Ottawa on November 5, 1981 and which came into force on patriation on April 17, 1982. During the time this proposal was being developed by the eight provinces opposed to unilateral patriation a number of serious concerns were raised. In fact, the level of disagreement among the representatives of the eight governments over the terms of the amending formula was very high. Some provinces felt that abandonment of an amending formula based on the Victoria formula (that is, a formula that required the consent of Ontario, Quebec, two Atlantic provinces and two Western provinces, as well as federal approval) was a serious mistake because it denied the defining historic saliences of the Canadian federation. Some provinces were also alarmed at the implications for national politics, as well as for the structure and operation of Parliament, of permitting provinces to opt out of constitutional amendments. It seems to have been in light of these misgivings that the March 16, 1981 draft of the provincial amending plan (prepared following a meeting of the eight provinces in Montreal on March 13) contained an early version of what is now section 49. The record of conflict strongly suggests that the idea of a fifteen year review was included in order to provide comfort to those who were in substantial opposition to the basic structure of the provincial patriation plan. In other words, a constitutionally mandated review was an element of the inter-provincial deal over the terms of patriation and, then, of the federal-provincial agreement that was reached in November.

The amending rules contained in Part V were not, of course, part of the federal government's plan of patriation introduced in October 1980 and, therefore, they were not part of the extensive review process conducted by the Joint Parliamentary Committee on the Constitution in late 1980 and early 1981. The current form of Part V did, however, become part of the patriation plan following the November 1981 First Ministers' Conference and, as such, was debated in the House of Commons in late November. Although there seems to be no specific reference to section 49 in this debate, concerns over the complex amending rules form a major portion of that debate; it is clear that there were significant misgivings about the terms of Part V. The chief of these concerns was the failure to include in the amending process a veto for Quebec and, consequently, the abandonment of the idea that constitutional development should reflect the bi-national origins of Canada. Again, there were also concerns over the cost to national integrity of allowing opting out of some constitutional amendments and over the granting of federal compensation to provinces that opt out of amendments.

What this legislative record demonstrates is that the section 49 review seems to have been inserted into the amending provisions to provide a level of comfort to those who were minded to think that the plan the eight provinces endorsed in April, 1981 was misguided —

[8] See R. Romanow, J. Whyte & H. Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 129-131; R. Sheppard & M. Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982) at 174-196.

that it was, in fact, out-of-step with fundamental values of the Canadian state and would, in time, damage the process of national self-determination. The comfort of section 49, slight as it was from the perspective of 1981, was rendered meaningless by the 1996 political decision not to conduct any review at all of how Part V has operated and what problems have arisen in its application.

It is not as if the first ministers of 1996 could sensibly conclude that the experience of the past fourteen years has revealed no problems. On the contrary, there has been a considerable degree of doubt about the meaning and appropriateness of the 1982 rules. There has been confusion over the operation of how the time limits should apply to complex amendments involving elements that require unanimous consent and elements that require the consent of seven provinces with fifty percent of the national population. There has been unresolved debate over whether amendments that affect one or more, but not all, provinces but which do not amend existing constitutional provisions fall within the regime created for bilateral constitutional amendments. Following the making of the Meech Lake Accord and, again, during the process leading to the Charlottetown Accord, the territories have raised questions over the fairness of the rules for creating new provinces. Meanwhile, Quebec has suggested that the rules for creating new provinces do not adequately protect its interests. Quebec has campaigned to make the rules relating to federal compensation to provinces that opt out of amendments more generous. The absence of a Quebec veto over all amendments has been a constant grievance, so much so that the federal government has put into effect a legislatively-based Quebec veto (albeit, perhaps, a veto that can be side-stepped). Proposals to expand the range of Quebec's veto power through expanding the list of constitutional matters requiring unanimous consent for amendment also have been repeatedly advanced.

Although attempting to conduct a review of Part V's provisions prior to April 1997 may have proven to be politically foolhardy, it must be admitted that the years since patriation have done nothing but confirm the framers' sense that a period of experience under the 1982 amending formula would disclose a number of amendment issues deserving of careful reconsideration. Both the 1981 history of constitution-making and the history of constitutional politics since then provide support for the claims that section 49 was grounded in political agreements and anticipated genuine political needs. Neither the agreements of the past nor the needs of the present were satisfied at the July 1996 First Ministers' Meeting.

SECTION 49'S REQUIREMENTS

The phrases of section 49 that bear most significantly on its interpretation are "within fifteen years after this Part comes into force" and "to review the provisions of this Part." The first phrase reveals that the review is meant to be based on experience under the Part V amending process. Identifying fifteen years as the time frame for review can be compared with the requirement in the now spent section 37 of the Constitution Act, 1982 which required that a constitutional conference on "constitutional matters that directly affect the aboriginal peoples of Canada" be held within one year of the new constitution coming into force. This provision discloses an intention to postpone a difficult issue but, at the same time, guarantee that the topic will receive early attention. The fifteen year time-frame in section 49 is clearly not motivated by ideas about when time and patience should be found to address a difficult political matter. The section is not written with the interests of the political agents in mind but rather with a view to when the topic will be ripe for consideration. The only plausible reason for selecting the lengthy period of fifteen years before the review must be held is that it was hoped that actual experience under the amending rules would serve to clarify what adjustments need to be made. Section 49 was written in the context of misgiving about the amendment provisions and a review was ordered at a point at which experience would prove to be a better guide to refinement than would debate and abstract thought. In other words, from the perspective of statutory interpretation, the "fifteen year" provision expresses the clear intention that first ministers base their review on careful consideration of political experience. In this way, section 49 calls for scrupulous assessment of the past and careful deliberation about the lessons to be learned. First Ministers attending the June 1996 meeting seemed neither to prepare themselves for, nor did they conduct, such a review.

The phrase "to review the provisions of this Part" also suggest procedural minima. In a word, it suggests that First Ministers are obliged to be *comprehensive*. The section requires, first, that there be a review (that is, that consideration be given to both the text and experience by the meeting's participants) and, second, that all of the Part's provisions — or elements — be considered. The context in which the section was framed, adopted, resolved and, finally, enacted reveals the sense that at some future time a critical assessment of the whole Part — all of its provisions — be undertaken by the leaders of Canada's governments.

These are not strained readings of the section. They are, in truth, merely ordinary readings — the readings

adopted by the Prime Minister's legal advisers and then abandoned under the pressure from premiers and, it seems, from a deep fear of substantive constitutional debate.

One question remains. Was the requirement of section 49 met during the process leading to the Charlottetown Accord? Of course, it would have been permissible for officials to have conducted the sort of comprehensive review that section 49 calls for and have had first ministers meet simply to adopt the work of officials and endorse their assessments. For this reason, the fact that First Ministers did not review the provisions of Part V at the August 1992 Ottawa and Charlottetown meetings is not conclusive proof that a section 49 did not take place in 1992.

However, what is clear is that the changes that were proposed for the provision of Part V were changes that specific parties brought to the pre-Charlottetown meetings and were brought into discussion not as a matter of comprehensive review but as a matter of promoting specific interests. The Accord included two amendments which were part of the reform program of the federalist Liberal government of Quebec. It guaranteed compensation to provinces from Canada in respect of all changes to the constitution which erode provincial powers or proprietary rights and from which the province has opted out.[9] Second, it added to the list of matters requiring unanimous provincial consent.[10] Chief among these items, however, was not a Quebec sensitive matter but, rather, the restriction on any amendments relating to the Senate, except by unanimous consent, once the elaborate set of Senate amendments contained in the Charlottetown Accord came into effect.

There were also changes to the rule for making new provinces (in response to an intense lobbying effort by the Yukon and Northwest Territories)[11] and the addition to Part V of the requirement that amendments directly referring to Aboriginal peoples not be proclaimed until the consent of Aboriginal peoples is obtained[12] (as part of a complete set of constitutional provisions obtained through the efforts of national Aboriginal organizations to enhance the rights of Aboriginal peoples).

In the absence of any public record of a section 49 meeting being initiated or convened it is simply not convincing that because three aspects of the Part V amending package were changed, and one aspect added, that the first ministers, or their officials, actually conducted a section 49 review. This is especially so when every one of the Charlottetown proposals for altering Part V is an adjunct of the promotion of provincial, regional and special interests.

CONCLUSION

Prime Minister Chretien may have made the right political calculation about how to handle the outstanding constitutional obligation presented by section 49. What is clear is that the strategy which, at the end of the day, he adopted was not one which paid due respect to constitutional memory. Nor is it a strategy that expressed any confidence in the constitution process as a means for exploring the nature of the Canadian state, for identifying the deficiencies of our past exercises of statecraft and for discovering new senses of how our basic ordering might be conducted. While it may be correct to suspect that critical reflection and a common search for new methods for expressing national self-determination would have bogged down in narrow self-interest and proven to be destructive, the fact remains, the Prime Minister acceded to a reading of the text and of history that has denied Canadians an opportunity to think critically and creatively about how best to structure constitutional foundations. Denying both the relevance of our history and confidence in our will to conduct ourselves as a self-determining nation seem to be impoverished ways to conduct national renewal.❑

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9 Draft Legal Text based on Charlottetown Accord of August 28, 1992, (October 9, 1992), s.32 amending *Constitution Act, 1982*, s.40.

10 *Ibid.*, section 32, amending ss.41 and 42, *Constitution Act, 1982*.

11 *Ibid.*, section 32, adding section 42.1, *Constitution Act, 1982*.

12 *Ibid.*, section 33 adding section 45.1, *Constitution Act, 1982*.