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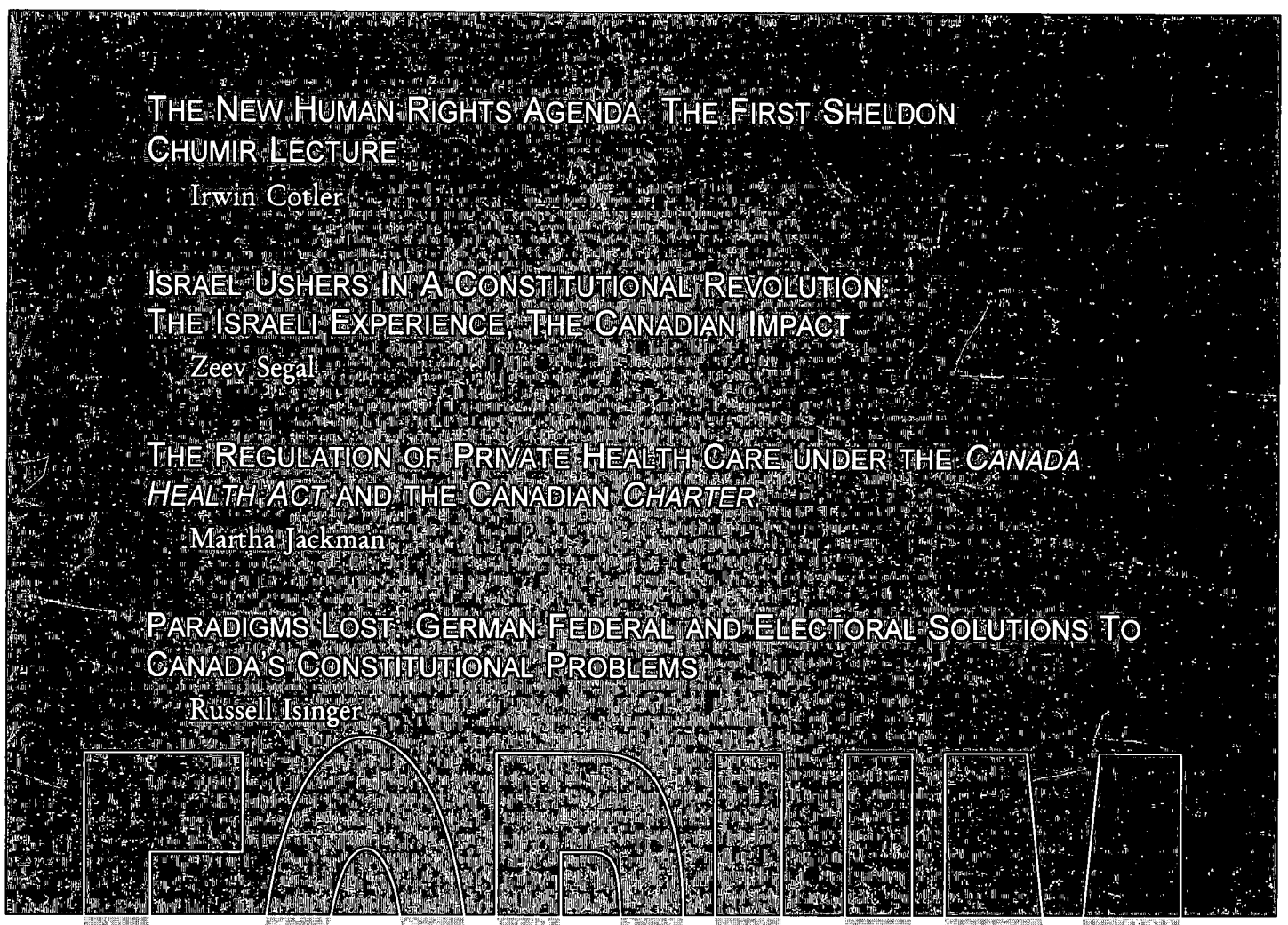

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The New Human Rights Agenda: The First Sheldon Chumir Lecture

Irwin Cotler

I am honoured to be here this evening and to participate in the common cause which brings us together: the inspired memory of Sheldon Chumir, the integrity of his person, the principles of his politics and public service, his legacy of ethics in government, and his compelling struggle for human rights and dignity in our time. Sheldon would have described this struggle as being, in the most profound and existential sense, a struggle for ourselves — that in what we say, or more importantly, in what we do, we make a statement about ourselves as a people.

I first met Sheldon thirty-two years ago, when we were both students on the World University Service Seminar to Poland. We spent three months in Poland and then travelled together to Israel. My first impression of Sheldon, the image that has remained with me since, was that of *mens sano in corpore sano* — a person of "a healthy mind in a healthy body." This impression is, in retrospect, tragically ironic given his ultimate fate. I had the good fortune that summer to be his roommate. We struck up a quick friendship, the kind of friendship that deepened over the years. Though we did not see each other often, when we did we were able to pick up where we left off and speak in a kind of shorthand.

As fate would have it, our last reunion took place in what was to be Sheldon's last visit to Montreal. He and Joel Bell, another good friend, came to my house in Montreal to spend a Sabbath lunch with me and my family. It was one of those wonderful lunches which lasted about six hours. We reminisced, as we often did, about that summer together in Poland and our ensuing trip to Israel. It had been the first visit to Israel for both of us, and it had a profound impact on our lives. We spoke about the changes in the human rights agenda, with Sheldon laughingly referring to our disagreements about that agenda — about issues like free speech, hate propaganda, pornography, or support for religious education. Our disagreements always served to hone and refine my own position. Behind and beyond the laughter, Sheldon always remained enduringly committed to the Talmudic principle of *tikkun olam*, which, literally translated, means "to repair or heal the world" — a principle which found expression in Shelly's abiding struggle for human rights and human dignity.

Indeed, we meet tonight at a rather critical juncture in this historic struggle for human rights and human dignity. For we live in a kind of Dickensian universe of the best of times and the worst of times, where there has been a literal explosion of human rights, where human rights have emerged as the organizing idiom of political discourse and political culture — increasingly spoken of as an organizing frame for foreign policy — where things that were thought impossible have not only happened, but have already been forgotten or are in danger of being forgotten.

Let us take a quick snapshot of the human rights universe since the baseline of 1989 — the year of the "velvet revolution," as Vaclev Havel put it at the time.[1] Hundreds of millions of people now enjoy the franchise in the former Soviet Union and Eastern Europe, people who would have been imprisoned or exiled had they sought even to advocate, let alone exercise, that franchise some ten or twelve years ago. Russia, just last year, held its first Democratic election since 1917. Democracy is on the march from

Central America to Central Asia, and the reunification of Germany, once thought to be unthinkable, is now a reality. Namibia has been liberated from South Africa, Mandela has been liberated from a South African prison, apartheid is on its way to being dismantled and there is hope of the establishment of a post-apartheid, democratic, non-racial South Africa. Captive nations, the metaphor for the Baltic nations, and closed borders, the condition of that people, have been turned on their heads. The whole can be summed up by one vignette of that revolution. Erich Honecker, then leader of East Germany, began the year 1989 by saying: "the Berlin Wall will last for a hundred years." By the end of that year, the Berlin Wall had fallen and Erich Honecker was under house arrest.

What is true of the human rights revolution internationally is also paralleled by the human rights revolution domestically. In 1982, the then Minister of Justice and now Judge of the Federal Court of Appeal, Mark MacGuigan, spoke of the advent of the *Canadian Charter of Rights and Freedoms* as "the most significant legal act in Canada in the twentieth century."[2] In 1987, Madam Justice Claire L'Heureux-Dubé spoke of Canada stretching the chords of liberty more in five years than the U.S. Supreme Court had done in two hundred years. And in 1992, on the tenth anniversary of the *Charter*, the Chief Justice of the Supreme Court, Antonio Lamer, spoke of the *Charter*'s revolutionary impact and compared it to the discoveries of Pasteur in science.[3]

As I have been giving you this snapshot of the human rights revolution, some of you may have been thinking to yourselves: "If everything is so good, why does everything appear to be so bad?" For at the same time as we have been witnessing this human rights revolution, we also have witnessed a counter-revolution, where violations of human rights continue unabated. The homeless of America, the hungry of Africa, the imprisoned of the Middle East, women victims of a kind of gender apartheid globally — all can be forgiven if they think that somehow the human rights revolution has passed them by; while the silent tragedy of the Kurds, the ethnic cleansing in the Balkans, the horror of Sarajevo, the agony of Angola — are metaphor and message of the assault upon, and abandonment of, human rights in our time.

Let me give you some specific graffiti from the counter-revolution against human rights. The dialectics of *glasnost* and democracy in the former Soviet Union have unleashed the repressed demons of racism and antisemitism. The new extremist Russian right blames the Jews for bringing about Communism, and the old extremist Communist left blames the Jews for the downfall of Communism — either way, the Jew is caught in a classic pincer movement — while the political uses of antisemitism resonate in the former Soviet Union. In a unified Germany, neo-Nazis stalk the streets in search of *l'étranger*, and a new xenophobia has begun to spread across Europe. Opening the gates of emigration has been met by closing of the doors of asylum. The mass rape of women in Bosnia-Herzegovina has not only been a consequence of war, though that would be tragic enough, but has emerged as a strategy of ethnic cleansing, as an actual purpose of the war. Democracy has been on the march, but not the war on poverty. Thirty-five thousand children die each day in the developing world from preventable diseases. Enfranchisement of the citizen has not been met by the empowerment of the disadvantaged. The emergence of new nations has not resulted in the recognition of First Nations. Despite Canada's ratification of the International Convention on the Rights of the Child,[4] more than one million Canadian children continue to live in poverty.

It is not surprising, therefore, that the rhetoric of the human rights revolution may yet invite the not uncynical rejoinder that, to paraphrase Bentham,[5] human rights law is so much nonsense on stilts, that it is rights without writs, rhetoric without remedy, semantics without sanctions. But I want to suggest to you — and it is the underlying theme of my remarks — that we abandon the human rights cause at our peril, indeed at the peril of our case and cause. For the struggle for human rights and dignity, as Sheldon would have put it, is ultimately the struggle for ourselves. If we abandon this revolutionary moment — what Havel called the power of a revolutionary human rights idea and movement to transform history — we run the risk, not only of betraying the idea and the movement, but indeed of losing it.

How then, do we confront injustice? Where and how are we to begin? Against what injustice? On behalf of what cause or victim? How does one rank human suffering? How does one organize human rights advocacy? I want to suggest that the problem is not which particular human rights cause we are serving but whether we are serving the cause of human rights at all; not which victim we are defending but why we are indifferent to the cause of the victim whoever he or she may be; not whether a claim is being asserted on behalf of a particular

minority, but why that minority must always appear to be standing alone.

I would like to offer to you a human rights agenda that would take us towards the year 2000. This agenda is more illustrative than exhaustive, more for purposes of animation than example. You can fill in, in your way, not only the details but the priorities as you yourselves deem appropriate. I am only going to share with you some of the priorities that I believe should be associated with such a human rights agenda:

- *The importance of human rights education* (*sensibiliser*, as the French would put it). The task here is to develop a culture of human rights, a human rights sensibility. In other words, as human rights activists have described it, what is needed is "conscienticization," a constituency of conscience on behalf of human rights. As the UNESCO convention has put it so well, "war begins in the minds of men."[6]

- *The combatting of racial incitement*. One of the more disturbing and dangerous contemporary phenomena, both in Canada and around the globe, is the proliferation of racist hate speech. The corrosive, catastrophic effects of Nazism, as the Canadian Supreme Court has put it, is the chilling stuff of history. What is needed is a strategy involving education, elite group condemnation, and the invocation and application of the panoply of rights and remedies available to us, including administrative, civil, criminal and human rights avenues. Such a strategy must be anchored in fidelity to a number of fundamental principles including the inherent dignity of the human person; the equal dignity of all persons; the right of minorities to protection against group-vilifying speech; the underlying values of a free and democratic society such as respect for group identity and cultural pluralism; the preservation and enhancement of our multicultural heritage which, as the Supreme Court put it, is itself under assault from racist hate speech; and adherence to our international law obligations which call upon us to enact domestic measures to combat racial incitement. We must remember, in this as in everything else, that the test of our civilization will be the way we treat and protect our minorities.

- *The right to food*. It is a case study of the Dickensian character of the human rights universe that we have over a hundred international instruments that purport to promote and protect the right to food, yet this internationally guaranteed right has meant little to the hungry. It shields neither the famine victim, nor the victim of armed conflict, nor the welfare mother from the calamity of food shortages. It continues to lie dormant in unimplemented treaties and unread or unused legal doctrine. It thus becomes our legal responsibility to make the elimination of hunger and the right to food the focal point for both our domestic and international justice agenda, the message and metaphor of the human rights revolution of the 90s. In the words of the 1980 U.S. Commission on Hunger:

> Whether one speaks of human rights or basic human needs, the right to food is the most basic of all. Unless that right is first fulfilled, the protection of all other human rights becomes a mockery for those who must spend all their energy merely to maintain life itself. The correct moral and ethical position on hunger is beyond debate. The major world's religions and philosophical systems share two universal values: respect for human dignity and a sense of social justice. Hunger is the ultimate affront to both.[7]

- *The rights of children*. If the right to food is a fundamental and overriding right, the rights of children must have first call on our resources. Yet, the dissonance is compellingly clear. On the one hand, more nations ratified the International Convention on the Rights of the Child more quickly than any other treaty. On the other, thirty-five thousand children die of preventable diseases every day. Redirecting the revenues spent on tobacco advertising in the United States alone could redress this entire situation.

- *International women's rights*. The struggle for international women's rights must be a priority on the justice agenda. The notion that women's rights are human rights must be not only a statement of principle but an instrument of policy. As UNICEF recently reported, "discrimination against women is an injustice greater than South Africa's Apartheid."[8] Charlotte Bunch dramatically summed up this particular priority and principle: "significant numbers of the world's population are routinely subject to torture, starvation, terrorism, humiliation, mutilation and even murder simply because they are female."[9]

• *The plight of Indigenous peoples.* If there is a case that is an historic and continuing assault on our human rights sensibilities as Canadians, a case that has yet to be significantly touched by the human rights revolution, it is that of indigenous peoples. For the fourth straight year, the Canadian Human Rights Commission, in its annual report, singled out the plight of Aboriginal Peoples as the single most important human rights issue confronting Canada today.[10] Indeed, it echoed the reports of governments in Manitoba, Nova Scotia and Alberta and the reports of non-governmental organizations, that the condition of Aboriginal Peoples is a "national disgrace." One chilling fact among many — which bears as much on the issue of children's rights and women's rights as it bears on the question of Aboriginal rights and which dramatizes the pain and anguish of Aboriginal peoples — is that eighty percent of women on native reserves in Ontario have been abused or assaulted. Accordingly, what is needed here is a new cultural sensibility, a politics and policy of inclusion. What is required is, as Ovide Mercredi put it, "a recognition of Aboriginal peoples' right to self-government, a recognition of their unique status by reason of their historic presence as First Nations, a generous rather than a grudging or recriminatory respect for their Aboriginal Treaty Rights and Land Rights."[11] There is a need for the improvement of economic and social conditions on reserves and the reform of the Canadian justice system to accommodate the distinctiveness and the sensibility of Aboriginal cultures.

In conclusion, may I summarize the lessons of history and the hopes of this human rights revolution. First, and as history has taught us only too well, that while it may begin with Blacks, Aboriginals or Jews as victims of the violations of human rights, it doesn't end with them. The struggle against racism, anti-semitism and the like must therefore not be seen simply as a Black issue or an Aboriginal issue or a Jewish issue, but as a profound justice issue of the first import. The words of the German Protestant theologian, Martin Niemöller, which I'm sure are very familiar to you, bear not only recall this evening, but acting upon them beyond this evening:

> They first came for the Catholics, but I wasn't a Catholic so I did nothing. Then they came for the Communists, but I wasn't a Communist so I did nothing. Then they came for the trade unionists, but I wasn't a trade unionist so I did nothing. Then they came for the Jews, but I wasn't a Jew so I did nothing. Then, they came for me, and there was nobody left.[12]

Second, as a corollary, and as the Ontario Court of Appeal recognized, in upholding the constitutionality of anti-hate legislation, 'the holocaust did not begin in the gas chambers, it began with words.'[13] As survivors of Sarajevo, be they Croatians, Muslims or Serbs said at a conference recently, "they are killing us with words." Indeed ethnic cleansing began with this kind of degrading and dehumanizing of the other.

Third, nazism almost succeeded, not only because of the ideology of hate and the technology of terror, but because of the crime of indifference and silence. It becomes our responsibility, with regard to Sheldon Chumir's legacy, to break the walls of indifference, to shatter the silence wherever it may be. As Sheldon said so well, "we must speak truth to power and must hold power accountable to the truth;" and as Nobel Laureate Elie Wiesel put it, "neutrality always means coming down on the side of the victimizer and never on the side of the victim."[14]

The time has come, therefore, in Canada and elsewhere, to stand and be counted, and to not look around to see who else is standing before we make a judgment to do so. For we live at a time when there is too much appeasement and too little moral courage, where there are too few people who are prepared to stand, let alone to be counted. If this century is not to become known as the century which began with Sarajevo and ended with Sarajevo, it becomes our individual and collective responsibility to shatter the silence. As I learned from Helsinki monitors and imprisoned prisoners of conscience — and the code words were everywhere the same be it prisoners of conscience in South Africa, Latin America or the former Soviet Union — we are each, wherever we are, the guarantors of each other's destiny. Each one of us has an indispensable role to play in this indivisible struggle for human rights and dignity. Each person can and does make a difference. But if you ever feel tired and cynical in wondering what one person can do to confront this juggernaut on human rights, then let us remember that one Swedish non-Jew by the name of Raoul Wallenberg saved more people in the Second World War than any single government. It is a staggering figure, but true. One Andrei Sakharov stood up against the whole Soviet Union and prevailed. One person, Nelson Mandela, nurtured the dream in a South African prison for 27 years, and has not only lived, but is organizing the dismantling of Apartheid.

A person in Canada, whose memory we have come together to honour and be inspired by this evening, Sheldon Chumir, nurtured the dream that a Canadian can make a difference. Indeed, we are sometimes even indifferent to what Canadians can do. But Sheldon showed us that an Albertan and a Canadian can touch people everywhere in Canada and beyond. This then must be our task. To speak on behalf of those who cannot be heard, to bear witness on behalf of those who cannot testify, to act on behalf of those who are not only putting their livelihood but, indeed, their lives on the line. At times such as these, as the French put it, *qui s'excuse, s'accuse* — whoever remains indifferent indicts himself or herself. A world which will not be safe for democracy and human rights, will not be safe for women, for minorities, disabled, disadvantaged, whoever they may be. A world which will not be safe for minorities, women, disabled, or the disadvantaged, will not be safe for democracy and human rights. That is Sheldon's legacy and our challenge. May this evening be not only an act of remembrance, which it is, but a remembrance to act, which it must be.❑

Irwin Cotler

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Endnotes

1. See: Vaclev Havel, [Untitled], Speech in acceptance of German peace prize, October, 1989 in *The Independent [London]* (9 December 1989).

2. Speech by the Mark R. MacGuigan on the eve of the Proclamation of the *Canadian Charter of Rights and Freedoms*, April 17, 1982.

3. Chief Justice Lamer in G.-A. Beaudoin, ed., *The Charter — Ten Years Later* (Cowansville: Les Éditions Yvon Blais, 1992).

4. G.A. Res. 44/25, opened for signing 26 January, 1990, 28 I.L.M. 1448 at 1456 with an addendum in 29 I.L.M. 1340 (entered into force 2 September, 1990).

5. See: Jeremy Bentham, "Anarchical Fallacies" in J. Waldron, ed., *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987) at 46.

6. Preamble of the *Constitution of the United Nations Educational, Scientific and Cultural Organization*, adopted in London, 16 November 1945 as amended.

7. Presidential Commission on World Hunger, *Overcoming World Hunger: The Challenge Ahead* (Washington: Presidential Commission on World Hunger, 1980) at 3.

8. UNICEF, *1992 Annual Report* (New York: UNICEF, 1993).

9. C. Bunch, "Women's Rights As Human Rights: Toward a Re-Vision of Human Rights" (1990) 12 Human Rights Q. 486 at 486.

10. Canadian Human Rights Commission, *Annual Report, 1992* (Ottawa: Minister of Supply and Services Canada, 1993).

11. Remarks by Chief Ovide Mercredi, McGill University, October 23, 1992.

12. [Attributed]. See: John Bartlett, *Familiar Quotations*, 16th ed. by J. Kaplan (Boston: Little, Brown, 1992) at 684.

13. See *R.* v. *Andrews and Smith*, (1989) 65 O.R. (2d) 161 (Ont. C.A.) at 179.

14. Speech by Elie Wiesel, McGill University, November 7, 1987.

SHELDON CHUMIR

Sheldon Chumir was born on December 3rd, 1940. He attended Central Memorial High in Calgary and the University of Alberta, where he graduated in Arts and Law. He was very active on campus, won the Gold Medal in Law and was the 1963 Rhodes Scholar. At Oxford, he obtained a Bachelor of Civil Laws degree.

He returned to Canada to article and further his knowledge of tax law as a lawyer for the Department of Justice. In 1971, Sheldon joined the firm now known as Bennett Jones Verchere. He developed a reputation as one of Canada's leading tax lawyers. In 1976, he established his own law practice which allowed him the freedom to devote himself to community service and active leadership on public issues. He was a champion of civil liberties, founding the Calgary Civil Liberties Association and Calgary Legal Guidance. He supported public education and was an advocate of the powerless, many as *pro bono* clients. He sought justice for all.

Sheldon was first elected to the Alberta Legislature as the Liberal representative from Calgary Buffalo in 1986. He was overwhelmingly re-elected in 1989 and was widely respected as an informed, dedicated, accessible and effective representative of the people. Sheldon Chumir died on January 26, 1992. In order to perpetuate his memory, friends of Sheldon Chumir established an essay competition and a lectureship at his *alma mater*, the University of Alberta Faculty of Law. This first lecture was given by Professor Irwin Cotler in Calgary and Edmonton on February 9 & 10, 1994.

Israel Ushers in a Constitutional Revolution: The Israeli Experience, The Canadian Impact

Zeev Segal

The Constitutional Revolution

"Parliament can do no wrong," goes the old English saying, "but it can do several things that might look pretty odd." The Israeli legal system has been constructed on the basis of the principle of "parliamentary sovereignty," adopted from England, according to which the Knesset is "omnipotent." "The vital principle to which we hold," wrote Justice Menahem Elon of the Israeli Supreme Court, "is that the validity of a law enacted by the Knesset is not subject to judicial review. A founding principle of our democratic system, with its three branches of government, is that we do not query the acts of the legislature in enacting its laws."[1]

One exception, however, has been created to this leading principle. The Supreme Court of Israel, sitting as the High Court of Justice, has held in four different cases that a law enacted by the Knesset is void on the grounds that it conflicts with the principle of equality in the electoral process.[2] This case law relies on grounds that the Knesset itself has declared in a specific provision of the Basic Law — that the right of equality shall not be infringed save by a law enacted by a special majority of 61-members.[3] The annulment of the conflicting laws relied primarily on the technical ground that the laws declared void were not enacted with this special majority. According to the "supremacy of parliament" principle, which underlies this exception, it is understood that a 61 member majority may infringe the principle of equality by, for example, conferring an advantage upon the larger political parties in the allocation of surplus votes, thus violating the principle of "one person one vote."[4]

In the above-mentioned cases, the High Court of Justice refrained from setting out an express rule regarding the Court's power to review the legality of Knesset laws. Instead, the Court relied on the absence of any contention to the contrary, i.e., that it did not have such a power. Nevertheless, it is clear that the High Court of Justice will respect the power of the Knesset to enact an "entrenched" provision in a Basic Law which cannot be overruled by an ordinary majority. This jurisprudence, which stressed that the rule of law binds the legislator, did not itself give rise to any divisive conflict between the courts and the Knesset. Nevertheless, it should be noted that these decisions, in spite of their limited application, paved the way for the development of a constitutional framework in a country without a written constitution.

In March 1992, a significant event took place in the Israeli constitutional arena. The Knesset enacted two new Basic laws: the *Basic Law: Freedom of Occupation* and the *Basic Law: Human Dignity and Liberty*.[5] These laws, which Justice Aharon Barak termed a "constitutional revolution" and "a constitution in miniature,"[6] created a new era in Israeli constitutional law. They recognized fundamental rights — freedom of occupation, the right to property, the right to freedom, privacy and human dignity — and provided that these rights could not be infringed save by legislation which meets certain specific criteria. This approach, recently affirmed when the Knesset re-enacted the *Basic Law: Freedom of Occupation*,[7] imposed restrictions on the power of the Knesset to pass any law it pleased.

THE "LIMITATION CLAUSE" AND "OVERRIDE CLAUSE"

The Israeli constitutional revolution was greatly influenced by the *Canadian Charter of Rights and Freedoms*.[8] As in the Canadian *Charter*, "limitation clauses" and "override clauses" were incorporated in Israeli constitutional legislation.[9] The "limitation clauses," which were included in both the *Basic Laws: Human Dignity and Liberty* (section 8) and *Freedom of Occupation* (section 4), are of special importance in the newly evolved constitutional structure. The provisions were intended to place constraints on future legislation enacted by the Knesset and thus deviate from the principle of "parliamentary sovereignty" which has characterized the Israeli legal system since the establishment of the State in 1948.

The "limitation clauses" provide that "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for the proper purpose, and to an extent no greater than required".[10] Unlike the *Basic Law: Freedom of Occupation*, the *Basic Law: Human Dignity and Liberty* does not have an entrenching provision expressly excluding amendment by an ordinary law of the Knesset. It nevertheless seems clear that the very inclusion of the "limitation clause" created a basic law of a superior status: the Knesset is not empowered to infringe the rights recognized by the law — in whatever way it sees fit — through its regular legislation. Still, the precise legal status of such a Basic Law is open to discussion.

One theory holds that Basic Laws enjoy a special status due to the fact that they form part of the future constitution of the state. It has thus been suggested that a provision in such a law may only be amended by another Basic Law (even though enacted by a regular majority) which explicitly affirms the validity of the amendment notwithstanding any provision of the original Basic Law being amended.[11] A different approach holds that ordinary legislation may also supersede a "limitation clause," provided, however, that it specifically declares that it is valid despite the provisions of the Basic Law.[12]

In my view, the first approach is to be preferred. It recognizes the absence of an entrenched provision, thus enabling a deviation from the Basic Law by a regular majority. At the same time, it requires that the regular majority express its will in a Basic Law affirming its validity notwithstanding the provisions of the Basic Law being amended. Such a requirement strengthens the status of a Basic Law marked by a "limitation clause."[13]

In any event, it would appear to be accepted by the Israeli legal system that the mere existence of a "limitation clause" prevents the Knesset from infringing, on a whim, the fundamental rights of individuals. The new Basic Laws open the door to judicial review of statutes to an extent previously unknown in Israel. Thus, the "limitation clause" makes it possible for a court to annul a Knesset law if, in its view, it conflicts with the fundamental rights safeguarded by the Basic Laws and does not "accord with the values of the State of Israel" — an imprecise term of uncertain boundaries.[14]

In 1994 the Knesset re-enacted the *Basic Law: Freedom of Occupation*, primarily with the aim of incorporating an "override clause" into the legislation. This provision enables the legislature to enact, by a special majority, a regular law which will be valid in spite of the fact that it contradicts the essence of the Basic Law. Such an "override clause," which is also contained in the Canadian *Charter*,[15] was included to prevent the importation into Israel of non-Kosher meat. Briefly, the Israeli Supreme Court had, in an earlier decision of October 1993, declared the prohibition on the import of non-Kosher meat to be contrary to the *Basic Law; Freedom of Occupation*, which was enacted in 1992. In order to overcome the problem caused by this decision, the "override clause" was incorporated in the new *Basic Law: Freedom of Occupation*, enacted in 1994, which replaced the 1992 Basic Law. Following the enactment of the *Basic Law: Freedom of Occupation* in 1994, the Israeli Knesset enacted the Import of Frozen Meat Law (1994), which prohibits the importation of non-Kosher meat. The Law was passed by a special majority of members of the Knesset, as required by the "override clause" in the aforementioned new *Basic Law: Freedom of Occupation*.[16]

It should be noted that the Israeli "override clause" differs from section 33 of the Canadian *Charter*, *inter alia*, by the fact that in Israel a special majority is needed in order to overcome the effect of the *Basic Law: Freedom of Occupation*. Shortly before the enactment of this Basic Law in 1994, Israeli Supreme Court Justice Aharon Barak wrote a letter to the Chairman of the Knesset's Judiciary

Committee, which was preparing the bill for final reading. Justice Barak, stating that his letter was confined to remarks of a judicial character, referred to the Canadian "override clause" as a possible clause for adoption by the Knesset. In public discussions it was mentioned that the "override clause" is very rarely used in Canada. It is hoped that the same restrained approach will be adopted in Israel.

THE JUDICIARY v. THE LEGISLATURE

The fact that legislation has not confined the power to annul laws to a special constitutional court (such as in France, Germany and Italy) has opened the gates to a phenomenon with which Israel is as yet unfamiliar. That the legislature has been silent regarding the question of the forum competent to annul legislation is not considered to preclude judicial review.[17] This silence has resulted in a situation where every court is competent to annul any law which conflicts with the basic laws relating to freedom of occupation and human dignity.[18]

The constitutional revolution relating to the annulment of a law which does not satisfy the "limitation clause" was sparked by a decision of the District Court of Tel Aviv delivered in March 1994.[19] In this case, the court was considering the Agricultural Sector (Family) Arrangements (Amendment) Law, which came into force in August 1993. In a detailed decision, the judge held that the law infringes upon the right to property (a right recognized in the *Basic Law: Human Dignity and Liberty*), since the creditors would be prejudiced by a provision which to some extent reduced the power of the court to give judgment in debt proceedings. "The Amendment Law," held the judge, "negates the rights of the creditors to have their property right in the debt adjudicated before the court, and subjects them to the powers of the receiver, a fact which retrospectively infringes the property rights of these creditors." In the view of the judge, the law infringed the principle of equality by favouring that part of the agricultural sector to which the provisions of the law applied.

The law was thus found to conflict with the "limitation clause," which requires the law to accord with the "values of the State of Israel," including the principle of equality, which is one of its cornerstones.[20] In the light of the above, the judge held that the provisions of the Knesset law are void "to the extent that they increase the exclusive powers of the receiver to hear debt proceedings...and negate the power of the court to consider the same matters."

From a legal point of view, it is clear that the decision of the District Court affects only the parties to the action, and does not constitute a binding precedent for other cases. However, the case created a new constitutional situation. For the first time in Israel, a court has held that a provision of a Knesset law is void as being contrary to the "values of the State of Israel." For the first time in Israel's legal system, a court, which was not the Supreme Court, held that the majority in the legislature had infringed a fundamental principle of democracy, the principle of equality — a value-laden term subject to differing interpretations. Such a ground for the annulment of a law was unknown to the Israeli legal system prior to the enactment of the two recent Basic Laws.[21] Before the outbreak of the constitutional revolution, the annulment of a law on the ground that it conflicted with the principle of equality would have been considered inconsistent with the Israeli legal system. The fact that the first decision to implement the new approach was taken by a District Court, and not by the Supreme Court, emphasizes the radical and far-reaching nature of this new legal development.

Even when one recognizes the importance of judicial review of Knesset legislation, as I do, the question remains whether it is appropriate that every court should be able to engage in this process. Such a decision requires a judicial determination which is difficult from a legal standpoint and sensitive from a societal standpoint. This is particularly so where the matter concerns the annulment of a law on the basis that it conflicts with principle of equality or another fundamental human right. In this context, I agree with the argument that a determination negating the validity of a law may lead to a real confrontation between the courts and the legislature. Such a determination requires the exercise of the highest possible discretion by a court with a maximum of prestige.

Consequently, it would be desirable to concentrate the right to negate a law within the jurisdiction of the Supreme Court.[22] It is my submission that the annulment of Knesset legislation by any court — Magistrate or District — will create chaos. It would be difficult to justify, for example, a situation in which one driver is found innocent because of a judicial decision that the law in accordance with which he is being tried is null and void, whereas another driver, appearing before a judge who determines that the relevant law is valid, is liable to a fine.

The decision of the District Court which negated a law of the Knesset on the grounds that it infringed property rights, contrary to the principle of equality, may open the gates to further judicial decisions over a wide range of matters, as has occurred in Canada and the United States. Following this breakthrough, Israel now faces a new and special constitutional era, even before the enactment of a written constitution. In this contest, the courts will play a vital role in the protection of human rights, while drawing inspiration from other democratic legal systems, headed by Canada, which provides the model for the two new Basic Laws.[23]

CONCLUSIONS

With the enactment of the Basic Laws in respect of Human Dignity and Freedom of Occupation, the State of Israel entered into a new era. Human dignity, as a broad and all-embracing right which encompasses the whole range of fundamental principles as well as specific rights, has evolved, in Israel, into a basic right. The climax of the constitutional revolution — which unfolded so quietly, and without the promulgation of a comprehensive formal constitution — ensued with the possibility of annulling primary legislation, on the grounds that it was contrary to the values of the State of Israel. This formula, which has found expression in the "limitation clause," is both broad and ill-defined. Indeed, it is more far-ranging in scope than the mere annulment of a law which is contrary to any specific constitutional provision.

In addition to their power to annul specific laws, the Basic Laws have far-reaching implications for the interpretation of existing legislation and the delimitation of the authority of governmental agencies. In a recent line of decisions, the Israeli Supreme Court has elucidated the properties of the Basic Laws. The Court has held that under the terms of the *Basic Law: Human Dignity and Liberty*, human dignity means the right of a person to his life, and the right of his relatives, after his death, to inscribe non-Hebrew characters on his tombstone, if they see fit.[24] Similarly, it has been held that courts must be mindful of human dignity and freedom and only in rare and exceptional cases should they order a person suspected of having committed a criminal offence to be held in prison until the conclusion of proceedings against him.[25] Overly stringent regulations in the field of the execution of judgments against debtors were found to operate within the ambit of human rights and were annulled.[26] The right to freedom of movement, which is recognized in the Basic Law, caused the Supreme Court to hold that an order restricting the right of a person to leave the country on the grounds of a debt is justified only in special cases.[27] The court has also held that the Basic Laws should guide IDF officers in the exercise of their military powers in territory subject to the control of the State of Israel, i.e. Judea, Samaria and the Gaza Strip, despite the fact that formally, the Basic Laws apply only within the territory of the State of Israel proper.[28]

Recognition of human rights in the *Basic Law: Human Dignity and Liberty* is general and all-embracing, and may even evolve into a substitute for a constitution which expressly addresses basic rights such as equality or freedom of expression. Human dignity can encompass equality before the law, freedom of expression and assembly, the right to due process and more. The Knesset is debating a detailed bill for a charter of basic human rights which expressly refers to these rights.[29] However, in the light of conflicting political views, particularly over freedom of religion, it is doubtful whether this bill will be enacted. Thus, it may be expected that the Israeli Supreme Court will interpret the existing Basic Laws in such a way as to incorporate within them the entire spectrum of fundamental human rights.

In any event, in enacting the new Basic Laws, the State of Israel has joined the family of nations which believe that limitations must be set on the right of a majority to derogate from fundamental human rights. In interpreting these Basic Laws, the Israeli judiciary will rely on the fact that the State of Israel is Jewish and democratic and is committed to equality for all its citizens, Jewish and non-Jewish alike. The Israeli courts will draw upon the wisdom of other legal systems which have allotted to the concept of human dignity its rightful place at the head of the hierarchy of human rights.

The repeal of legislation on the basis that it does not respect basic values or impair human rights more than necessary in a democratic society is an accepted concept in Canada, the United States, Germany and other states. In Israel it is still too early to say how the constitutional revolution will be adhered to when put into practice. The incorporation of the "notwithstanding clause" in the *Basic Law: Freedom of Occupation* (1994)[30] is the Parliament's first reaction to the new reality that it now enjoys limited supremacy.

In an illuminating book recently published, Justice Aharon Barak of the Israeli Supreme Court describes the constitutional revolution, explaining that "[i]n the past, human rights were subject to the laws. Today, the laws are subject to human rights."[31] This new reality, under which the Parliament can do wrong, would have to be followed by a development of constitutional remedies. Unlike the Canadian *Charter*, the Israeli new Basic Laws do not include any specific provision relating to the force or effect of a law which has been declared by the Court to be unconstitutional.[32]

Still, it could be submitted that the Israeli courts can declare a law to be void. Such power can be implied from a specific limitation mentioned in the Basic Laws which relate to legislative power. Such a limitation is exemplified by the "limitation clauses" in the new Basic Laws. It is within the powers of the courts to declare a law to be void *ab initio* or void *ex nunc*, from the time of the judicial decision. The Israeli court can, in my opinion, follow the Canadian approach, and suspend the entering into force of the nullity declaration.[33] The Israeli courts can also read into the law provisions which will abolish its unconstitutionality, instead of reading down the law.

All possible practices under which a law would be struck down only as a last resort, are highly advisable in the first stages of a constitutional revolution. It can be foreseen that the Israeli Supreme Court will enter into the new era with caution and respect for the Legislature, without overlooking human rights which are the basic element of a constitutional democracy.❑

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The abbreviations mentioned in this article are used in the Israeli legal system:

L.S.I..	Laws of the State of Israel (Official Translation into English).
H.C.J..	Israeli Supreme Court sitting as a High Court of Justice.
P.D..	Piskei Din (Hebrew) (Supreme Court Judgments).
S.H..	Sefer Hahukim (Hebrew) Laws of the Israeli Parliament (the Knesset).

Endnotes

1. H.C.J. 142/89 *Tnuat Laor (Laor Movement) v. Speaker of the Knesset*, 44(3) P.D. 529 at 555 (Hebrew) [hereinafter *Laor Movement*].

2. H.C.J. 98/69 *Bergman v. Minister of Finance*, 23(1) P.D. 693 (Hebrew). For an English translation, see Judicial Review of Statutes, 4 Israel. L. Rev. 559 (1969); H.C.J. 246/81 *Derech Eretz Association v. Broadcasting Authority*, 35(4) P.D. 1 (Hebrew); H.C.J. 141/82 *Rubenstein v. Speaker of the Knesset*, 37(3) P.D. 141 (Hebrew). See also *Laor Movement*, *supra* note 1.

3. The Israeli parliament, the Knesset, is composed of 120 members.

4. H.C.J. 148/73 *Kniel v. Minister of Justice*, 27(1) P.D. 794 (Hebrew).

5. See Appendices 1 and 2.

6. See, for example, A. Barak, "The Constitutional Revolution: Protected Human Rights" (1992) 1 *Mishpat Umimshal* 9 (Hebrew); A. Barak, "Protected Human Rights: Scope and Limitations" (1993) 1 *Mishpat Umimshal* 253 (Hebrew); A. Barak, "Protected Human Rights and Private Law" in *Klinghoffer Book on Public Law* (Jerusalem: Sacher Institute, 1993) 163 (Hebrew).

7. See Appendix 2.

8. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K), 1982, c. 11 [hereinafter the *Charter*].

9. The limitations provisions in the Israeli *Basic Laws: Human Dignity and Liberty* (section 8) and *Freedom of Occupation* (section 4), were somewhat influenced by section 1 of the Canadian *Charter*. The Canadian provision, which was mentioned in the Israeli parliamentary debates, states as follows:

> 1. 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.

Similarly, the "override clause" in the *Basic Law: Freedom of Occupation* (1994) (section 8), was drafted under the influence of section 33 of the Canadian *Charter*, which provides that:

> 33(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 not-

withstanding a provision included in section 2 [fundamental freedoms] or sections 7 to 15 [legal and equality rights] of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

10. The "limitation clauses," which are similar in both Basic Laws, should be read in the spirit of the new provision incorporated in the *Basic Law: Human Dignity and Liberty*, which was amended by a provision of the *Basic Law: Freedom of Occupation* (1994). The latter legislation inserts the same provision in both Basic Laws, which is entitled "basic principles." The provision reads as follows:

> Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirt of the principles set forth in the Declaraiton of the Establishment of the State of Israel.

The Declaration of the Establishment of the State of Israel (14 May 1948), proclaims, *inter alia*, that "THE STATE OF ISRAEL... will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom or religion, conscience, language, education and culture...".

It is evident that by the incorporation of the new provision the principles of the Declaration of Independence merge with the reference to "the values of the State of Israel" in the limitations clauses.

11. See A. Barak's articles, *supra* note 6.

12. M. Elon, "Constitution by Legislation: The Values of a Jewish and Democratic State in Light of the *Basic Law: Human Dignity and Personal Freedom*" (1993) 17 *Tel Aviv Univ. L. Rev.* 659 at 684 (Hebrew). See also D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 *Israel L. Rev.* 238 at 242.

13. A total of nine Basic Laws have been enacted in Israel since 1958. These Laws, which relate, *inter alia*, to the parliament, the executive branch and the judiciary, do not contain "limitation clauses." According to a 1950 policy decision of the Israeli parliament, Basic Laws will one day form the constitution of the State of Israel. For reviews of the structure of Israeli constitutional law prior to the enactment of the 1992 Basic Laws, see generally, A. Shapira, "Judicial Review Without a Constitution: The Israeli Paradox" (1983) 56 Temp. L.Q. 405; I. Zamir, "Rule of Law and Civil Liberties" (1988) 7 Civ. J.Q. 68; A. Maoz, "Defending Civil Liberties Without a Constitution: The Israeli Experience" (1988) 16 Melb. U. L. Rev. 815; Z. Segal, "A Constitution Without a Constitution: The Israeli Experience and the American Impact" (1992) 21 Capital U. L. Rev. 1.

14. See Appendices: *Basic Law: Human Dignity and Liberty* (1992), sections 1 and 8 and *Basic Law: Freedom of Occupation* (1994), sections 1 and 4. These two Basic Laws are the first laws enacted in Israel which make specific reference to Israel's Declaration of Independence. See *supra* note 10.

15. See *supra* note 8.

16. See especially section 8 of the Basic Law, Appendix 2.

17. The absence of a specific provision indicating the appropriate forum for constitutional scrutiny in the American constitution has not barred judicial review of statutes since the decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For an argument that a similar lacuna in Israeli basic laws does not preclude judicial review see I. Zamir, "Judicial Review of Statutes" (1993) 1 *Mishpat Umimshal* 395 at 408-410. This approach is open to debate. When a Basic Law or Charter of Rights is amended in modern times, when questions of judicial review are under discussion, it seems highly advisable that the legislature should express its will explicitly. Nevertheless, in my opinion, judicial review remains possible because of the existence of express limitations on legislative power, such as those found in a "limitation clause."

18. See I. Zamir, *ibid.* at 408-410. The question of the validity of a law may arise in a lower court — Magistrate or District — where the contention is raised in civil or criminal proceedings which are competently brought before the court. Such an attack on the validity of legislation may be entitled an "indirect attack" as the validity of the law is not the primary cause of the legal proceedings. A direct attack on the constitutionality of a law of the Knesset, where it is the sole ground for the legal proceeding, may be initiated in a petition to the Supreme Court of Israel sitting as a High Court of Justice. Such a quest for judicial review may be

described as a "direct attack." The Supreme Court sits then as a court of first and last instance.

19. Tel Aviv, Civil File 2252/91 *Shirutei Ashrai Mischari (Israel) Ltd. (Commercial Credit Ser-vices (Israel) Ltd.) v. Givat Yoav*. Unreported (16 March 1994), Judge Henia Stein, District Court of Tel Aviv-Jaffa. In November 1994, the Israeli Supreme Court started hearing oral arguments in an appeal of the Districts' Court's decision. The Supreme Court is hearing the appeal in a special panel of nine Justices (out of 14 Justices who are members of the Court). The Israeli Supreme Court sits usually in a panel of three Justices.

20. This principle is mentioned in the Israel's Declaration of Independence, dated 14th May, 1948, which as noted guarantees "complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex". See *supra* note 10.

21. See *supra* notes 1-4 and the accompanying text.

22. See I. Zamir, *supra* note 17. The view that the right to negate legislation should be limited to the Supreme Court found expression in the proposed bill entitled the Basic Law: Legislation, which the then Minister of Justice, Dan Meridor, tabled in the 12th Knesset in January 1992. By the terms of this bill, the jurisdiction to negate legislation would have been given to a court for constitutional matters, namely, the Supreme Court sitting with 9 or more Justices. However, the bill was not even given a first reading because of the opposition of religious elements to judicial review generally, and to the institution of the Supreme Court as a constitutional court, in particular. This approach led the current Minister of Justice, David Libai, to table a new bill in the Knesset for a Basic Law: Legislation, in which the section dealing with the establishment of a constitutional court was eliminated.

23. See *supra* note 9. The decisions of the Supreme Court of Canada and Canadian legal literature are often cited by the Israeli Supreme Court and by Israeli scholars when considering the new Basic Laws. The strengthening links between the Israeli and Canadian legal systems were emphasized in a legal conference held in Jerusalem in December 1992. The conference, which was attended by Supreme Court justices from both countries and by leading scholars, was held under the auspices of the Canada-Israel Legal Co-operation Programme and the Law Faculty of the Hebrew University of Jerusalem. The articles which furnished the background for discussions are being compiled in a book. See *Chartering Human Rights* (Canada-Israel Law Conference, Canada-Israel Legal Cooperation Programme, Faculty of Law, the Hebrew University of Jerusalem, 1992).

For illuminating Canadian legal writings on the Charter, see for example: P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992); L.E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Sup. Ct. L. Rev. 469; L.E. Weinrib, "Learning to Live with the Override" (1990) 35 McGill L. J. 541; L.E. Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution" (1992) 42 U. Toronto L. Rev. 207.

24. Civil Appeal 294/91, *The Burial Society "Jerusalem Community" v. Kastenbaum*, 46(2) P.D. 464 (Hebrew).

25. Criminal Applications 2169/92, *Suissa v. The State of Israel*, 46(3) P.D. 338 (Hebrew).

26. H.C.J. 5304/92 *Farach v. The Minister of Justice*. Unreported (22 October 1993) (Hebrew).

27. Criminal Applications 6654/93 *Binkin v. State of Israel*. Unreported (12 December, 1993) (Hebrew).

28. H.C.J. 2722/92 *Al-Amarin v. The Military Commander of the Gaza Strip*, 46(3) P.D. 693 (Hebrew).

29. The Judiciary Committee of the current Knesset (the 13th Knesset) has, over the years 1992-1994, considered a number of drafts for a *Basic Law: Basic Human Rights*. No bill has yet been laid before the plenary, due to the absence of political consensus. The principal areas of dispute relate to the relationship between religion and state, on one hand, and security needs *vis-à-vis* principles of democracy on the other.

30. See *supra* note 9.

31. A. Barak, *Interpretation in Law — Constitutional Interpretation* (Volume Three, 1994) 29.

32. See section 52(1) to the *Charter*. It is reminiscent, however, of the Canadian Bill of Rights which also lacked an enforcement provision.

33. See *Schachter* v. *Canada* (1992), 93 D.L.R. (4th) 1.

APPENDIX 1

Basic Law: Human Dignity and Liberty*

[As Amended by Basic Law: Freedom of Occupation (1994)]

1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaraiton of the Establishment of the State of Israel.[1]

1A. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

2. There shall be no violation of the life, body or dignity of any person as such.

3. There shall be no violation of the property of a person.

4. All persons are entitled to protection of their life, body and dignity.

5. There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or by any other manner.

6.(a) All persons are free to leave Israel.

(b) Every Israel national has the right of entry into Israel from abroad.

7.(a) All persons have the right to privacy and to intimacy.

(b) There shall be no entry into the private premises of a person who has not consented thereto.

(c) No search shall be conducted on the private premises or body of a person, nor in the body or belongings of a person.

(d) There shall be no violation of the secrecy of the spoken uttterances, writings or records of a person.

8. There shall be no violation of rights under this Basic Law except by a Law befitting the values of the State of Israel, enacted for the proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorization in such law.

9. There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defence Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a Law and to an extent no greater than required by the nature and character of the service.

10. This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law.

11. All governmental authorities are bound to respect the rights under this Basic Law.

12. This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under section 9 of the Law and Administration Ordinance, 5708-1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than required.

Yitzhak Shamir, Prime Minister
Chaim Herzog, President of the State
Dov Shilansky, Speaker of the Knesset

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* Passed by the Knesset on the 12th Adar Bet, 5752 (17th March, 1992) and published in *Sefer HaChukkim* No. 1391 of the 20th Adar Bet, 5752 (25th March, 1992); the Bill and an Explanatory Note were published in *Hatza'ot Chok*, No. 2086 of 5752, p.60.

The Basic Law was amended in March 1994 (*Sefer Ha-Chukkim* of 5754, p.90); the amendment is incorporated in the present text.

1. For the official English text of the Declaration of the Establishment of the State of Israel, see LSI, vol. 1, p.1.

Translation from the Hebrew and notes prepared by Deputy Attorney General Shlomo Guberman and Dr. Carmel Shalev, March 1994.

APPENDIX 2A

Basic Law: Freedom of Occupation (1992)**

[Repealed by the Basic Law: Freedom of Occupation (1994)]

1. Every citizen or resident of the state may engage in any occupation, profession or business; this right shall not be restricted save by statute, for a worthy purpose and for reasons of the public good.

2. If the engagement in an occupation is conditional upon receiving a license, the right to a license shall not be denied except according to statute and for reasons of state security, public policy, public order and health, safety, the environment, or safeguarding of public morals.

3. All governmental authorities are obligated to respect the freedom of occupation of every citizen or resident.

4. Emergency regulations shall not have the power to amend, temporarily suspend or place conditions on this Basic Law.

5. This Basic Law shall not be amended save by a Basic Law enacted by a majority of Knesset members.

6. Legislative provisions that were in force prior to the coming into force of this Basic Law, and which contradict its provisions, shall remain in force for two years from the date on which this Basic Law comes into force; however, the aforesaid provisions shall be interpreted in the spirit of this Basic Law.

** Enacted by the Knesset on 28th Adar A, 5752 (3 March 1992). The Bill and explanatory comments were published in H.H. 2096, of 17th Tevet 5752 (12 December 1991), p. 102. The Law was published in Sefer Hachukkim No. 1387 of 7th Adar B, 5752 (12 March 1992).

APPENDIX 2B

Basic Law: Freedom of Occupation***

1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.[1]

2. The purpose of this Basic Law is to protect freedom of occupation, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

3. Every Israel national or resident has the right to engage in any occupation, profession or trade.

4. There shall be no violation of freedom of occupation except by a Law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such Law.

5. All governmental authorities are bound to respect the freedom of occupation of all Israel nationals or residents.

6. This Basic Law shall not be varied, suspended or made subject to conditions by emergency regulations.

7. This Basic Law shall not be varied except by a Basic Law passed by a majority of the members of the Knesset.

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 herein.

9. Basic Law: Freedom of Occupation[2] is hereby repealed.

10. The provisions of any enactment which, immediately prior to this Basic Law would have been of effect but for this Basic Law or the Basic Law repealed in section 9, shall remain in effect two years from the commencement of this Basic Law, unless repealed earlier; however, such provisions shall be construed in the spirit of the provisions of this Basic Law.

11. In Basic Law: Human Dignity and Liberty[3]:

(1) Section 1 shall designated 1A and shall be preceded by the following section:

1. Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

(2) At the end of section 8, the following shall be added: "or by regulation enacted by virtue of express authorization in such Law."

Yitzhak Rabin, Prime Minister
Ezer Weizman, President of the State
Shevah Weiss, Speaker of the Knesset

*** Passed by the Knesset on the 26th Adar 5754 (9th March 1994) and published in *Sefer Ha-Chukkim* No. 1454 of the 27th Adar 5754 (10th March 1994), p.90; the Bill and the Explanatory Notes were published in *Hatza'ot Chok* No. 2250 of 5754, p.289, and No. 2227 of 5754, p.128.

Translation from the Hebrew and notes prepared by Deputy Attorney General Shlomo Guberman and Dr. Carmel Shalev, March 1994.

1. For the official English text of the Declaration of the Establishment of the State of Israel, see LSI, vol.1, p.1.
2. This Basic Law: Freedom of Occupation repeals and replaced the former Basic Law on freedom of occupation, enacted in 1992 (*Sefer Ha-Chukkim* of 5752, p.114).
3. The Basic Law includes an amendment to Basic Law: Human Dignity and Liberty, enacted in 1992. (*Sefer Ha-Chukkim* of 5752, p.150).

THE REGULATION OF PRIVATE HEALTH CARE UNDER THE *CANADA HEALTH ACT* AND THE CANADIAN *CHARTER*

Martha Jackman

INTRODUCTION

Like most aspects of the modern Canadian welfare state, the publicly funded health care system is under ever increasing strain. Canadians' near universal equation of health with access to medical services in the event of illness, the emphasis on the delivery of services by physicians and in-hospital settings, growing health insurance plan and hospital revenue shortfalls, and the pressure on governments to reduce spending, have contributed to the current situation.[1] These problems have in turn fuelled renewed debate over the merits of the national medicare system, with some commentators suggesting that the *Canada Health Act*[2] and the system as a whole need to be overhauled to allow for more private activity and greater competition in the delivery of services.[3]

Successive federal health ministers have, however, held firm in their defence of the existing single-payer model, and have threatened to cut federal transfers to provinces sanctioning practices perceived to be at odds with the *Canada Health Act* principles of accessibility and universality. Most recently, the federal government's determination to forestall any movement towards a two-tier health care system has prompted Health Minister Diane Marleau to threaten to penalize Alberta and British Columbia for permitting extra-billing and the operation of private health clinics in those provinces. In Marleau's words: "Canadians do not want cash-register medicine — with or without an express line."[4]

Against this background, the following comment will consider what legislative or constitutional limits now exist on governments' ability to regulate private, or for-profit, health care in Canada. To this end, the paper will first describe the evolution of the Canadian health care system from an essentially private to a largely public one over the past fifty years. Second, it will discuss the *Canada Health Act* and its impact on the provision of private health care services. Third, it will consider whether governments can restrict the provision of private health services if a right to health care is recognized under section 7 of the *Canadian Charter of Rights and Freedoms*.[5] On the basis of this review, the paper will conclude that, regardless of whether a *Charter* right to health is found, the major constraint on governments' ability to restrict private health care services is a political rather than a legal one.

THE EVOLUTION OF THE NATIONAL HEALTH INSURANCE SYSTEM

In his book on the Canadian health insurance system,[6] Malcolm Taylor describes the origins of the present system and the methods of paying physicians in the pre-medicare era:

> In private practice, prior to any form of prepayment, the medical practitioner billed his patients on a fee-for-service basis, taking into consideration the presumed "intrinsic" worth of the medical "act" and, in many cases, also the patient's ability to pay ... As the provincial medical associations became more involved with fee issues, their "tariff" committees developed standardized fee schedules as guidelines or "minimum sug-

gested fees" for an ever-increasing range of procedures.[7]

From the 1930s onwards, a growing number of commercial insurance companies introduced medical insurance policies, using these fee schedules as a basis for their indemnity rates. The private plans generally provided for reimbursement at less than the official tariff, and for a fixed deductible before the insurance took effect. During the same period, physicians came together in a number of provinces to introduce their own competing profession-controlled prepayment plans. Under these plans, in contrast to the commercial regimes, participating physicians accepted the plan's reimbursement as payment in full, so that subscribers effectively enjoyed 100 percent coverage.[8] As Taylor recounts, by the second world war, the Canadian medical establishment had fully approved the principles of health insurance. In 1943, the Canadian Medical Association formally endorsed the idea of a national health insurance plan, although it envisioned the role of government as limited to subsidizing the premiums of those who could not afford to make their own payments to the voluntary agencies.[9]

Thus, when the Royal Commission on Health Services, chaired by Justice Emmett Hall, was established in December 1960, the notion of health insurance as a means of facilitating individual access to health care was well established in Canadian thinking. As Taylor notes, by 1965 almost five million Canadians were insured to some degree under commercial insurance policies, and over 5.6 million were covered under physician-sponsored or approved plans.[10]

The *Report*[11] and Recommendations of the Hall Commission did not seriously question the insurance model as the appropriate vehicle for ensuring universal access to health care.[12] What was different in the Hall Commission recommendations was the proposal that administration of health insurance plans be taken over from the private sector by provincial governments, and that the plans be fully and universally subsidized by federal and provincial governments, rather than paid for through individual subscriptions.[13]

The Hall Commission recommendations for the creation of a government sponsored national health insurance plan, meeting conditions of comprehensiveness, universality, public administration and portability, were implemented in the national *Medical Care Act* which came into force in December 1966.[14] All of the provinces and territories adopted health insurance plans, meeting the conditions of the *Medical Care Act*, and thereby became eligible for federal financial contributions over the next six years. In order to do so, each of the provinces displaced pre-existing physician-sponsored or private insurance plans, although an effort was made in some provinces to integrate non-profit plans into the new system.[15]

In essence, the Hall Commission and the *Medical Care Act* entrenched a national public health care system based upon a private insurance model. All Canadians became policy holders in a nationalized health insurance plan, with premiums paid through the tax system instead of directly, and with a general assumption that services would continue to be provided by individual physicians who would simply be reimbursed by the provinces instead of by profession-controlled or commercial insurers. Physicians also expected that they would continue to be reimbursed on a fee-for-service basis, at tariffs set largely by them, thereby preserving a significant degree of professional and economic independence from governments — now occupying the dual role of regulator and insurer.

THE *CANADA HEALTH ACT* AND ITS IMPACT ON THE PROVISION OF PRIVATE HEALTH CARE SERVICES

In principle, the *Medical Care Act* and the *Hospital Insurance and Diagnostic Services Act*,[16] its companion legislation in relation to hospital services, had established a system of free and universal health care throughout Canada by the early seventies. By the early 1980s, however, extra-billing by physicians and the imposition of user fees by hospitals had become widespread. These practices were viewed by the federal government and by the public alike as threatening the basic principle that all Canadians should have access to the health care system, irrespective of individual ability to pay. In 1984, the federal government responded by enacting the *Canada Health Act*, which added the criteria of "accessibility"[17] to pre-existing federal requirements that provincial health insurance plans be comprehensive,[18] universal,[19] portable,[20] and publicly administered,[21] in order to be eligible for federal cash contributions.[22]

The accessibility criterion under section 12 of the *Act* was designed to eliminate extra-billing by physicians and the imposition of hospital user charges. Provinces which allowed such practices were, by virtue of section 18 (with respect to extra-billing)[23] and section 19 (with respect to user charges),[24] disentitled to receipt of the full federal cash contribution towards provincial health insurance costs pursuant to the *Established Programs Financing Act*.[25]

What the *Canada Health Act* prohibits, therefore, is not the provision of private health care services *per se*. Rather the provinces are prevented, under threat of losing federal funds, from permitting health care providers to bill patients directly for amounts over and above what they receive for such services under provincial health insurance plans. Similarly, hospitals may not be allowed to impose outpatient fees, or other user charges, directly on patients for use of insured hospital services.

In short, the *Canada Health Act* does not regulate health care providers directly, but simply dictates the terms upon which federal cash transfers to the provinces will occur. As such, the legislation does not prevent private, or for-profit, institutional providers from delivering, and being reimbursed for, provincially insured health services, so long as extra-billing of patients is not involved. Nor does the *Act* prevent the provinces from allowing private health care providers, whether individual or institutional, to operate outside the state subsidized health care system.

That is, health care providers may opt out of provincial health insurance plans altogether, and bill patients directly for the full cost of services provided, without any penalty being imposed on the province under section 18 of the *Act*. In these cases patients must also be ineligible for reimbursement under provincial health insurance plans, in order to avoid the ban on extra-billing under section 18. Finally, the *Canada Health Act* does not preclude private insurers from supplementing provincial health insurance plans, by insuring supplementary or non-insured services at an additional cost to the subscriber.

THE *CHARTER* AS A BARRIER TO GOVERNMENT LIMITS ON PRIVATE HEALTH SERVICES

As discussed above, the provision of private, or for-profit, services is permissible under the current legislative framework so long as it does not amount to extra-billing. The question which remains is whether the *Charter* places any limits on governments' ability to impose further restrictions, or even to prohibit altogether, the provision of private health care in Canada.

Aside from the statutory conditions of accessibility and universality set out under the *Canada Health Act*, a credible claim can be made that section 7 of the *Charter* guarantees a constitutional right to health care. In practical terms, a right to life and to security of the person is meaningless without access to health care, both in a preventive sense, and in the event of acute illness. The Law Reform Commission of Canada recognized this in suggesting, in its Working Paper on *Medical Treatment and Criminal Law*, that "the right to security of the person means not only protection of one's physical integrity but the provision of necessaries for its support."[26]

With the advent of medicare, Canadian citizens and Canadian governments alike have come increasingly to perceive free and universal health care as a basic right of citizenship.[27] As Justice Wilson stated in her decision in *Stoffman v. Vancouver General Hospital*: "...government has recognized for some time that access to basic health care is something no sophisticated society can legitimately deny to any of its members."[28] An interpretation of the section 7 right to "life, liberty and security of the person" that includes a right to health care reflects the broader social context in which the *Charter* was adopted — the background against which the Supreme Court has argued the *Charter* must be understood.[29] This reading of section 7 is also consistent with, and to some extent dictated by,[30] Canada's extensive international human rights commitments in the area of social and economic rights, including in the area of health.[31]

If the argument that section 7 of the *Charter* guarantees a right to health is accepted, however, it is unlikely to entail more than an individual right to

basic and medically necessary care. In other words, the right, if it is found to exist, is likely to extend only to the actual person whose life, liberty or security of the person is threatened by a deprivation of care, and not to the individual or institution seeking to provide the care which is sought. Furthermore, and particularly in light of the accessibility and comprehensiveness of the current public system, it is unlikely that a right to health care would be read so expansively as to entitle an individual to demand unlimited freedom of access to services or to choice of providers, free from any restrictions. In other words, it is unlikely that section 7 could be successfully invoked to challenge existing provisions of the *Canada Health Act*, or to challenge further restrictions on access to private health care services, on the grounds that such restrictions amount to a deprivation of the right to health care.

Supreme Court jurisprudence also suggests that *Charter* rights of institutional providers of private health care services will be limited. In its decision in *Irwin Toy Ltd. v. Québec (A.G.)*, the Supreme Court held that section 7 of the *Charter* protects only the rights of human beings, and not of corporate and other artificial entities.[32] Based on a reading of the legislative history of section 7, the Court also rejected the claim that property-related rights, or economic rights of a corporate/commercial nature, are entitled to constitutional protection.[33] It is therefore unlikely that institutional providers of private health care service will enjoy independent constitutional protection. Thus it can be imagined that government restrictions or outright prohibitions of for-profit activities by institutional providers of private health care services would be constitutionally unobjectionable.

In the case of individual providers of private health services, potential *Charter* claims also appear weak. In *Wilson v. Medical Services Commission*,[34] the appellants challenged the validity of the British Columbia *Medical Services Act Regulations*,[35] which enabled the province to restrict the type and geographic locations of doctors' practices covered by the provincial health insurance plan, through the allocation of practitioner billing numbers. In its decision, the British Columbia Court of Appeal invalidated the B.C. regulations on the grounds that "denying doctors the opportunity to pursue their profession falls within the rubric of 'liberty' as that word is used in section 7."[36] In response to the suggestion that the appellant's claim involved a purely economic interest, the Court of Appeal maintained: "[d]enial of the right to participate under the plan is not the denial of a purely economic right, but in reality is a denial of the right of the appellants to practise their chosen profession within British Columbia."[37]

The soundness of the Court of Appeal's conclusion in the *Wilson* case was put into doubt by Justice Lamer's concurring judgment in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code*.[38] In his decision, Justice Lamer argued that while the non-economic or non-pecuniary aspects of work are important to the individual, the rights under section 7 do not extend to the right to exercise one's chosen profession.[39] On the basis this reasoning, in contrast to the Court of Appeal's approach in *Wilson*, restrictions imposed by governments on the ability of individual health care providers, whether physicians or otherwise, to provide private health care services would not be subject to section 7 review.

Even if claims on behalf of individual or institutional providers of private health care services were to succeed under section 7, it would remain open to the government to attempt to justify any deprivation of these rights under section 1 of the *Charter*. In *McKinney v. University of Guelph*,[40] Justice LaForest suggested that the courts should apply the *Oakes*[41] test with a greater degree of circumspection in areas outside the field of criminal law, where legislative decisions are based on "a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components."[42] Citing his decision in *R. v. Edwards Books and Art Ltd.*,[43] Justice LaForest also proposed that where, in attempting to protect the rights of one group the legislature imposes burdens on the rights of another, it "must be given reasonable room to manoeuvre to meet these conflicting pressures."[44]

In order to justify restrictions on the section 7 rights, if any, of individual and institutional providers of private health care services, it would therefore be open to the government to argue that maintenance of a single-payer system is necessary in order to safeguard the integrity of the existing Canadian health care system. This argument was made at length in debates preceding the adoption of the *Canada Health Act*,[45] and support for it can also be found in more recent discussions on this issue, which reject the privatization of health care as a threat to the preservation of a high quality and universally accessible

health care system for all Canadians, irrespective of individual ability to pay.[46] As Justice LaForest's reasoning in the *McKinney* case suggests, given the complexities and the difficult balancing of competing public and private interests involved in this area, it is likely that the courts will grant governments considerable latitude in reviewing their health policy choices under section 1.

CONCLUSION

In conclusion, although it can be argued that section 7 of the *Charter* includes a right to health care, it is unlikely that the courts would interpret such a right as extending constitutional protection to those seeking to provide services unhindered by government regulation. It would therefore be open to the provinces, pursuant to their jurisdiction in relation to health under sub-sections 92(7), (13) and (16) of the *Constitution Act, 1867*,[47] to restrict or to entirely prohibit the provision of private health care services.[48]

It would be difficult for the federal government to support similar, direct, legislative restrictions on providers of private health care services under the federal peace, order and good government power.[49] However, pursuant to its spending power, the federal government could attempt to achieve this result by modifying the terms of the *Canada Health Act*.[50] In the same way as it now requires that provincial health insurance plans be comprehensive, universal, portable, publicly administered and accessible, the federal government could insist that the provinces prohibit private health services as a condition for receiving federal financial support towards provincial health insurance plans.

As described in the first part of the paper, the creation of a national, state sponsored, health insurance regime in the late 1960s illustrates the federal and provincial governments' ability to regulate, even to the point of eliminating, private health services. As in the case of the *Canada Health Act*, adopted two decades later, the primary obstacle facing governments in their regulation of private health services remains a political, and not a legal, one. Those who believe that maintaining the current single-payer system is fiscally irresponsible, poor health policy, or contrary to the health interests of Canadians, will therefore have to look beyond the *Charter* for support for greater privatization of the Canadian health care system.❑

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Endnotes

1. See for example Canadian Bar Association Task Force on Health Care, *What's Law Got To Do With It? Health Care Reform in Canada* (Ottawa: Canadian Bar Association, 1994); Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies*, Volume 1 (Ottawa: Ministry of Government Services Canada, 1993) at 75-84; P.M. Leslie, "Financing Health Care and Post-Secondary Education" in S. Torjman, ed., *Fiscal Federalism for the 21st Century* (Ottawa: The Caledon Institute of Social Policy, 1993) 27; Canada, House of Commons, Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, *The Health Care System in Canada and its Funding: No Easy Solutions* (Ottawa: Queen's Printer, June 1991) (Chair: B. Porter); National Council of Welfare, *Funding Health and Higher Education: Danger Looming* (Ottawa: Supply and Services Canada, 1991); National Council of Welfare, *Health, Health Care and Medicare* (Ottawa: Supply and Services Canada, 1990).

2. R.S.C. 1985, c. C-6.

3. See for example R. Sutherland & J. Fulton, *Spending Smarter and Spending Less: Policy and Partnerships for Health Care in Canada* (Ottawa: Canadian Hospital Association Press, 1994) at 319-24; and the essays collected in A. Blomqvist & D.M. Brown, eds, *Limits to Care: Reforming Canada's Health Care System in an Age of Restraint* (Vancouver: C.D. Howe Institute, 1994).

4. M. Kennedy, "Minister fines B.C. to stop extra-billing" *The Ottawa Citizen* (27 April, 1994) A1, A12; see also S. Feschuk, "Marleau renews threat to Alberta" *Globe and Mail* (29 November, 1994) A1, A12.

5. Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11.

6. M.G. Taylor, *Health Insurance and Canadian Public Policy: The Seven Decisions that Created the Canadian Health Insurance System and their Outcomes*, 2d ed. (Montreal/Kingston: McGill-Queen's University Press, 1987). See also C.D. Naylor, *Private Practice: Canadian Medicine and the Politics of Health Insurance 1911-1966* (Montreal/Kingston: McGill-Queen's University Press, 1986); D. Guest, *The Emergence of Social Security in Canada*, 2d ed. rev'd (Vancouver: University of British Columbia Press, 1985); A. Crichton & D. Hsu, *Canada's Health Care System: Its Funding and Organization* (Ottawa: Canadian Hospital Association Press, 1990) at 27-48.

7. Taylor, *Health Insurance and Canadian Public Policy*, *ibid.* at 436.

8. Taylor, *ibid.* at 435-436; Naylor, *Private Practice*, *supra* note 6 at 143-152.

9. Taylor, *ibid.* at 334-35.

10. *Ibid.* at 336-37.

11. Canada, *Report of the Royal Commission on Health Services* (Ottawa: Queen's Printer, 1964) (Chair: E.M. Hall).

12. As Taylor recounts, the Canadian Labour Congress was the only group to squarely address the insurance issue. It its brief to the Hall Commission the CLC argued that while the prepayment plans had been useful, they were simply a convenient technique for the budgeting of health care costs. The CLC insisted that the real issue was Canada's health care system, which should be thought of as a public service, and not simply as an insurance mechanism; Taylor, *Health Insurance and Canadian Public Policy*, *supra* note 6 at 358.

13. *Ibid.* at 342-47.

14. S.C. 1966-67, c. 64.

15. Taylor, *Health Insurance and Canadian Public Policy*, *supra* note 6 at 374-376.

16. S.C. 1957, c. H-8.

17. Under section 12 of the *Act*, "accessibility" means reasonable access to services on uniform terms and conditions, unimpeded by direct or indirect charges or otherwise.

18. Under section 9 "comprehensiveness" means coverage of all insured health services provided by hospitals, medical practitioners, dentists, and where permitted, by other health care practitioners.

19. Under section 10 "universality" means universal entitlement to services on uniform terms and conditions.

20. Under section 11 "portability" means a maximum provincial waiting period of three months, and coverage during such waiting periods and during temporary absences from a province.

21. Under section 8, "public administration" means by a public non-profit authority designated by and responsible to the province, and subject to audit. Subsection (2) authorizes the provinces to designate a non-governmental agency to receive amounts payable under the provincial health insurance plan, or to carry out any responsibilities in connection with the receipt or payment of accounts rendered for insured services.

22. For a general discussion of the *Act*, see Health and Welfare Canada, *Canada Health Act Annual Report 1992-1993* (Ottawa: Minister of Supply and Services, 1993); Taylor, *Health Insurance and Canadian Public Policy*, *supra* note 6 at 415-62; S.L. Martin, *Women's Reproductive Health, the Canadian Charter of Rights and Freedoms, and the Canada Health Act* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 14-34; Guest, *The Emergence of Social Security in Canada*, *supra* note 6 at 227-29.

23. Section 18 of the *Act* provides: "In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, no payments may be permitted by the province for that fiscal year under the health care insurance plan of the province in respect of insured health services that have been subject to extra-billing by medical practitioners or dentists."

24. Section 19 of the *Act* provides: "(1) In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, user charges must not be permitted by the province for that fiscal year under the health care insurance plan of the province. Sub-section (2) makes an exception for user charges for patients in institutional chronic care.

25. *Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act* (*Established Programs Financing Act*), R.S.C. 1985, c. F-8. Section 20 of the *Canada Health Act* provides for a deduction from the federal cash transfer to a province of an amount equal to the amount charged to patients in the province through extra-billing or through hospital user fees.

26. Law Reform Commission of Canada, *Medical Treatment and Criminal Law* (Ottawa: Supply and Services Canada, 1980) at 6.

27. The evolution of Canadians' attitudes towards the health care system are described in Naylor, *Private Practice, Public Payment*, *supra* note 6; Taylor, *Health Insurance and Canadian Public Policy*, *supra* note 6; and Guest, *The Emergence of Social Security in Canada*, *supra* note 6; and see also M. Bégin, *Medicare, Canada's Right to Health* (Montreal: Optimum Publishing, 1988).

28. [1990] 3 R.S.C. 483 at 544.

29. For an extended discussion of the claim that section 7 of the *Charter* guarantees social welfare rights, including the right to health care, see M. Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 *Ottawa L.Rev.* 257; see also I. Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 4 *J.L. & Social Pol'y* 33.

30. The Supreme Court of Canada has held that the *Charter* should be read in a manner consistent with Canada's international human rights obligations; see

for example *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038 at 1056-1057.

31. Paragraph 1 of Article 25 of the *Universal Declaration of Human Rights* (U.N.G.A. Res. 217 (III), 3 U.N. GAOR, Supp. (No. 13) 71, U.N. Doc. A/810 (1984)), endorsed by the members of the United Nations General Assembly including Canada in 1948, provides that "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including ... medical care ..." Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, (1966)), ratified by Canada in 1976 after lengthy discussions with the provinces, recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Article 12(2)(d) of the *Covenant* sets out States Parties' obligations to take all steps necessary for "The creation of conditions which would assure to all medical service and medical attention in the event of sickness." See generally Jackman, "The Protection of Welfare Rights Under the *Charter*", *supra* note 29 at 283-290; C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall L.J.* 769.

32. [1989] 1 S.C.R. 927 at 1004.

33. *Ibid.* at 1003-04.

34. (1988), 53 D.L.R. (4th) 171 (B.C.C.A.).

35. C.R.B.C. 1985, Reg. 144/68, adopted pursuant to the *Medical Services Act Amendment Act, 1985*, S.B.C. 1985, c. 39.

36. *Supra* note 34 at 189.

37. *Ibid.* at 187.

38. (1990), 109 N.R. 81 (S.C.C.).

39. *Ibid.* at 131, 143.

40. [1990] 3 S.C.R. 229.

41. *R. v. Oakes*, [1986] 1 S.C.R. 103.

42. *Supra* note 40 at 304-05.

43. [1986] 2 S.C.R. 713.

44. *Ibid.* at 795.

45. See for example E.M. Hall, *Canada's National Provincial Health Program for the 1980's* (Ottawa: Health and Welfare Canada, 1980) discussed in Taylor, *Health Insurance and Canadian Public Policy*, *supra* note 6 at 430; Bégin, *Medicare, Canada's Right to Health*, *supra* note 27; National Council of Welfare, *Medicare: the Public Good and Private Practice* (Ottawa: Supply and Services Canada, 1982); R.G. Evans, *Strained Mercy: The Economics of Canadian Health Care* (Toronto: Butterworths, 1984).

46. See for example Bégin, *Medicare, Canada's Right to Health*, *ibid.*; Royal Commission on New Reproductive Technologies, *Proceed With Care*, *supra* note 1 at 70-106; Canadian Hospital Association, *An Open Future: A Shared Vision* (Ottawa: Canadian Hospital Association Press, 1993); Standing Committee on Health, *The Health Care System in Canada and its Funding*, *supra* note 1 at 31-32; National Council of Welfare, *Health, Health Care and Medicare*, *supra* note 1.

47. (U.K.), 30 & 31 Vict., c. 3.

48. For a discussion of the federal-provincial division of powers in the field of health see generally M. Jackman, "The Constitution and the Regulation of New Reproductive Technologies" in *Overview of Legal Issues in New Reproductive Technologies*, Volume 3 of the Research Studies of the Royal Commission on Reproductive Technologies (Ottawa: Supply and Services Canada, 1993) at 3-18; A. Lajoie & P.A. Molinari, "Partage constitutionnel de compétences en matière de santé au Canada" (1978) 56 *Can. Bar Rev.* 579; R. T. McKall, "Constitutional Jurisdiction Over Public Health" (1975) 6 *Man. L.J.* 317.

49. For a discussion of the peace, order and good government power as a source of federal jurisdiction in the field of health, see Jackman, "The Constitution and the Regulation of New Reproductive Technologies", *ibid.* at 4-7; M. McConnel & L. Clark, "Abortion Law in Canada: A Matter of National Concern" (1991) 14 *Dalhousie L.J.* 81; J. Leclair, "La Théorie des dimensions nationales: une boîte à phantasmes: *Canada (Procureur Général) c. R.J.R.-MacDonald Inc*" (1993) 72 *Can. Bar Rev.* 524.

50. The argument that the *Canada Health Act* could not be supported under the federal spending power was rejected by the Alberta Court of Appeal in *Winterhaven Stables Ltd. v. Attorney General of Canada* (1988), 53 D.L.R. (4th) 413; leave to appeal refused [1989] 1 S.C.R.

PARADIGMS LOST: GERMAN FEDERAL AND ELECTORAL SOLUTIONS TO CANADA'S CONSTITUTIONAL PROBLEMS

Russell Isinger

INTRODUCTION

> *No leader, no man whatever his dedication to his country and his party may be, can ever march forth, facing the foe, if he is afraid that there is someone behind him who is interfering directly or indirectly.*[1]

Diefenbaker would hate this article, for its purpose is to do exactly what "Dief the Chief" feared and loathed — to interfere.

One of the difficulties Canadians have with proposals for reforming the political system is an inability to visualize how different Canada would be if such proposals became law. I intend to address this problem by presenting electoral and Senate reform proposals based upon the bicameral parliament of the Federal Republic of Germany and utilizing statistics from the Diefenbaker years, a period which I have an academic interest in.

"Designing electoral systems," Irvine observes, "has become a cottage industry."[2] The same could be said of Senate reform proposals. Both have been held up as panaceas, but the former would be easier to achieve because it lies within the purview of Parliament (although it would require broad party and public support).[3] Senate reform, requiring amendment of the constitution, is more difficult, as the failure of the Meech Lake and Charlottetown Accords indicate.

To many readers I may appear to be deaf to Livingston's admonition that it is impossible for some to make an analytical distinction between the instrumentalities of federalism and the federal nature of the society they were designed to preserve and protect.[4] However, please remember that this essay is intended to be illustrative, not prescriptive.

A CANADIAN *BUNDESTAG*?

The German lower house — the *Bundestag* — is one of the most equitably elected representative chambers. Germany's hybrid post-Second World War electoral law is combines features of the British Westminster model and European PR (proportional representation).[5] However, in adapting this mode of selecting governments to the Canadian context, two assumptions have been made.

First, I have assumed a House of Commons with 530 MPs, a degree of representation similar to more populous G-7 democracies. Support for such remodelling would be hard to achieve, especially in times of economic recession, fiscal restraint, and public cynicism. But one should recall the words of Sir John A. Macdonald: "I was perhaps singular in opinion, but I thought it would be well to commence with a larger representation in the lower branch."[6]

To avoid depersonalizing the relationship between electors and elected, half of the MPs are elected under the simple plurality system, in 265 single member constituencies. The candidate who receives a relative, rather than an absolute, majority — "first-past-the-post" — wins.[7] Therefore, the actual 1957-1965 election outcomes presented in Table One were taken to be the results for only one-half of the House of Commons.

Under-representation of the parties is corrected by adding another 265 MPs elected by PR. This topping-up ensures that representation corresponds to

the parties' proportions of the popular vote.[8] Thus a voter would cast two ballots, one for a candidate to represent the constituency, and a second for a party from whose list of candidates are elected MPs to represent the province. However, it is the second ballot which determines party strengths for the entire House of Commons, rather than for only half the membership.[9]

It is at this point that we come to my second assumption: that voters' recorded loyalties extend to this second ballot. Thus a vote for a party's candidate in the 1957-1965 elections is taken to indicate a second vote for that party nationally. Ticket-splitting is uncommon among the two main German parties, but it is an option whereby a voter can support one party's candidate locally and a different party nationally.[10] Thus the results presented in Table Two are indicative, not definitive.

The total number of second votes cast for all parties are added to produce an aggregate national vote, which is divided by the number of seats available plus one to produce a quota — the number of votes needed to win a seat. This quota is then divided into the national vote total for each party to determine the minimum number of seats each is entitled to. Any remaining seats are allocated through the highest average system, *i.e.*, the first leftover seat is allotted to the party with the highest national total, that party's total being divided by two. This process continues until all remaining seats are distributed.[11] In order to avoid a fractionalization of the party system, a party must poll five percent of the national popular vote or win three constituencies before being eligible for the proportional allocation of seats.[12] Thus this electoral system favours parties that gain widespread or concentrated support. The five percent/three constituency hurdle is a handicap on fringe or extremist parties, not on regional protest movements.[13]

The aforementioned process is repeated for each party separately in order to allocate their seats to each province. The national vote total for a party is divided by the total number of seats it is entitled to plus one to produce another quota. This quota is divided into that party's provincial vote totals to determine the minimum number of seats each province is entitled to. The first leftover seat is allotted to the province with the highest provincial vote total, that total being divided by two, and the process continues until all the party's remaining seats are assigned.[14]

Ontario and Quebec benefit most under this method, which could cause the Western and Atlantic provinces to resist such an electoral system. Furthermore, the representation to which a province is entitled is not fixed according to population. It is a function of a province's share of the popular vote and is, therefore, in direct proportion to votes cast. A province with a lower voter turnout *vis-a-vis* other provinces would suffer a reduction in the number of seats to which it is entitled. Since voting equals power, a province would have a great incentive to get its citizenry out to vote.[15]

The number of constituency seats a party won in a province would then be subtracted from the number of seats to which the party is entitled to in order to give the number of MPs elected from the party list.[16] Furthermore, should a party win more constituencies than the total number of seats to which it is entitled, no MPs would be elected from the list and that fortunate party is allowed to retain the extra seats.[17] As indicated in Table Two, the size of the House of Commons would vary because of these additional seats.[18] In Germany this is a rare occurrence, but in Canada it might be a regular event which might also contribute to the slight over-representation of the two old parties.[19]

Proponents argue that it would be easier for parties to build local campaign organizations and attract qualified candidates under this proposed electoral system.[20] Veteran parliamentarians and rookie candidates who ran in constituencies need not worry about defeat if their names were also placed high enough on their party's list. Women, Aboriginal Canadians, and people of diverse ethnic backgrounds could be guaranteed election in a similar manner. Should an MP resign or die, a by-election is unnecessary: the next eligible person on the party list of that province becomes the new MP, regardless of whether the former MP was a constituency or list MP.[21]

"Canadians," Cassidy states, "see a mismatch between how they vote and how they are represented in Parliament."[22] As Irvine notes, the existing electoral system results in a weak relationship between votes cast and seats won, leading to an over-representation of the winner and under-representation of the runners-up which grows sharper as a party's support grows thinner.[23] Cairns adds that this forces parties to skew their efforts and policies toward areas of

TABLE 1 — National Distribution of Popular Vote and House of Commons' Seats Among The Parties, 1957-1965 General Elections

		1957			1958			1962			1963			1965	
	%[1]	Seats	%[2]	%	Seats	%	%	Seats	%	%	Seats	%	%	Seats	%
PC	38.9	112	42.3	53.7	208	78.5	37.3	116	43.8	32.8	95	35.9	32.4	97	36.6
Liberal	40.9	105	39.6	33.7	49	18.5	37.2	100	37.7	41.7	129	48.7	40.2	131	49.4
CCF/NDP	10.7	25	9.6	9.5	8	3.0	13.5	19	7.2	13.2	17	6.4	17.9	21	7.9
Social Credit	6.6	19	7.2	2.6	-	-	11.6	30	11.3	11.9	24	9.1	3.7	5	1.9
Others	2.8	4[3]	1.6	0.5	-	-	0.4	-	-	0.4	-	-	5.8	11[4]	4.2

1. Percentage of popular vote won by party nationally.
2. Percentage of total House of Commons' seats won by party.
3. Independents.
4. 2 Independents and 9 seats won by the *Creditistes*, who polled 4.7% of the popular vote, winning 3.4% of House of Commons' seats.

SOURCE:

Chief Electoral Officer, *Twenty-Third General Election of 1957* (Ottawa: Queen's Printer and Controller of Stationery, 1958), viii; Chief Electoral Officer, *Twenty-Fourth General Election of 1958* (Ottawa: Queen's Printer and Controller of Stationery, 1959), viii; Chief Electoral Officer, *Twenty-Fifth General Election of 1962* (Ottawa: Queen's Printer and Controller of Stationery, 1963), viii; Chief Electoral Officer, *Twenty-Sixth General Election of 1963* (Ottawa: Queen's Printer and Controller of Stationery, 1964), xx; Chief Electoral Officer, *Twenty-Seventh General Election of 1965* (Ottawa: Queen's Printer and Controller of Stationery, 1966), xx; and Peter Regenstreif, *The Diefenbaker Interlude. Parties and Voting in Canada. An Interpretation* (Toronto: Longman's Canada Limited, 1965), 31-166 *passim*. See also Frank Feigert, Canada Votes, 1935-1988 (Durham, N.C.: Duke University Press, 1989).

TABLE 2 — National Distribution Of Popular Vote And House of Commons' Seats Among The Parties Under Hypothetical Electoral System, 1957-1965 General Elections.[1]

		1957			1958			1962			1963			1965	
	%[2]	Seats	%[3]	%	Seats	%	%	Seats	%	%	Seats	%	%	Seats	%
PC	38.9	212	39.8	53.7	293	55.1	37.3	204	38.1	32.8	177	33.2	32.4	180	33.5
Liberal	40.9	222	41.7	33.7	185	34.8	37.2	199	37.2	41.7	224	42.0	40.2	216	40.2
CCF/NDP	10.7	58	10.9	9.5	54	10.2	13.5	71	13.3	13.2	69	13.0	17.9	96	17.9
Social Credit	6.6	37	6.9	2.6	-	-	11.6	61	11.4	11.9	63	11.8	3.7	19	3.6
Others	-	4[4]	0.8	-	-	-	-	-	-	-	-	-	5.8[5]	26	4.8
Total Number of Seats		533			532			535			533			537	

1. Including extra MPs as set forth in footnote 19.
2. Percentage of popular vote won by party nationally.
3. Percentage of total House of Commons' seats won by party under proposed model.
4. Independents.
5. 2 Independents and 24 seats won by the *Creditistes*, who polled 4.7% of the popular vote, winning 4.5% of House of Commons' seats.

potential strength where they can make the electoral system work to their advantage, thus "exacerbat[ing] the very cleavages it is credited with healing ... the party system is not simply a reflection of sectionalism ... sectionalism is also a reflection of the party system."[24]

Table Two demonstrates that the proposed electoral system would result in greater fairness in the national, regional, and provincial distribution of seats among the parties because their share of seats would be approximately equal to their share of the national (and provincial) popular vote. The inequity of a party being completely shut out of a region or winning all of a province's seats would cease. No significant regional, cultural, or linguistic segment would have reason to feel frozen out of the caucus of the governing party. The forces of Western and Atlantic political alienation and Quebec separatism might well be dampened due to significant regional input into the decision-making process.[25] A nationally representative caucus might even act as a counterweight to the zero-sum games played out through First Ministers' Conferences and federal-provincial diplomacy.[26]

As Courtney points out, with so many MPs there would be an increase in the operating costs of the House of Commons, a reduction in speaking time for MPs, and a strain on the physical limits of the Parliament buildings. But leaders would have a larger pool from which to choose their front benches, parliamentary assistants, and committee members. A Westminster-style committee structure with enhanced membership and expanded investigatory and agenda-setting powers might arise. Furthermore, unless a leader desired a backbench revolt, they could not take their MPs' for granted. Tight party discipline might loosen, with MPs able to dissent publicly without fear of penalty.[27]

However, academics such as Courtney and Lovink challenge the efficacy of electoral reform, believing advocates "exaggerate the significance of the electoral system for party policy ... overstate its nationally divisive consequences, and understate its contribution to the effective functioning of the parliamentary form of government."[28] Because every second ballot counts, campaigns could become all-or-nothing ideological exercises in mudslinging and scaremongering. An optimal electoral strategy might be to abandon campaigning where returns would be limited in favour of redeploying resources to areas which promise to return large numbers of constituency and list MPs. And a nationally representative caucus may not ensure that the cabinet would not ignore the regions in favour of their own set of priorities, interests, and biases.[29]

Canada, it is argued, is a difficult country to govern. Nationally representative majority governments, therefore, are essential. But the existing electoral system produced six minority governments out of sixteen since 1945, or 37.5 per cent, and the 1993 election, though resulting in a majority government, also produced a fragmented House of Commons which may not be able to maintain Canada as a viable and coherent political and economic unit. Minority or coalition governments should neither be labelled aberrations nor equated with inefficient, unstable, or indecisive government. As in Germany, the proposed electoral system may produce a cooperative coalition government rather than confrontational partisan government because PR tends to militate against fluctuations in party strength. Canada would develop a different conception of responsible government and brokerage politics; it would not become Weimar Germany, Fourth Republic France, or present-day Italy.[30]

Electoral reform is not, as Courtney accuses and Irvine denies, a conspiracy to transform the Liberals-CCF/NDP into a natural governing coalition. Governments such as St. Laurent's in 1957, which received more votes but fewer seats than Diefenbaker's Conservatives, still chose to turn over power. The Liberal party was not forced to, but they chose to because they perceived themselves to be defeated.[31] The proposed electoral system might function better had, using our historical example, the Liberals and CCF/NDP switched places and Social Credit vanished from the federal scene earlier. On the other hand, perhaps Social Credit would have survived as a rightist party whereupon, along with the leftist CCF/NDP, either could have played the role of kingmaker. One can even envisage an expanded role for the Governor-General under such circumstances.[32] However, a fixed election term may be an option worth considering, with early dissolution only when a coalition disintegrates and no party has the support to form a new government.[33]

Perhaps in 1957 St. Laurent could have prolonged Liberal rule by forming a government with the support of the CCF, either by adopting part of the CCF's platform or by co-opting CCF MPs as cabinet members. Diefenbaker's 1958 electoral victory — the largest in Canadian history — would have resulted in a less massive majority government which he might not have squandered. In 1962, due to the closeness of

the election in terms of popular vote, either one of the old parties might have succeeded in forming the government with third party allies. Diefenbaker might have prevented Pearson from defeating his government in a 1963 non-confidence motion by working with Social Credit. CCF/NDP leader Douglas or Social Credit leader Thompson may even have served as Deputy Prime Minister.

According to Cassidy, "[t]he three basic criteria by which electoral systems can be evaluated are fairness, effective representation and effective government."[34] A Canadian version of the German electoral system would certainly meet the first two criteria, and in all likelihood would satisfy the third.

A CANADIAN *BUNDESRAT*?

All federal legislatures have second chambers, but the Germans possess one of the strongest upper houses — the *Bundesrat* — and have gone farther than Canada in entrenching the federal principle in their national institutions.[35] Senate reform proposals based upon the *Bundesrat* were popular in government and academic discourse until the early 1980s when the concept of the Triple-E Senate arose.[36] But at least one political scientist has consistently advocated a German-style "House of the Provinces" or "Council of the Federation," writing that "[t]he best way to reform the Senate would be to give it to the provinces. Let their elected governments appoint and control the Senators."[37]

Because the German *land* (or state) governments are elected in the same manner as the federal government (except that there is no five percent/three constituency hurdle), the German electoral system could be applied to the provincial election results during the Diefenbaker years. However, determining the governing coalitions would be an exercise in futility, and for this simulation knowledge of the party in power in each province is essential.

A number of methods concerning the distribution of Senate seats among the provinces have been envisaged in Canada, from regional to equal to "rep by pop." Table Three illustrates three variants. The first is as it was during the Diefenbaker years. The second gives each province the same number of Senators. The third parallels the *Bundesrat* itself, where membership is graded roughly according to a *land's* population — three to six members for sixteen *lander* for a total of sixty-nine. Because of Section 51A, I have chosen a range of four to eight Senators for a total membership of sixty-one.[38]

The public perceives the appointed Senate as an undemocratic, a reward given to people for services rendered to the two old parties. The Red Chamber has failed to function as a chamber of regional representation, of "sober second thought," and as a countervail to executive power.[39] In the proposed Senate, and in a manner analogous to the pre-1913 US Senate, Senators would be representatives or ministers of the cabinets of the provincial governments. Senators from each province would vote in a bloc as instructed by their governments and a province's delegation could be recalled to deliver an accounting to their government and legislature. Senators would serve only as long as their party retained power and their premier chose to send them to Ottawa. Senate committees would exist, but Senators would not be able to serve in the federal cabinet. Premiers would even be entitled to sit in the Senate if they chose to lead their own delegations.[40]

Thus, to return to our historical example, Diefenbaker would not only have faced the Liberal Opposition across the aisle, but Premiers Bennett, Manning, Douglas, Duplessis, Smallwood, and — ominously — Stanfield *et al.* could have been down the hall. However, instead of a Liberal-dominated appointed Senate, in 1959 Diefenbaker would have dealt with 14 Social Credit, 6 CCF, 8 *Union Nationale*, 5 Liberal, and 28 Conservative Senators — a Senate which might have been more amenable to Tory rather than Grit philosophy. One has to acknowledge that such a Senate would ensure that the provinces would not be ignored by the federal government.

Such institutional reforms would make sense only if they were accompanied by constitutional reforms related to the powers of the Senate and the allocation of responsibility between the federal and provincial governments. For example, Supreme Court Justices, the Governor of the Bank of Canada, and other patronage appointees could be confirmed by both chambers through an on-the-record vote or a secret ballot.[41] The Speaker of the Senate could be elected or the post could rotate annually between the provinces as it does in Germany.[42]

Table 3. Distribution Of Senate Seats Among The Provinces Under Hypothetical Senate Models, 1957-1963.

	Existing	Equal	Proposed	Premier/Party In Power
British Columbia	6	10	7	W.A.C. Bennet, Social Credit
Alberta	6	10	7	Ernest Manning, Social Credit
Saskatchewan	6	10	6	T.C. Douglas, CCF W.S. Lloyd, NDP (1961)
Manitoba	6	10	6	Douglas Campbell, Liberal Progressive Coalition Duff Roblin, PC (1958)
Ontario	24	10	8	Leslie Frost, PC John Robarts, PC (1961)
Quebec	24	10	8	Maurice Duplessis, *Union Nationale* Paul Sauve, *Union Nationale* (1960) Antionne Barette, *Union Nationale* (1960) Jean Lesage, Liberal (1960)
Newfoundland	6	10	5	Joey Smallwood, Liberal
Nova Scotia	10	10	5	Robert Stanfield, PC
New Brunswick	10	10	5	Hugh John Fleming, PC Louis Robichaud, Liberal (1960)
Prince Edward Island	4	10	4	A.W. Matheson, Liberal Alex Campbell, PC (1959)
Total Number of Senate Seats	102	100	61	

SOURCE: Dyck Rand, *Provincial Politics In Canada* (Scarborough: Prentice-Hall Canada Inc., 1986), 74-560 *passim*.

The House of Commons would remain the locus of decision-making authority in areas of a national character, with the Senate possessing its traditional power of review and a temporary suspensive veto. Such a veto could be overridden either by the passage of time or a House of Commons majority (perhaps one greater than the Senate majority which rejected the bill). Amendment power and an absolute veto could be exercised on bills which touched on areas of direct provincial jurisdiction or the exercise of the federal emergency power. In Germany bills can be initiated by the *Bundesrat* and government bills are first submitted to it for a statement of *lander* position; in Canada it seems likely that the venue for the introduction of legislation would remain the House of Commons.[43]

Gibbins postulates that formal and informal consultation and negotiation, both inside and outside of House of Commons and Senate committees, would either reconcile any federal-provincial disagreements or reveal if a measure would be rejected or amended in the Senate, thereby preventing its introduction. After introduction, any deadlocks that intra-parliamentary diplomacy failed to resolve could be submitted to a joint mediation committee for arbitration — a procedure with which the Germans have enjoyed success. Then the compromise solution or, failing that, the original legislation could be resubmitted for approval by a majority in each chamber. If rejected again by a Senate possessing an absolute veto, the bill might die, or the House of Commons might be able override a Senate veto, again perhaps with a majority greater than that which prevented the initial passage of the legislation.[44] Constitutional amendments could require a simple or two-thirds majority in both chambers to pass. Or federalism could be made more asymmetrical by granting an absolute veto — a so-called double majority — to the Quebec Senate delegation on matters related to the french language and culture.[45]

All of the aforementioned is purely speculative. But such a symbiotic relationship could result in a change in the way governments do business in Canada. According to Lyon, this Senate would constitute a standing federal-provincial conference. Through the operation of this Senate the federal government would benefit from an understanding of provincial point of view and the provincial governments would gain a national outlook and input to federal law and policy-making.[46]

The existing constitutional separation of power might even cease to exist. In Germany, governance is concurrent and interlocking and federal law has priority over almost all provincial law. Ultimate legislative jurisdiction resides with the federal government, albeit in close collaboration with the provinces through the *Bundesrat* and the federal-state bureaucracies. The *lander* possess meagre residual legislative powers but have responsibility for the uniform implementation and administration of federal legislation which they have either participated in drafting and passing or failed to defeat. The benefit to Canada of such a reduction in the size of the federal bureaucracy would exceed the costs of the concomitant increase in federal transfer payments to the provinces to cover the increased administrative expenses.[47] However, despite the support of at least one former premier, it seems implausible that the federal and provincial governments would adopt this aspect of German federalism.[48]

However, Gibbins also argues that a provincially-controlled Senate could be a "cure worse than the disease."[49] Such a restructuring would increase provincial influence and ambition in the conduct of national affairs in direct proportion to the Senate's power to amend and veto legislation. If provincial governments put their own interests ahead of those of the nation, Gibbins fears that they could become keepers rather than watchdogs. Such critics conclude that the federal government would never yield such legislative and administrative concessions.[50] As the federal government stated in 1978:

> It is argued by some Canadians that the creation of a Canadian equivalent to the *Bundestag* would help bring about integration of federal and provincial political parties and make provincial government politically "responsible" for the positions they take with regard to federal positions and policies. While this could in fact happen to some degree, it is unlikely it would come close to reproducing the situation in Germany, first because of the differences ... between Canadian regions and linguistic groups, and second because there is little prospect of the provincial governments in Canada agreeing to the same kind of "division of labour" (legislation at the centre, and administration by the provinces) that is practised in Germany. If the provinces were to retain their present wide range of legislative authority,

> which is wider than any of the other well-known federations ... a solid basis for separate provincial parties would remain ... In a Canadian *Bundesrat* they would confront each other on the basis of widely divergent interests, wider than in Germany.[51]

Some provincial rights advocates even envisage such a Senate as a Trojan Horse which would result in centralization, not decentralization. The argument proceeds as follows: Provincial elections would have national repercussions should they alter the composition of the Senate. Because control of the Senate would make the implementation of the federal government's program simpler, the party in power in Ottawa would attempt to exercise tight control over their provincial wing and would intervene in provincial elections in order to bring to power sympathetic governments. Thereafter the voting behaviour of Senators would be motivated by party discipline rather than provincial considerations.[52]

CONCLUSION

In the final analysis, Canada is not Germany, and the problems in melding these reforms onto Canadian social conditions and political traditions may be insurmountable. As Lyon opines, it is never feasible to transplant institutions "holus bolus."[53] But whatever "might have been," it is a certitude that Canadian political culture and its concept of federalism would have been radically different had a Prime Minister like Diefenbaker been able to substitute the *Bundestag* and the *Bundesrat* for the British Westminster model in redesigning Canada's political structures. And, given Canada's still uncertain future, such tinkering might be worth looking into.❑

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Endnotes

1. Speech to the Annual Meeting of the Progressive Conservative Party, January 4, 1964. John G. Diefenbaker, *One Canada. Memoirs of the Right Honourable John G. Diefenbaker. The tumultuous years 1962 to 1967* (Toronto: The Macmillan Company of Canada Limited, 1977) at 220.
2. William P. Irvine, "Power Requires Representation. The case for reforming the electoral system to produce more regionally balanced party caucuses" Policy Options 1, No. 4 (December 1980/January 1981) at 22.
3. Irvine, *supra* note 2 at 24-25.
4. William S. Livingston, *Federalism And Constitutional Change* (London: Oxford University Press, 1956) at 7-9: "The essence of federalism lies not in constitutional or institutional structure but in society itself" (at 2).
5. Alex N. Dragnich and Jorgen Rasmussen, *Major European Governments*, 6th ed. (Homewood, Il.: The Dorsey Press, 1982) at 364 and "The New Federalists" *The Economist* (6 October 1990) 33-34.
6. John C. Courtney, "The Size of Canada's Parliament: An Assessment of the Implications of a Larger House of Commons" in Peter Aucoin, ed., *Institutional Reforms for Representative Government*, Royal Commission on the Economic Union and Development Prospects for Canada, Vol. 38 (Toronto: University of Toronto Press, 1985) citing Canada, *Parliamentary Debates on Confederation of British North American Provinces* (Ottawa: Queen's Printer and Controller of Stationery, 1951) at 39.
7. Dragnich, *supra* note 5 at 366.
8. *Ibid* at 366. For other expositions on the applicability of a mixed electoral system to Canada see William P. Irvine, *Does Canada Need A New Electoral System?* Queen's Studies on the Future of the Canadian Communities, No.1 (Kingston: Institute of Intergovernmental Relations, 1979); and Michael Cassidy, "Fairness and Stability: How a New Electoral System Would Affect Canada" *Parliamentary Government*, No. 42 (August 1992) at 3-27.
9. *Ibid.* at 366.
10. *Ibid.* at 375.
11. Andrew McLaren Carstairs, *A Short History of Electoral Systems in Western Europe* (London: George Allen & Unwin, 1980) at 19-20; Dragnich, *supra* note 5 at 366-368. This is the d'Hondt/Hagenbach Bischoff formula.
12. Dragnich, *supra* note 5 at 368-369. Independent MPs would be able to represent the constituencies which elected them.
13. Irvine, *supra* note 8 at 60. Cassidy believes that a five percent hurdle would be in violation of the Charter of Rights and Freedoms. See Cassidy, *supra* note at 8 14.
14. Carstairs, *supra* note 11 at 19-20; and see Dragnich, *supra* note 5 at 367.
15. It seems likely that Section 52 of the *British North America Act, 1867*, which states that provinces are to be represented in the House of Commons in direct

proportion to their populations, would have to be amended to reflect the fact that this would only hold true for half of the MPs. See Department of Justice, *A Consolidation of The Constitution Acts 1867 to 1982* (Ottawa: Supply and Services Canada, 1989) at 18.

16. Dragnich, *supra* note 5 at 368. These lists could be drawn up and ranked by provincial party nominating conventions, possibly without interference from leaders and "backroom boys." However, it seems plausible that leaders would retain the power to veto the listing of any individual who was perceived to be incompatible with the parties' principles and objectives. See Dragnich, *supra* note 5 at 370; Irvine, *supra* note 2 at 26.

17. Dragnich, *supra* note 5 at 368.

18. The extra seats won are as follows: in 1957, two Conservative seats in PEI and one Liberal seat in Newfoundland; in 1958 one Conservative seat in both PEI and Saskatchewan; in 1962 two Conservative seats in both PEI and Saskatchewan and one in Alberta; in 1963 two Conservative seats in Saskatchewan and one Liberal seat in Newfoundland; and in 1965 two Conservative seats in PEI, four Conservative seats in Saskatchewan, and one Liberal seat in Newfoundland.

19. In Saskatchewan, Alberta, and Newfoundland this is directly related to the parties involved sweeping or nearly sweeping all of the provincial seats in constituencies. PEI would benefit under this proposed model because it is constitutionally over-represented due to Section 51A which states that *"a province shall* always be entitled to a number of members in the House of Commons not less than the number of senators representing such province," and PEI has four Senators. It seems likely that this section would have to be repealed. See Department of Justice, *supra* note 15 at 18.

20. William P. Irvine, "A Review and Evaluation of Electoral System Reform Proposals" in Peter Aucoin, ed., *Institutional Reforms for Representative Government*, Royal Commission on the Economic Union and Development Prospects for Canada, Vol. 38 (Toronto: University of Toronto Press, 1985) at 85.

21. Dragnich, *supra* note 5 at 367-370; and Cassidy, *supra* note 8 at 16-17 and 21.

22. Murray Campbell, "How rep by pop wins converts" *The Globe and Mail* (27 October 1993) A17.

23. Irvine, *supra* note 2 at 20.

24. Alan C. Cairns, "The Electoral System and the Party System in Canada, 1921-1965" in Douglas Williams, ed., *Constitution, Government, and Society In Canada: Selected Essays By Alan C. Cairns* (Toronto: McLelland & Stewart Inc., 1989) at 121 and 115; also found in Canadian Journal of Political Science I, No. 1 (March 1968) at 55-80.

25. Irvine, *supra* note 2 at 20.

26. *Ibid.* at 26.

27. Courtney, *supra* note 6 at 5-32 *passim*.

28. J.A.A. Lovink, "On Analyzing the Impact of the Electoral System on the Party System in Canada" Canadian Journal Of Political Science III, No. 4 (December 1970) at 499. See also Alan C. Cairns, "A Reply to J.A.A. Lovink" Canadian Journal of Political Science III, No. 4 (December 1970) at 517-521.

29. John C. Courtney, "Reflections on Reforming The Canadian Electoral System" Canadian Public Administration 23, No. 3 (Fall 1980) at 439-449 *passim*. Critics point out that Quebec Conservative MPs elected in 1958 had little impact on Diefenbaker's insensitivity toward and ignorance of French-Canada.

30. Irvine, *supra* note 2 at 24; and Cassidy, *supra* note 8 at 20-21. Experts in comparative politics note that the existing electoral system tends to produce governments which practice short-term coping rather than long-term problem solving. A 1978 study also reveals that there were only eight democracies where an inflationary-deflationary economic cycle was not in evidence, all of which had PR-based electoral systems, Germany included. See Irvine, *supra* note 20 at 100, citing Edward Tufte, *Political Control of the Economy* (Princeton, N.J.: Princeton University Press, 1978) at 12.

31. Courtney, *supra* note 29 at 431-435; and Irvine, *supra* note 20 at 85.

32. Irvine, *supra* note 8 at 72-75. In Germany the two main parties are the leftist Social Democratic Party and the rightist Christian Democratic Party, while the third party is the centrist Free Democratic Party.

33. Dragnich, *supra* note 5 at 380. This has occurred only once in Germany.

34. Cassidy, *supra* note 8 at 4.

35. R.L. Watts, "Second Chambers in Federal Political Systems" in *Ontario Advisory Committee on Confederation — Background Papers and Reports* Vol. 2 (Toronto: Queen's Printer and Publisher, 1970) at 339. See also Richard Janda, *Rebalancing The Federation Through Senate Reform: Another Look At The Bundesrat* (North York: York University Centre for Public Law and Public Policy, 1992) at 7-32 *passim*.

36. Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism in Canada* Royal Commission on the Economic Development and Development Prospects of Canada, Vol. 39 (Toronto: University of Toronto Press, 1985) at 121. This formula was recommended by the Pépin-Robarts Commission, the Committee on the Constitution of the Canadian Bar Association, the Ontario Government's Advisory Commission on the Constitution, the Task Force on Canadian Unity, the

Governments of Alberta and British Columbia, and the Constitutional Committee of the Quebec Liberal Party. However, the Special Joint Committee on Senate Reform and the Macdonald Commission explicitly rejected the *Bundesrat* solution as inappropriate and irrelevant. See also Janda, *supra* note 35 at 2-3, fn. 6, 7, and 21-32 *passim*.

37. Peyton Lyon, "For A Useful Senate" *The Ottawa Citizen* (7 July 1991) B1. For an earlier argument see Peyton Lyon, "A New Idea for Senate Reform" *Canadian Commentator* 6, No.7 (July-August 1962) at 24-25.

38. "The New Federalists" *The Economist* (6 October 1990) 33-34. The Yukon and the NorthWest Territories did not have senate seats during the Diefenbaker years.

39. R. M. Burns, "Second Chambers: German Experience and Canadian Needs" in J. Peter Meekison, ed., *Canadian Federalism: Myth or Reality?* (Toronto: Methuen Publications, 1977) at 189-190; and also in *Canadian Public Administration* 18, No.4 (Winter 1975) at 541-568; and Watts, supra note 35 at 317.

40. Dragnich, *supra* note 5 at 381-391 *passim*. For another more detailed and thoughtful exposition on how a Canadian *Bundesrat* might look and act see Janda, *supra* note 35 at 33-84 *passim*.

41. Rainer-Olaf Schultze, *Models of Federalism and Canada's Political Crisis*, paper presented at the All European Canadian Studies Conference, "Canada on the Threshold of the 21st Century" The Hague, (October 24-27, 1990) D-8900 University of Augsburg, Augsburg, Federal Republic of Germany, 5. Another possible list of powers of a reformed Senate is contained in the defeated 1992 Charlottetown Accord. See *Consensus Report on the Constitution* (28 August 1992) at 4-7 and Draft Legal Text (9 October 1992) at 3-12.

42. Dragnich, *supra* note 5 at 385-386.

43. Burns, *supra* note 39 at 195-211 *passim*; and Watts, *supra* note 35 at 339-341. A common proposal is that if the Senate defeats a bill by (say), two-thirds, it should require a two-thirds majority in the House to override that vote. Otherwise a simple majority would suffice.

44. Roger Gibbins, *Senate Reform: Moving Towards the Slippery Slope* Institute Discussion Paper, No. 16 (Kingston: Institute of Intergovernmental Relations Queen's University, 1983) at 30-31; and Dragnich, *supra* note 5 at 389.

45. Schultze, *supra* note 41 at 5.

46. Watts, *supra* note 35 at 354.

47. Burns, *supra* note 39 at 194-199 *passim*.

48. Knowlton Nash, *Visions Of Canada: Searching For Our Future* (Toronto: McClelland and Stewart, 1991) at 35-36. During an interview with former Saskatchewan NDP Premier Allan Blakeney, Nash asked what level of decentralization there should be in Canada. Blakeney replied: "I would think that we could move to a model where more administration was done by provincial and municipal governments, for example, the German model, where most major issues are decided by the German federal parliament, but the programs are delivered by the provincial *lander* governments. I'd like to see a bit more of that. But in terms of significant transfer of legislative jurisdiction to the provinces, I don't see any particular need for it, and no particular benefit for Canadians from it."

49. Gibbins, *supra* note 44 at 4.

50. Burns, *supra* note 39 at 205-211 *passim*. This view is encapsulated by Gordon Robertson, a former federal mandarin, who characterized provincial advocacy of the *Bundesrat* model as "What's ours is our own, what's yours is ours." Janda, *supra* note 35 at 29, footnote 64, citing Gordon Robertson, "The Role of Interministerial Conferences in the Decision-Making Process" in Richard Simeon, ed., *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration in Canada, 1979) at 82.

51. Janda, *supra* note 35 at 19, citing *The Constitutional Amendment Bill* (Ottawa: Ministry of Supply and Services, 1978) at 6.

52. Louis Massicotte and Francoise Coulombe, *Senate Reform. Background Paper For Parliamentarians* BP96B (Ottawa: Political and Social Division, Research Branch, Library of Parliament, 1984) at 15-17; and Watts, *supra* note 35 at 340.

53. Lyon, *supra* note 37 at B1.