

# Israeli Constitutional Law in the Making

ed. by Gideon Sapir, Daphne Barak-Erez & Aharon Barak (Oxford: Hart, 2013) 578 pp.

*Reviewed by Adam M Dodek\**

Israel is a unique country in many ways. It is one of the few countries without a formal written constitution; however, the lack of formal document does not mean that Israel lacks a constitution. Israel's constitution was born neither in revolution like the American, nor through patriation like the Canadian, but rather through judicial declaration by the Israeli Supreme Court. *Israeli Constitutional Law in the Making* is an edited collection of essays that seeks to present "Israeli constitutional law as a living sphere, which reflects the dilemmas the country is faced with, as well as the challenges of constitutional theory in general."<sup>1</sup> The book accomplishes these objectives and should be of great interest to constitutional scholars around the world, precisely because of its rich examination of general issues of constitutional theory. The book thoroughly examines constitutional theory and systems in general using Israel as a case study.

When Israel was founded in May 1948, Israel's Declaration of Independence set the unrealistic goal of enacting a constitution no later than October 1<sup>st</sup> of that year.<sup>2</sup> However, the neighbouring Arab countries' declaration of war against Israel took precedence over fulfilling that pledge. The constitutional project was not abandoned; a Constituent Assembly was elected, which then converted itself into the first Israeli Parliament, the Knesset. It assumed a legislative function while continuing its work as a Constituent Assembly by striking a Constitutional Committee, which considered a draft constitution for the nascent Jewish state between 1949 and 1950.<sup>3</sup> By 1950,

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1 Gideon Sapir, Daphne Barak-Erez & Aharon Barak, "Introduction: Israeli Constitutional Law at the Crossroads" in Gideon Sapir, Daphne Barak-Erez & Aharon Barak, eds., *Israeli Constitutional Law in the Making*, (Oxford: Hart, 2013) 1 at 5.

2 *Declaration of the Establishment of the State of Israel*, 1 LSI 7 (1948).

3 After independence, a Constitutional Committee was struck to prepare a draft constitution to be submitted to the Constituent Assembly for debate and adoption. See Yehoshua Freudenheim,

the Knesset had abandoned the project and declared in the Harari Resolution that Israel's constitution would be constructed "chapter by chapter" through the enactment of "Basic Laws" that would eventually be compiled into a complete constitution.<sup>4</sup>

Between 1950 and 1988, Israel's Knesset passed nine such Basic Laws, dealing primarily with the structure of government: the legislature, the executive, the President, the state economy, the military, the judiciary, the state comptroller, and the establishment of Jerusalem as the state's capital.<sup>5</sup> These Basic Laws parallel many of the subjects covered by Canada's *Constitution Act, 1867*<sup>6</sup> (Israel is a unitary state without division of powers). Like pre-*Charter* Canada, Israel lacked a constitutional bill of rights until 1992 when the Knesset enacted two Basic Laws on human rights: *Basic Law: Human Dignity and Freedom* and *Basic Law: Freedom of Occupation*.<sup>7</sup> Aharon Barak, the Chief Justice of Israel's Supreme Court and one of the editors of *Israeli Constitutional Law in the Making*, declared extrajudicially that these laws had ushered in a "constitutional revolution" in Israel.<sup>8</sup> In 1995, the Supreme Court confirmed

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*Government in Israel* (Dobbs Ferry, NY: Oceana Publications, Inc. 1967) at 8. On the proceedings of the Constitutional Committee of the Provisional Council, see Frudenheim, *ibid.*, at 8-24; Emanuel Rackman, *Israel's Emerging Constitution, 1948-1951* (New York: Columbia University Press, 1955) 37-49. The Committee published its proceedings in a series of booklets which were intended to guide the Constituent Assembly. See Samuel Sager, *The Parliamentary System of Israel* (Syracuse: Syracuse University Press, 1985) at 34. These booklets have become extremely difficult to locate and most writing on this subject relies on secondary sources, especially on Rackman, *ibid.*

4 5 Divrei HaKnesset 1743 (1950) (Official Proceedings of the Knesset) (translation taken from Asher Maoz, "Constitutional Law" in Itzhak Zamir & Sylviane Colombo, eds, *The Law of Israel: General Surveys* (Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, 1995) at 7).

5 The laws were *Basic Law: The Knesset* 12 LSI 85 (1958), *Basic Law: Israel Lands* 14 LSI 48 (1960), *Basic Law: The President of the State* 18 LSI 111 (1964); *Basic Law: The Government* 22 LSI 257 (1968 - null); *Basic Law: The State Economy* 29 LSI 273 (1975), *Basic Law: The Army* 30 LSI 150 (1976), *Basic Law: Jerusalem, Capital of Israel* 34 LSI 209 (1980), *Basic Law: The Judiciary* SH no 1110, p 78 (1984), *Basic Law: The State Comptroller* SH no 1237, p 30 (1988). Official translations available at "The Existing Basic Laws: Full Texts" online: Knesset <[http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_yesod1.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm)>.

6 *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

7 For an English translation of the original laws see David Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26:2 *Isr LR* 238 at 247-49. For the official English translation that includes the 1994 amendments to these laws see Itzhak Zamir & Allen Zysblat, *Public Law in Israel* (Oxford: Oxford University Press, 1996) at 154-59.

8 See Aharon Barak, "The Supreme Court's Weighty Task," *Jerusalem Post* (24 May 1992) 6; Aharon Barak, "Balancing Rights: Principles and Perspectives" in M Kremnitzer & I Cotler, eds, *Chartering Human Rights: Canada-Israel Law Conference, 20-23 December, 1992*, vol 2 (Jerusalem: Hebrew University of Jerusalem, 1992) at 1.

this revolution in the *Mizrahi Bank* case,<sup>9</sup> holding that Israel has a constitution contained in the Basic Laws and that the Supreme Court of Israel has the power to strike down any law that is inconsistent with a provision of a Basic Law. Many legal scholars consider this ruling analogous to the American case *Marbury v Madison*.<sup>10</sup> As the editors of *Israeli Constitutional Law in the Making* explain in their introduction, the Israeli Supreme Court used the new Basic Laws “as a platform for developing Israel’s constitutional law, by interpreting them broadly to include those rights not specifically mentioned in the constitutional text.”<sup>11</sup> What the editors term “judicial innovation”<sup>12</sup> has more often been characterized as “judicial activism.”<sup>13</sup> The Supreme Court of Israel has been called “the world’s most activist court,”<sup>14</sup> attracting criticism from the late Robert Bork<sup>15</sup> and Richard Posner,<sup>16</sup> among others.

As the editors note, the post-1992 period of judicial engagement “was accompanied . . . by a rich scholarly discourse”<sup>17</sup> that in many ways parallels Canadian scholarship in the *Charter*’s first decade. As *Israeli Constitutional Law in the Making* demonstrates, the scholarly debate continues two decades after Israel’s constitutional revolution.

*Israeli Constitutional Law in the Making* is the second volume in Hart Publishing’s new series, Hart Studies in Comparative Public Law.<sup>18</sup> The

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9 CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* (1995), 49(4) PD 221 [*Mizrahi Bank*].

10 *Marbury v Madison*, 5 US 137 (1803).

11 *Supra* note 1 at 3.

12 *Ibid.*

13 See e.g. Evelyn Gordon, “Is it Legitimate to Criticize the Supreme Court” (1998) 3 *Azure* 50; Hillel Neuer, “Aharon Barak’s Revolution” (1998) 3 *Azure* 13; Ruth Gavison, Mordechai Kremnitzer & Yoav Dotan, *Judicial Activism, For and Against: The Role of the High Court of Justice in Israeli Society* (Jerusalem: Magnes Press, 2000). As explained by the late Daniel Elazar, the Supreme Court of Israel has pressed constitutional interpretation “to the farthest possible limits with the consent, active or tacit, of the Israeli public and acquiescence of the state’s other governmental institutions” (Daniel J Elazar, “Constitution–Making: The Pre-eminently Political Act” in Daniel J Elazar, ed, *Constitutionalism: The Israeli and American Experiences* (Lanham, Md: University Press of America, 1990) 3 at 23). Elazar further explained that “[t]his is in keeping with Jewish political culture that has always placed a high value on courts and judges as arbiters of the law” (*ibid.*).

14 See e.g. Jonathan Rosenblum, “Am Echad: Preserving One Jewish Nation” *Israel Resource Review* (23 February 1999) online: Behind the News in Israel <<http://www.israelbehindthenews.com/bin/content.cgi?ID=897&q=1>>.

15 See Robert H Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Jackson, TN: AEI Press, 2003) 111–34.

16 See Richard A Posner, “Enlightened Despot” *New Republic* (23 April 2007), online: New Republic <<http://www.newrepublic.com/article/enlightened-despot>>.

17 *Supra* note 1 at 3.

18 Other titles include Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford: Hart Publishing, 2013); Tania

collection is part of the growing English-language discourse on the workings of the Israeli legal system.<sup>19</sup> The book consists of nine parts, each containing multiple chapters by Israeli scholars along with commentary by a foreign, usually American, scholar. The nine parts are: (1) Towards a Full-Fledged Constitution; (2) Models of Judicial Review in Israeli Constitutional Law; (3) Global Impacts on Israeli Constitutional Law; (4) Balancing in Israeli Constitutional Law; (5) ‘Unenumerated Rights’ in Israeli Constitutional Law; (6) Social Rights in Israel; (7) Constitutional Rights and Private Law; (8) Constitutional Rights and ‘State of Emergency’; and (9) Israel — ‘Jewish and Democratic.’

Each part of the book contains insights for constitutional scholars from other countries, including Canada. Israel is a useful case study for many major issues in constitutional law, including: constitution making, the legitimacy of judicial review, the role of the Supreme Court, dialogue theory, the role of the constitution in a fragmented society, appointments, and judicial independence. Israel is a country of many cleavages — ethnic, national, religious, political — and thus struggles with balancing the rights and interests of different communities. Michael Ignatieff argued in *The Rights Revolution* that Canada’s experience in “reconciling individual and group rights within a multinational,

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Groppi & Marie-Claire Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013); David Haljan, *Constitutionalising Secession* (Oxford: Hart Publishing, 2014); Murray Hunt, Hayley Jane Hooper & Paul W Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing) [forthcoming in 2014]; Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Oxford: Hart Publishing) [forthcoming in 2014]; Anneken Kari Sperr & Diana Zacharias, *The Protection of Legitimate Expectations in Administrative Law: A Comparative Study* (Oxford: Hart Publishing) [forthcoming in 2015]; Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing) [forthcoming 2015]; Dennis Davis, Alan Richter & Cheryl Saunders, eds, *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Oxford: Hart Publishing) [forthcoming 2015].

19 See e.g. Assaf Meydani, *The Anatomy of Human Rights in Israel: Constitutional Rhetoric and State Practice* (New York: Cambridge University Press, 2014); Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge: Cambridge University Press, 2014); Suzie Navot, *The Constitution of Israel: A Contextual Analysis* (Oxford: Hart Publishing, 2014); Assaf Meydani, *The Israeli Supreme Court and the Human Rights Revolution: Courts as Agenda Setters* (Cambridge: Cambridge University Press, 2011); Menachem Mautner, *Law and the Culture in Israel* (Oxford: Oxford University Press, 2011); Suzie Navot, *Constitutional Law of Israel* (Netherlands: Kluwer Law International, 2007). Older contributions include David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002); Zamir & Zylsblat, *supra* note 7; Zamir & Colombo, *supra* note 4; Martin Edelman, *Courts, Politics, and Culture in Israel* (Charlottesville: University Press of Virginia, 1994). I do not include the voluminous literature on international law as applied to and in Israel.

multilingual state” is relevant to that of other countries.<sup>20</sup> In the same way, Canadians have much to learn from the Israeli experience and from the experience of other countries. This review highlights aspects of the book that are of particular interest to Canadian readers.

In Part 1, Gideon Sapir addresses the need for a constitution<sup>21</sup> and Ariel Bendor considers the purpose of the Israeli constitution.<sup>22</sup> Part 2 addresses four different models of judicial review in Israeli constitutional law.<sup>23</sup> In “Majestic Constitutionalism? The Notwithstanding Mechanism in Israel,” Canadian contributor Tsvi Kahana of Queen’s University explains the contribution of Canada’s notwithstanding clause to Israeli constitutionalism.<sup>24</sup> The *Charter* and Supreme Court of Canada jurisprudence played a significant role in the drafting of Israel’s 1992 Basic Laws and in the Supreme Court of Israel’s 1995 *Mizrahi Bank* decision. Israeli lawmakers, jurists, and lawyers found the Canadian constitutional experience relevant for their own society.<sup>25</sup>

Part 3 addresses “Global Impacts on Israeli Constitutional Law.” In “The Use of Foreign Law in Israeli Constitutional Adjudication,” Iddo Porat explains that, unlike in the US where there has been a “fierce debate” over the use of foreign law in Supreme Court decisions, in Israel the use of foreign law is longstanding and generally accepted practice.<sup>26</sup> Porat suggests that this can be explained in part by the following factors: “(1) non-textualism and the fact that Israel has no written constitution; (2) the effects of the Israeli ‘Constitutional Revolution’ on the use of foreign law; (3) the recent adoption of a European-based mode of constitutional adjudication, and (4) the anti-formalism of Israeli constitutional law.”<sup>27</sup> Porat explains that the Supreme Court of Israel read almost an entire Bill of Rights into the *Basic Law: Human Dignity and Liberty* by reference to the constitutional jurisprudence of other countries. On the anti-formalism in Israeli constitutional law, Porat states that “[s]ince the late 1970s or early 1980s the Court has been on a continuous move towards an open-ended mode of interpretation, higher

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20 Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi Press, 2000) ix.

21 Gideon Sapir, “Why a Constitution — in General and in Particular in the Israeli Context?” in Sapir, Barak-Erez & Barak, *supra* note 1, 9.

22 Ariel L Bendor, “The Purpose of the Israeli Constitution” in Sapir, Barak-Erez & Barak, *ibid.*, 41.

23 Sapir, Barak-Erez & Barak, *ibid.*, at 73-147.

24 Tsvi, Kahana, “Majestic Constitutionalism? The Notwithstanding Mechanism in Israel”, in Sapir, Barak-Erez & Barak, *ibid.*, 73.

25 See Adam M Dodek, “Canada as Constitutional Exporter: The Rise of the ‘Canadian Model’ of Constitutionalism” (2007) 36 Sup Ct L Rev (2d) 309.

26 Iddo Porat, “The Use of Foreign Law in Israeli Constitutional Adjudication” in Sapir, Barak-Erez & Barak, *supra* note 1, 151 at 151.

27 *Ibid* at 151-52.

involvement in public life, and greater supervision over administration and legislative action.”<sup>28</sup> According to Porat, anti-formalism represents “an expansion of the notion of legality and of interpretation, and therefore allows and even encourages the use of non-formal legal sources,” such as foreign law.<sup>29</sup> Anti-formalism has also resulted in an Israeli judicial style similar to an academic style that includes citation to various sources, including foreign ones. Porat compares the use of foreign law by the Supreme Court of Canada to the Supreme Court of Israel and notes a steep decline in its use in Canada after the *Charter*’s first decade.<sup>30</sup>

In “The Israeli Case of a Transformative Constitutionalism,”<sup>31</sup> Moshe Cohen-Eliya claims that “[t]he Supreme Court has always been the flag-bearer of liberal, democratic, and humanistic values”<sup>32</sup> — a statement that does not hold for the supreme courts of the United States or Canada, both of whom have gone through long anti-progressive periods. We need only think of the *Lochner* era in the United States and much of the history of the Supreme Court of Canada prior to the enactment of the *Charter* in 1982.<sup>33</sup>

In recent history, this progressive tendency has been due to the leadership of one figure, Aharon Barak. According to Cohen-Eliya, “[t]he idea of turning Israel into a more enlightened, liberal and humanistic society has been a recurring theme in the judgments, scholarship, and lectures of Aharon Barak, the highly influential former Court President of the Israeli Supreme Court. This ideal is the legacy of the Barak Court.”<sup>34</sup>

Indeed, it is impossible to understand Israeli constitutionalism without appreciating the monumental contributions of Justice Barak. In American terms, Barak might be considered a combination of James Madison, John Marshall, and Lawrence Tribe: a constitution maker, judicial leader and scholar. Canadians may imagine a figure combining Pierre Trudeau, Brian Dickson, and Peter Hogg. Barak was Israel’s foremost constitutional scholar prior to and during his tenure on his country’s highest court. He is the only

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28 *Ibid* at 162.

29 *Ibid*.

30 *Ibid* at 155-56.

31 Moshe Cohen-Eliya, “The Israeli Case of a Transformative Constitutionalism” in Sapir, Barak-Erez & Barak, *supra* note 1, 173.

32 *Ibid* at 178.

33 See e.g. Bora Laskin “The Supreme Court of Canada: A Final Court of and for Canadians” (1951) 29:10 Canadian Bar Review 1038; Ian Bushnell, *The Captive Court : A Study of the Supreme Court of Canada* (Montreal: McGill-Queen’s University Press, 1992)

34 Cohen-Eliya, *supra* note 32 at 173.

foreigner invited to write the foreword to the *Harvard Law Review*<sup>35</sup> and he has remained as prolific in his retirement as he was during his active career.<sup>36</sup> Even Richard Posner, one of Barak's strongest detractors, stated that "If there were a Nobel Prize for law, Barak would probably be an early recipient."<sup>37</sup> In 1998, Hillel Neuer mused that Barak "may well be the single most influential person in Israel public life today."<sup>38</sup> Despite these positive views, Barak is considered such a polarizing figure that Elena Kagan drew criticism for praising him after her nomination to the US Supreme Court.<sup>39</sup>

Indeed, even some contributors to this book critique Barak's work. Gideon Sapir describes Barak's role in recommending the inclusion of the notwithstanding clause in the re-enacted *Basic Law: Freedom of Occupation*<sup>40</sup>; he criticizes Barak's promotion of Hogg & Bushnell's dialogue theory<sup>41</sup> through convincing the Legislature to adopt a notwithstanding clause.<sup>42</sup> This is just one of many points of intersection between Canadian and Israeli constitutional law the book raises.

Another object of analysis is one of Barak's several retirement projects, which makes a comprehensive study of proportionality.<sup>43</sup> In the landmark *Mizrahi Bank* case, Barak drew heavily on the *Oakes* test.<sup>44</sup> Canadian jurists have been introduced to balancing and proportionality in the *Oakes* test and continue to struggle with its scope and application. In contrast, Israelis have long been familiar with these doctrines in administrative law.<sup>45</sup> Margit Cohn

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35 Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116:1 Harv L Rev 16.

36 See e.g. Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) [Barak, *Proportionality*].

37 See Richard A Posner, "Enlightened Despot" *The New Republic* (23 April 2007), online: New Republic <<http://www.newrepublic.com/article/enlightened-despot>>.

38 Hillel Neuer, "Aharon Barak's Revolution", *supra* note 13.

39 See Sheryl Gay Stolberg, "Praise for an Israeli Judge Drives Criticism of Kagan" *The New York Times* (24 June 2010), online: The New York Times <<http://www.nytimes.com/2010/06/25/us/politics/25kagan.html>>.

40 Gideon Sapir, *supra* note 21 at 21.

41 See Peter W Hogg & Allison A Bushnell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75.

42 Sapir, *supra* note 21 at 22.

43 See Barak, *Proportionality*, *supra* note 38.

44 *Mizrahi Bank*, *supra* note 9 at 128, 233, 239, 244.

45 See e.g. Itzhak Zamir, "Unreasonableness, Balance of Interests and Proportionality" in Zamir & Zysblat, *supra* note 7, 327.

examines “Proportionality in Israel and Beyond: Four Aspects,”<sup>46</sup> while Part 4 is entirely devoted to “Balancing in Israeli Constitutional Law,” with a commentary from Sujit Choudhry.<sup>47</sup>

Other parts of *Israeli Constitutional Law in the Making* should be of interest to Canadian (and other non-Israeli) scholars, including sections that address social rights in Israel; constitutional rights and private law; constitutional rights and “state of emergency”; and Israel as a “Jewish and Democratic” state.

Readers may assume the last section is particular to the challenges of the world’s only Jewish country. However, Israel’s struggles between its “Jewish” and “democratic” commitments mirror the increasing tensions that many countries, including our own, face as democratic and multicultural societies. We need only think of recent debates around the Quebec Charter of Values and the accreditation of Trinity Western University’s Law School by the Federation of Law Societies of Canada to realize that Canada also struggles to reconcile its varied commitments to religious freedom, equality, and diversity.

In 2007, I wrote of the rise of a “Canadian model” of constitutionalism that had found favour in countries such as Israel, South Africa, and New Zealand.<sup>48</sup> In a 2012 televised interview, Justice Ruth Bader Ginsburg stated that if she were drafting a constitution today, she would not look to the US Constitution as a model. Instead, Ginsburg recommended looking to the Canadian *Charter of Rights of Freedoms*, the South African Constitution, or the European *Convention on Human Rights*.<sup>49</sup>

Canada risks falling from favour like the US — appreciated for its historical contribution to constitutional development but largely treated as irrelevant because of its insularity. In 2001, speaking on the subject of equality — what she termed the “most difficult right”<sup>50</sup> — Chief Justice McLachlin issued an appeal for comparative analysis more generally and on equality in

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46 Margit Cohn, “Proportionality in Israel and Beyond: Four Aspects” in Sapir, Barak-Erez & Barak, *supra* note 1, 189.

47 Sapir, Barak-Erez & Barak, *supra* note 1 at 225-66; Sujit Choudhry, “Proportionality: Comparative Perspectives on Israeli Debates” in Sapir, Barak-Erez & Barak, *supra* note 1, 255.

48 See Dodek, *supra* note 25.

49 Interview of Ruth Bader Ginsburg (1 February 2012) on Al Hayat TV cited in Adam Liptak, “‘We the People’ Loses Appeal With People Around the World” *The New York Times* (6 February 2012), online: <[http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?\\_r=0](http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?_r=0)>.

50 The Right Honourable Beverley McLachlin, PC, “Equality: The Most Difficult Right” (2001) 14 *Sup Ct L Rev* (2d) 17.



particular.<sup>51</sup> However, instead of heeding the Chief Justice's call, Canada has moved in the opposite direction. Over the past decade, Canadian jurists have been retreating from this global dialogue. During the same period, the Law Commission of Canada was abolished and governmental research and policy budgets slashed. Similarly, funding has been reduced to organizations that sponsored Canadian experts going abroad to learn about the experiences of other countries.

*Israeli Constitutional Law in the Making* is a reminder of how much there is to learn from the constitutional experience, jurisprudence, and scholarship of other countries like Israel, South Africa, Germany, Australia, New Zealand, and, of course, the United Kingdom, with whom we share a constitution "similar in principle."<sup>52</sup>

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51 *Ibid* ("we may find it useful to look abroad" at 27).

52 *Constitution Act, 1867*, *supra* note 6, preamble. My colleague at the University of Ottawa Vanessa MacDonnell, among others, is doing good work in this respect. See Vanessa A MacDonnell, "The Constitution as Framework for Governance" (2013) 63:4 UTLJ 624; Julia Hughes & Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32:1 NJCL 23; Vanessa MacDonnell & Julia Hughes, "The German Abortion Decisions and the Protective Function in German and Canadian Constitutional Law" (2013) 50:4 Osgoode Hall LJ 999. Similarly, my colleague Peter Oliver has also written on the subject. See Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005).

