

The Use of Foreign Law in Israeli Constitutional Adjudication

Iddo Porat¹

Recent years have seen a fierce debate in the United States over the use of foreign law in American constitutional law decisions.² In Israel, however, the use of foreign law in constitutional decisions is a longstanding practice which seems to raise much less concern among judges and academics.³ Nevertheless, such practice has its flaws and deserves consideration.

This article will attempt to explain the reasons for the prevalence of the use of foreign law in Israeli constitutional decisions, canvas the different parameters that shape it, and assess several objections that have been raised against it. The conclusion would be that Israeli constitutional culture is traditionally receptive to the use of foreign law, and there are good reasons for it to keep using it. However, regarded as part of a global trend in which constitutional courts compete over leadership and innovation in rights protection, and taking into account Israel's shaky ground for its "Constitutional Revolution", the use of foreign law may raise some valid concerns.

The article will begin in Part I by presenting evidence for the extensive use of foreign law in Israeli law. It will then put forward seven explanations for this practice in Part II. The first four pertain to the nature and history of Israel's constitutional law. They are: 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. The other three explanations pertain to general characteristics of Israeli law, which also affect the use of foreign law in constitutional law. They are: 1. the fact that Israel is a young legal system; 2.

¹ Senior Lecturer, Academic Center of Law and Business. The paper was prepared for an international conference on Israeli Constitutional Law (Tel Aviv, May 2010). I would like to thank Moshe Cohen-Eliya, Binyamin Blum and Michael Ramsey for their helpful comments and suggestions.

² See e.g. Mark Tushnet, *When is Knowing Less Better than Knowing More? Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law* 90 MINN. L. REV. 1275 (2006); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40; Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Roger P. Alford, *Four Mistakes in the Debate on "Outsourcing Authority"*, 69 ALB. L. REV. 653, 658–60 (2006); Osmar Benvenuto, *Re-evaluating the Debate Surrounding the Supreme Court Use of Foreign Precedent* 74 FORDHAM L. REV. 2695 (2006); Daniel Farber, *The Supreme Court, the Law of Nations and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335 (2007); Roger P. Alford, *Four Mistakes in the Debate on "Outsourcing Authority"*, 69 ALBANY L. REV. 653 (2006).

³ For a recent exception, see Binyamin Blum, *Doctrines Without Borders: The "New" Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STAN. L. REV. 2131 (2008) (criticizing the use of foreign law by the Israeli Supreme Court in the context of evidence law and defendant's rights). Other examples include Chaim Haim Sandberg, "Cultural Colonialism – the Americanization of Legal Education in Israel", 27 Hamishpat 52 (2009) (criticizing the extensive reliance on American law in Israeli legal education.)

Israel's geopolitical isolation and fascination with the West, and 3. the strong professional and academic ties that Israeli lawyers have with other legal systems.

As regards the appropriateness of the use of foreign law in Israeli decision making, Part III of the article will document several general objections to the use of foreign law in constitutional law, and assess their applicability to the Israeli system. It will start with a substantive objection based on local sovereignty and on original intent, and will move on to discuss methodological objections according to which citing foreign law is undisciplined, and amounts to cherry picking, and comparison is often inaccurate and distorted due to the multiplicity of factors that need to be integrated into the comparison. While these objections are not without merit, they do not present strong enough reasons to object to the use of foreign law. The final objection may raise more concerns, and it is based on the pitfalls of Global Constitutionalism.

PART I – DOCUMENTING THE PREVALENCE OF THE USES OF FOREIGN LAW IN ISRAEL

Two preliminary remarks are in order. First, throughout this article, and unless otherwise noted, I will use the term “foreign constitutional law” to indicate both internal constitutional law of other countries and international law. Although, as Vicky Jackson has shown, there are important differences between foreign constitutional law and international law,⁴ both represent foreign legal materials pertaining to human rights and constitutional rights, and may reasonably be coupled together for the purpose of this study. Moreover, the border lines between constitutional law and international law have become blurred over time – a process termed as the “internationalization of constitutional law”, and the “constitutionalization of international law”, and this is another reason for coupling the two together. I should note however, that I do not include in my review international law that is binding to the state, but only the use of international law as suggestive, as in the case of foreign law. My second remark is that whenever I speak of the use of foreign law in Israel this always applies to the jurisprudence of the Israeli Supreme Court, because Israeli constitutional jurisprudence takes place almost exclusively within the bounds of Israeli Supreme Court adjudication.⁵ A final semantic remark. The word “foreign” in the term foreign law, carries with it obvious derogatory content, and is unfortunate in that sense. It seems to determine not only the origin of the law, which is not local, but the content of it, which is different or antithetical to the local law, something which is obviously not always true. In thinking of an alternative word I came up with some suggestion such as “colleague law” or “guest law” indicating a more respectable treatment of the laws of other countries, but I will leave that to

⁴ See, Vicky Jackson, *Constitutional Law and Transnational Comparisons: The Youngstown Decision and American Exceptionalism*, 30 Harv. J.L. & Pub. Pol’y 191, 5-7 (2006) (documenting five differences between citing foreign law and citing international law).

⁵ The Israeli Supreme Court sitting as High Court of Justice used to handle all petitions against the state as a first and last instance. As of [] some petitions are brought to the District Courts, sitting as Administrative Courts and may be appealed to the Supreme Court.

Taking these two remarks into consideration, the first thing to note is that the use of foreign law in Israeli constitutional law is extensive. Several indications attest to it, beginning with a study conducted in the mid 1990s which documented citation practices in the jurisprudence of the Israeli Supreme Court.⁶ This study applies to all cases and not only to constitutional ones, but it is the only study that is comprehensive for that period, and it is reasonable to assume that some of the general trends apply to constitutional cases as well.

The first finding of the study is that an average of 21% of the total number of citations in all⁷ Supreme Court decisions (including citations of cases, statutes, and academic or literary sources) published between the formation of Israel in 1948 and 1994 were foreign citations (I shall refer to this as the "citation ratio").⁸ Generally speaking, in the earlier years of Israeli law there were more foreign citations, as there were fewer local sources to draw on, and as there still existed formal and cultural ties with English law as a result of the British Mandate over Palestine before the creation of Israel.⁹ The bulk of foreign citations from the early years of Israeli law were therefore from English law.¹⁰ As the ties with British law weakened, and the formal tie abolished, and as there took place a natural process of building up a local reservoir of precedents, the citation ratio leveled down to around 10% towards the last decade of the study.¹¹ The study has further found that this percentage applied equally to citations from academic or literary sources and citations from law cases: 10% of all law review and book citations come from foreign sources, and 10% of all case citations come from foreign law sources. Although considerably smaller than in the early years this is still a substantial citation ratio taking into consideration comparative data to be discussed below.¹²

⁶ See Miron Gross, Ron Haris and Yoram Schachar, *References Patterns of the Supreme Court in Israel-Quantitative Analysis*, 26 HEBREW UNIVERSITY LAW REVIEW 115 (1996)

⁷ The study built a data based comprising of 7410 court decision which are 40% and a representative sample of the total 18,000 cases that were published in the official P.D. publication of Supreme Court decisions during these years. See *id.* at

⁸ See *id.* at 151 (last row, column 3, of the table there)

⁹ Formal ties to English law existed in Article 46 of the Palestine Order in Council, which remained in effect until 1980, and determined that in cases in which analogy, statute or case law provide no clear rule of decision, the courts shall decide based upon "the substance of the common law, and the doctrines of equity in force in England". The provision was later replaced by Foundations of Law Act, 5740-1980, 34 LSI 181 (1979-80) (Isr.), which in Section 2 replaced the common law with "the principles of freedom, justice, equity and peace of Israel's heritage".

¹⁰ At the highest point, in 1952, English law comprised of 37% of all citations – foreign and local. *Id.* (row 5 in the table there)

¹¹ See *id.* (average of the years 1984-1994, in the table there)

¹² See *id.* at 141.

The figure of 10% may be somewhat misleading, however, for two reasons. First, it does not reflect the increase in terms of the number of foreign law citations *per case* (the "per case number"). One should note that in the later years of the study the average per case number of total citations (both local and foreign) rose dramatically, in accordance with the rise in the average length of Supreme Court cases. In 1954, for example, the per case number of all citations (both foreign and local) was 5, whereas in 1993 it rose to 15.7.¹³ This means that in 1993, the per case number of foreign citations was 1.8, which means that, on average, every Supreme Court decision had 1.8 foreign citations in it.¹⁴

In addition, both the 10% citation ratio and the 1.8 average per case number are misleading since they refer to all published Supreme Court cases some of which carry little precedential weight.¹⁵ If we turn our gaze to the leading and precedential cases, the results in terms of the use of foreign law are much more dramatic. A study that looked for citations practices in the 100 most cited cases in Israeli law between 1948 and 2000 (the 100 list) found that the per case number on that list was 7.8, that is 8.7 times more than in the regular cases.¹⁶ That study does not calculate the citation ratio in these cases, but it does indicate that it is higher than in the regular cases.¹⁷

A third type of indicator for the use of foreign law is the percentage of cases citing any foreign law out of the total number of cases in a given year (the "cases ratio"). Since there was no data available on the cases ratio at the time, I conducted two rudimentary studies, both of which seem to indicate a very high cases ratio. I conducted the first on the 100 list, and it showed that the cases ratio was 75%: 75 out of the 100 most cited cases cited foreign law. Among the 50 cases of the 100 list that were constitutional cases, the ratio was 100%.¹⁸ In another rudimentary study that I conducted I looked for citations of foreign law in the cases appearing in my syllabus for the first year course of constitutional law, as a very rough estimate of leading constitutional cases.

¹³ See *id.* at 140.

¹⁴ The year 1994 saw a very substantial incline in the number of citation per court decision, and had an average of 25 citations per court decision, which would mean an average of 3 foreign law citations per case, but this data can be attributed to the Mizrahi case published during that year, which was especially long, and may have caused an abnormality regarding that year.

¹⁵ The published cases are comprised of the more important ones, however, even among those many are of limited precedential weight, as that number amounts to several hundred cases a year.

¹⁶ Chanan Goldschmit, Miron Gross, and Yoram Shachar, *100 Leading Precedents of the Supreme Court – A Quantitative Analysis* 7 HAIFA UNIVERSITY LAW REVIEW 243, 267 (2004)..

¹⁷ The indication for that comes from the fact that citations of Israeli cases in the 100 most cited cases increases only 6.6 times compared to regular cases, while citations of foreign law increases 8.7 times compared to regular cases.

¹⁸ Study results available with author.

The results here were also very distinct. The cases ratio was 61%: out of the 77 cases on my syllabus, 47 cited foreign law.¹⁹

Recently, however, I was handed a draft of a study which for the first time checked cases ratios in all Israeli Supreme Court constitutional decisions. In a study conducted by Professor Suzie Navot she found that between the years 1985 and 1994 the foreign law cases ratio in all Israeli Supreme Court constitutional decisions was 31%.²⁰ The same study also separated between "institutional" constitutional decisions and "human rights" constitutional decisions and found out that 70% of the cases citing foreign law were human rights cases and only 30% were institutional cases. Combining this fact with the fact that only 40% of the constitutional cases were human rights cases, we arrive at the conclusion that within the human rights cases, the cases ratio is a high 53% (while in the institutional cases the ratio is only 16%).²¹

A fourth type of indicator attests to the breakdown of foreign law sources according to different countries. The 1994 study, which checked all types of cases, and not only constitutional ones, found that in the last 12 years of the study (1982 – 1994) the two main sources of foreign law citations were English and commonwealth cases and American cases comprising each of about 50% of all foreign law citations in all Supreme Court cases. Continental and international sources were very few.²² In the Navot study which surveyed only constitutional law between the years 1985 and 1994 the results were very different. Her study found that 73% of all foreign law citations in constitutional cases (both institutional and human rights) were from American cases, 18% from Canadian, 8% from English and 7% from German cases,²³

¹⁹ Study results available with author. I thank Avichai Shalom, for excellent research assistance in producing this study and the study in the previous footnote.

²⁰ Suzie Navot, *The use of foreign precedents by constitutional judges Israeli report (draft)*, p 3. (on file with author).

²¹ *Id* at 4. מתוך כלל הקייסים החוקתיים 31 אחוז מצטטים משפט זר. כמה אחוזים מכלל הקייסים הם של זכויות אדם – 40 אחוז מתוך כלל הקייסים הם של זכויות אדם (הרוב הוא של מוסדי) לעומת זאת 70 מתוך החוקתיים המצטטים זרים הם של זכויות אדם. אם יש 100 קייסים – 31 מהם מצטטים זר. ניקח את ה 31 האלו – 70% (68.6) הם זכויות אדם – כלומר 21.2 ואילו 30% (31.4) הם מוסדיים – 9.7. עכשיו מתוך ה 100 – 40% הם זכויות אדם – כלומר 40. זה אומר שמתוך 40 קייסים של זכויות אדם, 21.2 מצטטים זר – כלומר – 53%. ומתוך 60 קייסים של מוסדי, 9.7 מצטטים זר – כלומר 16%.

²² But see Eli Salzberger & Fania Oz-Salzberger, *The German Heritage of the Israeli Supreme Court*, 21 TEL AVIV U. L. REV. 259 (1998) (arguing that the influence of continental law, and especially of German law, on Israeli law is profound but hidden, due to anti-German sentiments after the Holocaust)

²³ Navot supra note 20 at 8.

Data regarding the use of foreign law in more recent years is not available yet, but an example from a recent leading case could give us some indication. *Adalah v. Minister of the Interior*²⁴ involved the controversial issue of whether residents of the Palestinian Authority who marry Israeli citizens may move to Israel and become residents and eventually citizens of Israel. Indeed, such a case lends itself to comparative perspectives regarding immigration and residency policies, however the extent of foreign law citations in that case is very impressive. The citation ratio of foreign law in this case is 24%: out of a total of 243 cases cited in the Court's decision 60 are foreign law cases. The breakdown between different countries is also interesting and seem to correspond to the Navot study finding regarding the lower share of English citations. The wide range of countries cited is also remarkable: 30 cases from the USA, 9 from Canada, 8 from the European Court of Human Rights, 6 from England, 3 from Germany, 3 from South Africa, 1 from Ireland and 1 from Australia.

How extensive is the use of foreign law in Israel in comparison to other countries? Comparative perspectives are tricky, but it seems that Israel can be situated among the countries that tend to cite foreign law extensively. The U.S. Supreme Court is obviously on the lower side of the scale in terms of foreign law citations, It cites much less than the Israeli Supreme Court, or any other court in the Western world for that matter. According to the study of Steven G. Calabresi and Stephanie Dotson Zimdahl²⁵, over a period of 55 years (between 1940 and 2005) only 17 cases of the American Supreme Court relied on foreign law, which is obviously far below 10% of the total number of citations used during those years. In Australia, a study that checked for foreign citations in State Supreme Courts, found that, setting English citations aside (Australia being subject to the English Privy Council, and hence tied formally to English law), 3.65% of the total number of citations in 1995 came from foreign sources, and in 2005 – 2.14%.²⁶ By comparison, the use of foreign sources in Israeli constitutional law is indeed extensive.

Frequent use of foreign law can be found also in several other countries. Thus, in the first decade of the Canadian Supreme Court, (after the Canadian Charter in 1984) the citation ratio of foreign and international citations amounted to nearly 10% of the total number of citations – the same as the citation ratio in all (not only constitutional) Israeli Supreme Court cases in roughly the same years.²⁷ The cases ratio (ratio of cases citing any foreign law) reached a high of 32% in 1995,

²⁴ H CJ 7052/03

²⁵ Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV 743, 752-53 (2005)

²⁶ Russell Smith, *Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis*, 29 (unpolished paper available at: http://works.bepress.com/russell_smyth/1) (2008).

²⁷ Daniel M. London *Cites Unseen: The Canadian Supreme Court and Comparative Constitutionalism* (Presented at the Annual Conference of the American Political Science Association Philadelphia, Pennsylvania August 31, 2006)

which is roughly the same as the average in Israeli constitutional jurisprudence between 1984 and 1995. The per case ratio reached a high of 1.61 in the Canadian Supreme Court in 1990 (compared to 1.8 in all Israeli Supreme Court cases between 1982-1994). However, studies surveying later years of Canadian jurisprudence show a dramatic decline in the use of foreign law suggesting that the extensive use of foreign law was due to the fact that these were formative years in which the Court lacked any jurisprudence of its own. As for the citation ratio in Canada it dropped from 10% down to 6% in 2000, and to 3% percent in 2005. The cases ratio declined from 32% in 1995 to 14% in 2005, and the per case number reached a level of just 0.34 foreign citations per case in 2005.

In South Africa numbers are even higher, owing partly to the fact that the South African Constitution requires reference to foreign and international law. Between the years 1995 and 2009 the cases ratio was a high 50%. Israel can therefore be situated in a category somewhat similar to that of the Canadian early Charter jurisprudence but well above later Canadian jurisprudence and somewhat below South African constitutional Jurisprudence.

The purpose of the following sections will be to explain the reasons for this phenomenon and describe the factors that shape it. I will begin with a discussion of the special features of Israeli constitutional law, and then proceed with an analysis of several general factors that may provide an explanation to this extensive use of foreign law.

Part II: EXPLAINING THE PREVALENCE OF THE USE OF FOREIGN LAW IN ISRAELI CONSTITUTIONAL JURISPRUDENCE

A. Israeli Constitutional Law and the Use of Foreign Law

Four major features of Israeli constitutional law shape the use of foreign law in Israeli jurisprudence and can explain its pervasiveness: 1. its non-textual nature; 2. the Constitutional Revolution of 1992, and 3. the adoption of a European based and universalistic model of constitutional adjudication, and 4. its non-formalistic nature, especially since the 1980s.

1. Non-Textualism

A historical overview is necessary in order to understand Israeli constitutional law in general and its non-textual nature in particular.²⁸ The history of Israel's constitutional law is usually divided

citing Peter McCormick, *The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview*, 8 SUP. CT. L. REV. 527, 533 (1997).

²⁸ For a general review of the constitutional history of early Israel, sympathetic the review here, see See Ruth Gavison, *The Constitutional Revolution, Description of Reality or a Self-Fulfilling Prophecy?* 28 MISHPATIM 21, 78 (1997) [Hebrew], See also GIDEON SAPIR CONSTITUTIONAL REVOLUTION IN ISRAEL (2010) 29-40 [Hebrew].

into two stages: from the establishment of the State in 1948 until 1992, and from 1992 onwards. As will be shown, both stages are marked by non-textualism.

Israel was established in 1948 after a period of 30 years of British colonial rule over mandated Palestine. Although in its defining document – the Declaration of Independence – Israel’s early leadership vowed to adopt a constitution,²⁹ this commitment was made without any public debate since the UN resolution that provided the legitimacy to the State of Israel, demanded a constitution as a condition for gaining international recognition of the state.³⁰ However, once the international community recognized the State of Israel even without a formal constitution, the need for a constitution was put again to question, and the Israeli Parliament (the Knesset) decided, in a decision called the Harrari decision, not to adopt a constitution.³¹ Instead, the form of government that was adopted was a Westminster-like form of Parliament-sovereignty without a formal constitution. Accordingly, up to 1992 constitutional law in Israel was shaped roughly around the British model of a substantive constitution, which, in terms of human rights, meant a sophisticated administrative law imposing human rights protections against administrative incursions, but no limitation on primary legislation.

However, the Harrari decision not to adopt a constitution did not close the door on a constitution but took the form of a compromise: the constitution would be drafted in stages, chapter by chapter, each chapter to be called a Basic Law.³² These Basic Laws, promulgated by the Knesset in ordinary acts of legislation, would then be compiled into a formal constitution. This compromise decision, devised to avoid a constitution at that stage but also to remain faithful to the internal and international commitment to have one, intentionally left vague both the status of these Basic Laws during the interim period, and the deadline by which they should be compiled into a constitution. The political and legal community consequently interpreted it as a decision to defer the question of a constitution to a later stage. The ten Basic Laws that were enacted intermittently until 1992 (including Basic Law: The Knesset, Basic Law: the Government and of the Military) were therefore treated as regular laws, albeit important in view of the fact that they included some of the basic rules of government. No Bill of Rights Basic Laws were enacted.

²⁹ Declaration of the Establishment of the State of Israel, 1 LAWS OF THE STATE OF ISRAEL [L.S.I.] 3, 4 (1948). The declaration refers to “the establishment of the elected, regular authorities of the State in accordance with the Constitution, which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948.” *Id.*

³⁰ UNGA Resolution 181, A/RES/181(II)(A+B), 29 November, 1947

³¹ Knesset Protocols 1743 (1950). The Resolution states: “The first Knesset directs the Constitutional, Legislative and Judicial Committee to prepare a draft Constitution for the State. The Constitution shall be composed of separate chapters so that each chapter will constitute a basic law by itself. Each chapter will be submitted to the Knesset as the Committee completes its work, and all the chapters together shall be the State’s constitution.”

³² The compromise decision was a Knesset decision from 1950 called the Harari Decision, after the name of the Knesset Member that proposed it.

To conclude, the entire first stage of Israeli constitutional law, from its formation in 1948 until 1992, was completely devoid of any textual components, and Israel was categorized as a system without a formal constitution. The Court did develop an impressive set of civil rights, including the rights to freedom of speech, equality, freedom of consciousness, freedom of religion and from religion, [freedom of occupation, liberty from arrest, due process of law and the right to fair trial?], but all these rights were made judicially, without a textual basis, and also could not be used to defy a formal manifestation of legislative will (i.e. no judicial review over primary legislation).

The most salient feature of Israeli constitutional law is therefore its non textual nature, and the fact that Israel has no formal constitution. This non textual nature substantially facilitates the use of foreign law in Israeli constitutional law in two major respects. First, it sets aside one of the main objections to the use of foreign law in constitutional interpretation – loyalty to the text and original intent. As will be discussed more extensively in Part III, constitutional interpretation methods based on textualism or on original intent are antithetical to some uses of foreign law, since the way other nations interpret and apply their own constitutions is generally considered irrelevant to the question of the textual content of one’s own constitution or of the original intent of its drafters. Therefore, a constitutional jurisprudence which is not based on text, but only on case law, is not prone to this particular objection. Indeed, as Jamal Greene has well shown, even constitutional systems with a formal constitution do not usually adopt an originalist interpretation, unless, as in the American case, their constitution has achieved a canonical or a sacred text status, and unless the drafters of the constitution have achieved the status of cultural giants and bigger than life figures.³³ This is all the more so when it comes to systems that have no constitutional text whatsoever, as in the Israeli case. This is not to say that non-textualism necessarily means extensive use of comparative law, just as textualism does not necessarily deny the use of foreign law. It only means that it makes such use easier by lifting the obstacle of the text.

Secondly, the entire project of building up a corpus of constitutional rights from scratch, as it were, by judicial means, lends itself to comparative use and to drawing on the experience of other countries. Foreign law, especially when originating in countries with a developed and longstanding jurisprudence of constitutional rights, is a natural source of reference for such a project.

Accordingly, some of the early decisions that built the impressive corpus of judge made constitutional rights used foreign law materials extensively. A striking example is the leading and breakthrough case of *Kol Haa’m*. The *Kol Haa’m* case of 1953, which for the first time recognized the right to free speech in Israeli law, without any textual anchoring, was replete with foreign law citations. The decision stroke down an administrative decision by the minister of

³³ Jamal Greene, *On the Origins of Originalism*,

interior to temporarily close down two newspapers because of “seditious” Op-Eds run by their editors. Written by Justice Agranat – himself legally trained in the United States – the decision included citations from such classic free speech American cases as *Abrams v. United States* (1919) (citing the famous paragraph regarding the “free market of opinions”)³⁴, *Whitney v. California* (1926)³⁵ (citing Justice Brandies on the quality of free speech “to make men free to develop their faculties”), *Schenck v. United States* (1918) (citing Justice Holmes on the special conditions of free speech in times of war)³⁶ *Gitlow v. New York* (1924),³⁷ as well as from cases and books that were more recent to the case, such as *Cantwell v. Connecticut* (1939), *U.S. v. Associated Press* (1943),³⁸ *Zecharia Chaffee’s Free Speech in the United States* (1948), and *Dennis v. United States* (1951) – a case on which Justice Agranat based the particular balancing test that has become the standard free speech case in Israeli law ever since. The case included also citations from Milton, Blackstone, Mill, Lord Scrutton and Lord Sumner. All in all in the case included citation of 9 American cases, 8 English cases, and only 3 Israeli cases.

Many later leading cases that established newly created rights or shaped and enlarged their contours followed suit. This is especially true with regard to precedential cases involving doctrines of free speech, such as free speech right against film censorship,³⁹ the right to protest⁴⁰ free speech versus racist incitement,⁴¹ censorship of pornography⁴², but also with regard to other

³⁴ 40 S. Ct.17.

³⁵ 47 S. Ct. 641

³⁶ 39 S. Ct. 247

³⁷ 45 S. Ct. 625

³⁸ 52 F. supp. 362, 372 (Judge Hand)

³⁹ HCJ 243/62 *Ulpanei Hasrata v. Gery* (citing 5 American cases).

⁴⁰ HCJ 153/83 *Levi v. Southern District Police Commander* (citing 7 American cases, 2 English cases, and 1 Irish case); *Dayan v. Vilk* HCJ 2481/93 P.D. 48(2) 456 (including citations from 12 American cases, 2 English cases, 2 Canadian cases, 1 German case, 1 Indian case, and 1 Australian case)

⁴¹ HCJ 399/85 *Kahana v. The Broadcasting Authority* (citing 8 American cases, 1 Canadian case, and 1 case of the European Court of Human Rights).

⁴² HCJ 4804/94 *Station Films v. the Commission of Film and Theatre Censorship* (citing 10 American cases, 3 Canadian cases, 3 English cases, and 1 Irish case); HCJ 5432/02 *SH.I.N. v. The Cable and Satellite Broadcasting Commission*, P.D. 58(3) 65 (including citations from 3 American cases, 2 Canadian cases, and 4 American law review articles)

rights such as equal rights for women⁴³ gay rights, equal rights for women, and even in areas such as sexual harassment.

2. Constitutional Revolution

The second stage of Israeli constitutional law begins in 1992. At that time two new Basic Laws were adopted by the Knesset- Basic Law: Freedom of Occupation (protecting the freedom of occupation), and Basic Law: Human Dignity and Liberty (protecting the rights to life, bodily integrity, dignity, property, freedom from arrest and extradition, right to move in and out of the country, and right to privacy).⁴⁴ These two Basic Laws included, for the first time, civil rights protections that could be seen as the first stage of a full Bill of Rights. They also included some explicit provisions [as to their superiority?] over regular laws.

The Court interpreted the 1992 Basic Laws very broadly, and regarded them, in the leading 1994 case *Mizrahi v. Migdal*⁴⁵ as a “Constitutional Revolution”. First, in *Mizrahi*, it considered them as conferring on the Court the authority to impose judicial review over primary legislation, despite the fact that there was no direct legal provision to that effect. Secondly, in a series of later cases it read into Basic Law: Human Dignity and Liberty almost an entire Bill of Rights, including rights which were not written into it, such as the right to equality, freedom of conscience, freedom of religion, the right to a family, the right to have access to the courts, the right to freedom of speech, the right for minimal living conditions, the right to education, and what may appear to be a newly kind right – a right against privatization. Thirdly, the Court used these two laws to read back the status of the previous ten Basic Laws, giving them superiority over regular laws, so as to create a quasi constitutional regime, based on the twelve existing Basic Laws.⁴⁶

The second stage of Israeli constitutional law does, therefore, have a textual basis, in the form of the two new Basic Laws and the reinterpretation of the ten older ones. However, at least in terms of a Bill of Rights, this basis is very incomplete and idiosyncratic. The gap between the limited set of rights given by the text, and a more complete set of rights, was breached by the Court itself, in the form of the very broad reading of these Basic Laws. In many respects, therefore, also after 1992 Israeli constitutional law continued the tradition of building up constitutional rights by judicially made law, rather than by basing them on text. Consequently, non-textualism remains to a large extent a valid explanation for the use of foreign law.

⁴³ 104/87 *Nevo v. the National Labor Court* (citing 2 English cases, and 2 cases of the European Court of Human Rights)

⁴⁴ 1992, S.H. 1391. The Basic Law: human dignity protected on top of the right to human dignity, also the rights to property, movement, and privacy.

⁴⁵ CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221, 342, 447.

⁴⁶ See GIDEON SAPIR *CONSTITUTIONAL REVOLUTION IN ISRAEL* (2010).

Indeed, the Constitutional Revolution provided an additional reason for relying on foreign law, since it was seen as an opportunity to revamp and revisit the existing set of judicially made rights. The period following the Mizrahi case was characterized by an enthusiastic and hectic judicial work, aimed at making use of the newly acknowledged constitutional framework in order to enlarge the scope of constitutional rights, and revisit those rights that were already established, based on the new Basic Laws. As was the case in the first (and more limited) wave of constitutional creativity, this project could find considerable support, both in content and in legitimacy, by referring to other constitutions and other constitutional courts who have a larger and more established set of constitutional rights.

Accordingly, in many of the decisions in which as part of the Constitutional Revolution new rights were acknowledged through interpretation, or old rights were revisited in view of the new Basic Laws, one can find extensive recourse to foreign law. These decisions include the case in which the right to human dignity was extended so as to include also the right to equality, the right to family, the right to education, the right to free speech and the right to minimal living conditions⁴⁷

In addition, one may regard the entire thrust for a Constitutional Revolution as based on a comparative claim, namely that Israel is amongst the few Western democracies without a constitutional regime, and without judicial review, and that it should “catch up” with other countries in terms of its constitutional law (this claim was raised in the Mizrahi case). Even the way the Court legitimized its bold move of recognizing judicial review without clear textual authorization, was made by allusion to comparative law. Chief justice Barak, referred to *Marbury v. Madison*, where the American Court also used judicial interpretation to claim its authority for judicial review.

3. European Law

A third factor that can explain the intensive use of foreign law in Israeli constitutional law is the adoption of a European based model of constitutional adjudication in Israeli constitutional law.

The two Basic Laws of 1992 have a limitation clause framed after the Canadian Charter of Rights and Freedoms, which is based on a European model and a model that exists in international human rights conventions. Article 8 of Basic Law: Human Dignity and Liberty reads: "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 a proper purpose and to an extent no greater than is

⁴⁷ *Manor v Minister of Finance* HCJ 5578/02 P.D. 59(1) 729 (citing 2 American cases, 3 South African cases, 6 Canadian cases) [complete]

required."⁴⁸ The wording resembles the wording of the general limitation clause in the Canadian Charter.⁴⁹ The latter part of the clause was interpreted as imposing a proportionality test.

The adoption of a proportionality test and of the European-based limitation clause model resulted in an increased willingness to look into models of countries that also use proportionality and share this model, termed by Lorraine Weinberg the Post WWII constitutional model.⁵⁰ German constitutional law for example has been cited in several key decisions developing the new tests for the application of the proportionality test, as well as the Canadian constitutional law. By adopting the proportionality test, the Israeli Supreme Court has entered the ever growing family of constitutional courts that use proportionality, this has allowed it to borrow more easily from those systems and create a dialogue with them.⁵¹ A similar phenomenon has been well documented with regard to other constitutional courts adopting the European model, and many times this came at the expense of citing American constitutional law, which has a substantially different doctrinal framework. There is no data regarding a decline in the use of American constitutional law in Israel, but some of the examples cited above may indicate that there is an increase in the use of foreign law from such countries as Canada, Germany and South Africa.

Hand in hand with adopting the methodology of European constitutionalism, Israel may have also gotten closer to the substantive commitment of the European model that differs from the American one. As Jed Rubenfeld has argued, the European conception of rights is universalistic, much more so than the American one, that puts a high premium on popular democracy, and sovereignty.⁵² [expand on this in Hebrew version] In addition, the European model is more

⁴⁸ Basic Law: Human Dignity and Liberty, 1992, S.H. 1391.

⁴⁹ Section 1 of the Canadian Charter "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."

⁵⁰ Lorraine Weinrib, *The postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 98 (Sujit Choudhry ed., 2006)

⁵¹ For the documentation of the spread of proportionality in different constitutional systems, and for the dialogue it allows between them see, e.g., Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT'L* 72 (2008); DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159, 171–76 (2004); Francis G. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 1, 1 (Evelyn Ellis ed., 1999); Stephen Gardbaum, *Limiting Constitutional Rights*, 54 *UCLA L. REV.* 789, 853 (2007); David S. Law, *Generic Constitutional Law*, 89 *MINN. L. REV.* 652, 693–95 (2005); Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 *UNIV. OF TORONTO L.J.* 383, 395 (2007); Moshe Cohen-Eliya and Iddo Porat, *The Hidden Foreign Law Debate in Heller: Proportionality Approach in American Constitutional Law*, 46 *SAN DIEGO L. REV.* 367 (2009)

⁵² Jed Rubenfeld, *Commentary, Unilateralism and Constitutionalism*, 79 *N.Y.U. L. REV.* 1971 (2004)

expansive in terms of the concept of rights, and allows for a positive rather than only negative rights, and for rights to have effect in the private sphere and not only in the public one.⁵³ These developments characterize Israeli constitutional law, and further promote and ease the use of foreign law in it.

4. The non-Formalist nature of Israeli Constitutional Law

The fourth central feature of Israeli constitutional law that explains the extensive use of foreign law in Israel is its non-formalist and open ended nature, especially since the 1980s. This feature is obviously related to the non-textual nature of Israeli constitutional law, but it is not necessarily the product of it, and is related also to the general move in Israeli law towards anti formalism.

Since the late 1970s or early 1980s the Court is on a continuous move toward an open-ended mode of interpretation, higher involvement in public life, and greater supervision over administrative and legislative actions. In short, since the late 1970s the Court has been showing clear signs of judicial non-formalism and activism. Although it has not exerted judicial review over primary legislation made until the Constitutional Revolution of 1992, it has dramatically upgraded its ability to supervise administrative decisions, and even internal decisions, of the Parliament by loosening up entry barriers such as standing and justifiability, and by adopting a “purposivist” and non formalist mode of interpretation. There are also several empirical pieces of evidence for the increase in anti-formalism in the Court’s jurisprudence; these include the on average lengthening of court decisions, and the increase in the relative part of academic and literary citations at the expense of statutory citations.⁵⁴ It is interesting to note that the length of court decisions was relatively high also in the earlier and formative years of Israeli jurisprudence, in which canonical cases such as *Kol Haam* paved the way for later cases, and set up the foundations for the Israeli legal system.⁵⁵

Professor Mautner reviews several reasons that explain why the court became more anti-formalist in the 1980s.⁵⁶ These reasons are: 1. the shift within Israel from a society that was more collectivist, socialist and state-centered to one that is more individualistic, capitalistic and more suspicious of the state. This shift has changes the status of the courts within Israeli society – within a socialist society courts are at odds with the main ethos, within a collecitivs one, they are right at the center of the ethos. Accordingly courts took a greater role in Israeli society, and society has shifted to them more decision power, resulting in more open ended forms of

⁵³ See Moshe Cohen-Eliya and Iddo Porat, *The Culture of Justification*, AM. J. COMP. L. (forthcoming 2010)

⁵⁴ Shachar

⁵⁵ Id

⁵⁶ Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law*, 17 IYUNEI MISHPAT (TEL AVIV U. L. REV.) 503 (1993).

interpretation, and broader conceptions of the courts' functions.; 2. the weakening of the Israeli political system, due to the fracturing of major parties to smaller ones, and due to unstable coalitions, which again channeled power to the Court, and encouraged non-formalism and a larger conception of its role; and 3. the loss of political hegemony of the liberal leftist party to the rightist party and to the religious parties, and the use of the Court by the liberal left to rebalance its loss of political power, given its liberal inclinations.

Whatever the reason, the dramatic move of the Court towards activism and anti-formalism since the early 1980s can also explain its extensive use of foreign law in at least three ways. First, 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. The more the judiciary steers away from seeing its own function as applying mechanically preexisting law, and moves toward the role of shaping the law according to considerations of policy and justice, the more it becomes relevant for the judge to look into a variety of sources that deal with similar policy or moral questions, regardless of their formal pedigree.

Secondly, anti-formalism in judicial writing has also resulted in a judicial style that is similar to an academic style. This is particularly characteristic of former Supreme Court Justice Aharon Barak's style, himself a former law professor and dean of the faculty of law at the Hebrew University. Academic style includes citations from a variety of sources, including comparative law and foreign law review articles. As in a law review article, an "academic-style" court decision would not restrict itself to the solution of the particular legal dispute, but attempt to encapsulate the general parameters of a particular legal question, including history, statutes, case law, policy questions, academic literature and comparative law. A survey of comparative law is considered to be part of the "due diligence" standard of Israeli academic writing. For example, an Israeli law student who writes a research paper on a general legal question is required to survey comparative law in her paper, and her grade would be affected if she would not do so.

Thirdly, one of the important implications of anti-formalism in the field of constitutional law is the lowering down of procedural barriers of entry to the Court. During the 1980s the doctrines of standing and of political question loosened up considerably.⁵⁷ This resulted, among other things, in the ability of civil society organizations and human rights groups to petition directly the Court. Among these organizations are: the Israeli Association of Civil Rights, Adala (the Legal Centre for Arab Minority Rights in Israel), the Israeli branches of the International Red Cross and of Doctors without Borders, as well as many other groups. With almost no formal requirement of standing and a loose requirement of political question, such groups can petition the Court not only as representing claimants that were particularly harmed by governmental action but also on their own initiative addressing general matters pertaining to the rule of law. The role of human rights organizations in Supreme Court petitions and the number of petitions originated by such

⁵⁷ See Daphne Barak-Erez, *the Justiciability Revolution Revisited*, 40 HAPRAKLIT 3 (2008)

groups have therefore increased substantially. Such organizations specialize more than other petitioners in international and comparative law, as they consider themselves part of an international community of civil society and human rights organizations, and as they often try to import what they would consider to be more advanced notions of human rights into the local system. These petitions contribute therefore to the more frequent use of foreign law and international law in legal briefs and consequently in Supreme Court decisions⁵⁸ [Balance with other side. Does not work]

B. Israeli Law Generally and the Use of Foreign Law

1. A Young Legal System

In its first stage, as a young legal system, Israel had no prior case law of its own to draw on. The best next thing was Mandatory case law, which was heavily influenced by English law. Early Court decisions used as their main resource Mandatory as well as English cases, which were both formal sources of law (The tie to English cases as an optional formal legal source for case was abolished only in 1984.). The use of non-Israeli materials in the early years was therefore common and natural, and partly formalized. This was true of all legal decisions, including decisions on constitutional matters. [too options –that they get used to it and continue or that they abandon it as times go by – it seems the second -]

2. Geopolitical Isolation

Since Israel is a democracy surrounded mostly by hostile and non-democratic countries it has always sought legitimacy and acceptance from the West – from Europe and North America in particular, and wished to be integrated in Western culture. The use of American and European legal materials is one way of such a cultural exchange and integration. Israel is also relatively isolated in terms of the extent of relevant legal materials that can be used to expand its legal horizon and imagination. The United States for example, has a large repository of legal materials to draw on from the legal systems of the 50 states and of the federal system. So does Europe, which especially since the formation of the European Union has very important legal interactions between the different countries and can also draw on the jurisprudence of the ECJ, and ECHR. In Israel, however, there is no such regional or internal large repository of legal materials, so that in order to go beyond its relatively limited scope of legal materials it must draw generally on foreign materials.

Some view the fascination with the West as part of a post-colonial syndrome, shared by other former British colonies, in which the newly created state attempts to mimic the former colonial

⁵⁸ Compare, Yuval Elbasha, *the Juridication of Protest*, [] (arguing that Justice Ahraron Barak was respectful towards human rights organizations, and raised their status in Supreme Court litigation to that of central players in the shaping of law, rather than marginal players).

ruler, and looks for it as a role model.⁵⁹ Others find its reasons in the ever increasing importance of American culture, including its legal culture.⁶⁰ What might be one of the distinct signs of the attempt at cultural assimilation or mimicry is the use of legal icons, legal epitaphs and legal quotations from foreign rather than only local sources. An Israeli Justice wishing to spice up her free speech decision with famous quotations, for example, would turn to Justice Holmes, and Justice Brandeis, almost as naturally as she would turn to Justice Agranat. American leading academics such as Ronald Dworkin, Lawrence Tribe, and Alexander Bickel also appear regularly in the repertoire of Israeli Court decisions.

One should note again that, given the young age of the Israeli judicial system, not many of its Justices have attained the stature of canonical figures, legal icons, or larger than life figures, so that Israeli Justices look sometimes for them outside the borders of Israel. Jewish giants of Hebrew law are apparently too remote in time, in professional affinity and in worldview to effectively fill this niche. [This despite the nature of Israel as Jewish and democratic]

3. Professional and Academic Ties

The third factor that shapes the use of foreign law in Israel is the close ties of Israeli legal professionals with foreign legal systems. Israeli lawyers, judges and law professors have always had close ties with other countries, and many of them acquired their legal training abroad. This is definitely the case with the first generation of law professionals, in the first two decades since independence, most of whom were born and trained abroad in a large variety of countries from Russia and Poland in the East to Germany, Italy and England in Central and Western Europe and up to the United States.⁶¹ These lawyers, judges and academics possessed, therefore, a wealth of knowledge on a wide array of legal systems and had an easy access to them. These assets were naturally integrated into their legal products – in court decisions, legal briefs and legislation.

Most of the lawyers, judges and professors of the following generations were already born in Israel and had their basic legal training in the country. However higher legal education, especially for those wishing to follow an academic career, continued to be carried out predominantly abroad, especially in the US. Most law professors teaching today received their graduate and post graduate education in the United States and to a lesser degree in England. Consequently, over time, the former close acquaintance with the laws of European countries has

⁵⁹ According to Binyamin Blum, “Israel looks to England and other nations for parental approval of its jurisprudence. In this regard Israel can be viewed as experiencing a broader postcolonial syndrome, residual of the Mandate.” Blum, *supra* note 3. Compare HOMI K. BHABHA, THE LOCATION OF CULTURE 85-92 (1994)

⁶⁰ See Sandberg *supra* note 3.

⁶¹ Eli Salzberger, *50 years to the Israeli Supreme Court* []; See also Eli Salzberger & Fania Oz-Salzberger *supra* note 22

dwindled, and on the other hand US influence has grown considerably. Furthermore, in the Israeli legal profession academic prestige is highly dependent on publications abroad, especially in US law reviews. In consequence, academic research and writing in Israel is oriented towards such areas of law that would be palatable to an American legal audience, and a large number of Israeli academics write more on US law than on Israeli law.

As regards judicial ties with foreign legal systems, several Justices who joined the Supreme Court in recent years (especially those who followed an academic career prior to their appointment to the Court) earned advanced degrees in the US and England, and have integrated their knowledge into their judicial products. In addition, many Supreme Court Justices over the last two decades have had foreign law clerks in their chambers, a practice that is now almost standard in the Israeli Supreme Court. Many of these clerks are second or third year law students coming from top US law schools, such as Yale and Harvard, but others come also from Germany, Canada, and other countries. These law clerks provide important information and easy access to foreign law, and are one more indication of the demand for foreign law resources by Israeli Supreme Court Justices .

4. Israel as a Jewish State

All the previous traits of Israeli law were brought as explanation for the extensive use of foreign law in Israeli constitutional law. One should address however one major trait of Israeli law generally and of constitutional law in particular which seems to run against the use of foreign law. This is the definition of Israel as a Jewish as well as democratic state, and the formal requirement to use Jewish sources as sources of interpretation. Israel was defined in the declaration of independence as a Jewish state, and this definition has entered as a basic principle in the interpretation of laws in Israeli Supreme Court decisions. It has also been given formal recognition in the Law of Legal Foundations, that required that in cases of lacuna one should use the principles of Jewish law, and in the purpose clause of the two basic laws of 1992, which state that these basic laws should be interpreted according to the principles of the state of Israel as a Jewish and Democratic state. These principles seem to stress a particularist rather than universalist trait of Israeli law, one stressing its unique and local Jewish nature, and therefore averse to the incorporation of foreign law sources. In addition it would seem to indicate a preference of Jewish Halachic sources over foreign legal sources as sources for inspiration and analogy in case of lacuna in Israeli law. In practice however, this has not been the case in Israeli law generally and in Israeli constitutional law in particular. Despite the occasional lamentation of certain Supreme Court justices, the vast majority of Supreme Court cases have very few references to Jewish sources, and whatever the tendency to use such sources, it does not seem to come at the expense of the use of foreign law. In particular it is important to note the interpretation given by Chief Justice Barak to the requirement to use Jewish sources – Chief Justice Barak argues that those principles are the universal principle of Justice incorporated in Jewish law, thus giving Jewish law itself a universalistic approach, and stripping it of much of its particularity.

According to Rene Sanlivierz, the debate on the court between Justice Barak and Justice Elon as to whether there is primacy of Jewish law over other comparative sources, was decided in favour of Barak's view that there is no such primacy. The relevant court decisions in the matter were Handeles, and Bank Kupat Haam v. Handeles (1980) 34(iii) P.D. 57 and Dicker v. Moch (1978) 32(ii) P.D. 141. "Reference to Jewish law for interpreting Israeli Law is not obligatory but only permitted, a judge may choose Jewish law as one of the possible solutions from which he may choose the appropriate law, and not as the end of the process." in Renee Sanilevici, "Israel" in the Use of Comparative Law by Courts (1999) (Ulrich Drobnig and Sief Fan Erp eds)

PART III: NORMATIVE ASSESSMENT

The preceding review was descriptive in nature, and aimed at mapping the main factors that affected the use of foreign law in Israeli constitutional law. The next part will deal with its normative aspects. It will attempt to assess the use of foreign law in Israeli constitutional decisions by discussing the different points of criticism addressed against such use. The most comprehensive set of attacks on the use of foreign law can be found in the burgeoning discussion over the use of foreign law in US constitutional law. I will thus rely on this discussion in order to map the different types of criticism and then turn to their application to the Israeli case.

A. Substantive Objection - Sovereignty and Originalism

The major substantive objection to the use of foreign law in constitutional adjudication is that it undermines the democratic choice of the local population, and subjects its own conceptions of rights and of their proper scope to the notions of other peoples and international bodies.⁶²

In the United States, in particular, this objection is tied to the originalist movement, which contends that the constitution should be interpreted according to the meaning assigned to it originally, when it was drafted, since this meaning only reflects the will of the people. Foreign law is immaterial to the task of expounding the will of the people who drafted the constitution, and therefore should not be used in interpreting the constitution.⁶³ Originalism bases the legitimacy of constitutionalism and of judicial review on democracy – the constitution reflects the higher will of the people, and the Court only imposes the people's higher will on the people's "regular will" as expressed by regular laws.

However, as noted earlier, originalism does not travel well outside the United States. The legal and constitutional cultures of most other nations are different and do not put such an emphasis on

⁶² See the Scalia-Breyer debate set out in Dorsen, *The relevance of foreign legal materials in United States constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT. J. CON. L., 519 (2005)

⁶³ See e.g. *Roper v. Simmons*, 543 U.S. at 622-28 (Scalia, J., dissenting).

sovereignty and on original intent.⁶⁴ Moreover, an originalist interpretation to the Israeli quasi-constitution may show that the meaning intended by it at the time of the drafting was not so alien to the use of foreign law in its interpretation and application. Other recent Bills of Rights, that of South Africa for example, make the use of foreign sources a formal requirement, and other ones, such as the New Zealand Bill of Rights, allude to them in the preamble and in the travaux préparatoires of their drafters.⁶⁵ In the Israeli case the evidence is less clear, but the fact that the Israeli Knesset has chosen consciously to draw on an existing model from a foreign country – Canada – could be taken to mean that the Knesset expected the Court to draw on the Canadian experience, and maybe also on the experience of other countries with a similar model of constitutionalism, such as Germany.

Israeli constitutional culture and the circumstances under which the Basic Laws were enacted do not support, therefore, a strong objection to the use of foreign law, based on original intent. However, the democratic problem seems to lurk in the background of some more nuanced problems that may arise because of the use of foreign law, and these will be discussed later on with regards to global constitutionalism.

B. Methodological Objections - Cherry Picking and Bad Comparisons

1. Cherry Picking

There are two major methodological objections to the use of foreign law in constitutional adjudication. The first is that it is undisciplined. Since not all foreign law decisions can be taken into account in each decision, and as there is no rule regarding which foreign law a judge should use, the choice, so it is argued, is necessarily arbitrary and boils down to “cherry picking”, that is to choosing such foreign law material which is supportive of the judge’s preferred legal outcome. According to Justice Scalia, for example, a particular foreign doctrine is either authoritative, in which case its use is mandatory, or not authoritative, in which case its use is completely undisciplined and open to judicial manipulation. Cherry picking is manifested not only in decisions on which foreign law to turn to in a particular legal issue, but in the first place in the very selection of the cases in which one turns to foreign law. Some US Justices, for example, chose to turn to foreign law to support their views on homosexual rights and on death penalty, but not on abortions nor on criminal defendants’ rights.

2. The Embeddedness of Law

⁶⁴ Compare Allan and Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts* 43 SAN DIEGO L. R. 1 (2006).

⁶⁵ The preamble to the *New Zealand Bill of Rights Act* states that one of the purposes of the Act is to affirm New Zealand’s commitment to the ICCPR. Moreover, the White Paper to that Act made clear that the use of comparative law was contemplated by the government that proposed the bill of rights.

The second criticism is based on the impossibility of comparison and of migration of legal concepts. It claims that the use of foreign law is misleading because any comparison would have to take into account so many factors that it would be hard to draw any conclusions from it. Since any statutory provision or court decision is so deeply embedded in the particular legal culture it belongs to, as well as in the general culture, history, political climate and particular circumstances of the case, the use of it out of its specific context would teach us nothing. The same reasons would also make any attempt at legal transplantation almost impossible.⁶⁶

3. Examples in Israeli Law

Problems of cherry picking, bad comparisons, and bad transplantations, are inherent in the use of foreign law, and can obviously be found also in Israeli constitutional law. To illustrate this point one can go back to the “father” of all foreign law citations in Israeli constitutional law, the Kol Haam case. In Kol Haam, Justice Agranat cited the Dennis case in order to transplant the American free speech balancing test into Israeli constitutional law. As described earlier, this was no less than a revolutionary moment that helped establish and protect the right to free speech in the years to come. However, Agranat completely disregarded the role of the balancing test in American free speech law, which was the inverse of the role it played in the Kol Haam case. As lamented by the dissenting Justice in the Dennis case, the balancing test diluted the previous Clear and Present Danger test, and amounted to a judicial admonition of the Congress's sense of when hurting free speech would be reasonable. The crucial comparative difference is that the United States had a formal constitution with a formal and absolute protection of free speech, so that a balancing test in effect diluted the absoluteness of the free speech precept that “Congress shall make no law abridging the freedom of speech”. In Israel, which has no formal constitution and no textual protection of free speech, the balancing test was used to create the right to free speech by reading the balancing test into the law that authorized censorship. What was balanced was the administrative unlimited discretion to censor speech, rather than the right to free speech itself. This was an ingenious move, but one that disregarded the comparative difference between the two constitutional cultures.

The second example is taken from the second wave of constitutional creativity. In the Mizrahi case of 1994 Chief Justice Barak relied partly on the Marbury case to legitimize a judicially acknowledged right to judicial review. The comparative difficulty here is the fact that Marbury found this right in a full blown formal constitution that was ratified in a long, demanding and comprehensive process, while the Court in Mizrahi relied on two Basic Laws that were ratified in a regular act of legislation, without much public attention, and with a low participation of Knesset Members. What can be derived from the former process of constitution making cannot

⁶⁶ See Pierre Legrand, *The Impossibility of "Legal Transplants"*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 73-74 (2004) (arguing against the comparison drawn in the Lawrence case between American constitutional law and the European legal context, since the legal tests diverge substantially.)

be derived from the latter. Marubry itself, of course, is accused of cherry picking and bad comparison, by arguing that judicial review logically follows from the superiority of the constitution and disregarding comparative counter examples in Europe at the time. The citation of Marbury amounts therefore to a “secondary” bad comparison, as well.

There are many other examples, including: the transplanted of the exclusionary rule, disregarding the difference between a bifurcated Jury system and a unitary judiciary, turning to comparative law to establish a consensus around gay rights, diminishing the role of countries that do not follow that move, doing the same with regard to establishing a right to affirmative action, and other cases.

4. Assessment

Cherry picking, bad comparisons are real problems, but they do not seem to be problems which apply only to Israeli law, or to constitutional law, or even to the citation of foreign law. Professor Tushnet argued that the cherry-picking objection, “could be made ... about nearly every approach to constitutional interpretation,” including about the selection of historical data for originalist-based interpretation, and judges often rely on hosts of non-authoritative sources, that similarly may raise the problem of cherry picking and bad comparisons, such as lower courts' decisions, law review articles, public policy memoranda and the like. Justice Breyer, for example argued that he would use whatever the clerks find, and whatever the parties' lawyers would provide him with, and this is true to public policy memoranda, law review article, as well as to foreign law cases.

Some have argued that the use of foreign law is more prone to the problems of cherry picking and to bad comparisons than the use of other non-authoritative materials. They contend that foreign law provides an especially large reservoir of examples, and thus amplifies the possibilities of manipulation, and that comparisons are especially hard to make between different cultures. Constitutional law is sometimes believed to be especially imbedded in the culture of a nation because it represents its *raison d'être*, and therefore it may be harder to draw comparisons in this particular area of law. However, the difference between the dangers of foreign law manipulation and those of other types of manipulation appears to be a difference of degree rather than of kind, and the danger in using foreign law can sometimes be exaggerated. Also, one may always argue that the problem lies in the bad use of foreign law, rather than in the use in itself. It seems therefore that we should look elsewhere if we wish find a more principled objection to the use of foreign law.

C. The Pitfalls of Global Constitutionalism

After having shown that the mere use of foreign law and its methodological problems do not present a unique or particularly worrying problem, and that the originalist objection does not apply so much to Israel, I would now like to point out several aspects in which the use of foreign law could be genuinely troublesome.

1. Ratcheting Up, Race to the Top and Human Rights Organizations

Cherry picking is not a major threat to the integrity of law in and of itself, but it might become such a threat if biased and used in support of one particular view. There is some reason to believe that this is indeed happening in the use of foreign law by many constitutional courts including the Israeli one.

A New Zealand survey has found that the use of foreign law in interpreting the New Zealand Bill of Rights Act has been substantially biased in favor of expanding notions of rights, rather than diminishing them.⁶⁷ Although New Zealand judges could find outside their own system examples of both diminished and enlarged scopes of rights, and of different ways of line drawing between rights and public interests, they tended to cite mostly those that expanded notions of rights and drew the line closer to rights, and tended to disregard those systems in which rights had a more diminished scope. The use of foreign law there had a *ratcheting up* effect on the scope of rights, at the expense of other considerations.

David Law identified a similar phenomenon regarding the interrelations between different countries and different constitutional courts, and called it a “race to the top”.⁶⁸ Using empirical data, Law found that countries and constitutional courts around the world look at each other’s jurisprudence and compete amongst themselves over who would be more “advanced” or expansive in terms of rights protection. Law bases his finding on an economic explanation,⁶⁹ but it is confirmed also by common wisdom. It would seldom be the case that a Court would proud itself for being the least protective of rights, and more often one could find a Court lamenting the fact that one’s own system “lags behind” or does not “catch up” with other systems in terms of rights protection.

A ratcheting up effect may occur also as a result of the role human rights organizations play in initiating and participating in petitions. As argued earlier, human rights organizations are central players in the promotion of the use of foreign law in judicial opinions, and such organizations have an inherent bias in favor of expanding the notion of rights, and citing those foreign opinions that are the most expansive in terms of rights.

There is no survey similar to the New Zealand one with regards to Israeli constitutional law, but a quick review of many of the cases mentioned above would show that many of them used foreign law to expand local notions of rights. This is true with regard to the issue of

⁶⁷ James Allan, Grant Huscroft and Nessa Lynch, *The Citation of Overseas Authority in Rights Litigation in New Zealand* 11 OTAGO LAW REVIEW (2007).

⁶⁸ David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008)

⁶⁹ Law argues that “As capital and skilled labor become increasingly mobile, countries will face a growing incentive to compete for both by offering bundles of human and economic rights that are attractive to investors and elite workers.” *Id.* at 1282.

pornography, of affirmative action, of gay rights, of the exclusionary rule, and of social and economic rights such as the right to minimal existence and the right to education. Binyamin Blum has shown nicely the way the Israeli Supreme Court made an effort to portray its ruling on evidentiary law as adopting the most “advanced” standard in the global market – the exclusionary rule – participating, as it were in the race to the top of rights protection in this field. This, despite of the fact that the ruling itself did not diverge dramatically from previous precedent, and its portrayal as adopting the exclusionary rule subsequently caused much confusion in lower courts’ jurisprudence. There are also counter examples, notably not choosing the American position regarding the legality of racism and other forms of incitement or of hurting public feelings, but here too the Israeli Supreme Court relies on a wide consensus among European countries, and cannot be regarded as diverging from a high standard of rights protection.

Used both by the majority and the minority – but this is not really so.

2. Writing to a Global Audience: Transjudicialism , Global Community of Judges, and The Court as an Ambassador

Constitutional judges may be participating in a race to the top since they see themselves more and more as part of global community of judges⁷⁰ and as participating in what Ann Marie Slaughter called transjudicial communication.⁷¹ Slaughter has documented the way constitutional judges around the world participate in international conferences, meet each other, and correspond with each other over the pages of their court decisions. Since rights jurisprudence is a global language, much of this communication is concerned with rights, and rights adjudication may become the lingua franca of transnational law. Today many courts make a conscious effort to transmit their decisions to other courts, and to expand their global influence, and this is aided by technological advancements that make such transmission easy and quick.

The German Federal Constitutional Court, for example, issues English press releases and sends them to its counterpart courts in other countries.⁷² The Supreme Court of Canada sends automated messages to subscribers, giving them one week’s notice of impending decisions, along with brief summaries of the relevant history of a case. The Israeli Court is no exception. Its leading decision are translated and put on the website of the Court sometimes a short span of time after they are published in Hebrew. Israeli judges are wanted participants in international

⁷⁰ Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003)

⁷¹ Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); See also Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000)

⁷² See <http://www.bundesverfassungsgericht.de/links.html>.

conferences, and global meetings of constitutional judges, because of the interest Israeli law promotes around the world, and they promote their decisions in those venues as well.

The result of this is that constitutional judges are writing their decisions knowing that they would be read by a global community; they therefore inevitably write also to the global audience, and may try to “sell” their decision to that audience, present it in a way that would be palatable to that audience, or even in a way that would distinguish it and portray it as innovative, or advanced. One may talk in this respect about judges getting “compensation” in terms of international recognition, and participation in international conferences and events. This phenomenon exceeds the mere citation of foreign law, but should be regarded as part of it, since it addresses the more general phenomenon of the global influences on local constitutional law.

Several Israeli decisions portray this transjudicial dialogue, or a possible attempt to address the palate of the international audience. Leading cases in terms of the protection of rights versus threats to state security, such as the precedential case banning torture, and to a lesser extent, the decision limiting Targeted Killing, were very well received abroad, and presented by Israeli Justices as attesting to the way Israel is leading among democracies in rights protection. In another decision, pertaining to the holding of Lebanese Hizballa militants as bargaining chips for the release of an Israeli captive soldier, the Court changed its mind in a second hearing of the case, following strong internal, as well as international and academic criticism of the first decision. While obviously these decisions are led by other considerations as well, the effect they have in the global community of judges and lawyers cannot be overlooked. Another example that shows a more direct dialogue between the Israeli Court and the international community pertains to the ruling regarding the security fence erected between Israel and the Palestinian territories.⁷³ The timing of the decision was very telling; it was given a short time before an expected decision of the International Court of Justice on the legality of the fence. It cannot be interpreted other than as partaking in a dialogue with that other Court, showing, as it were, that Israel does stand to international standards of human rights protection, with regard to the fence. Other Courts also act similarly. The Lithuanian Constitutional Court, for example, issued a ruling in 1998 banning the death penalty in the state, despite an overwhelming objection in the populace.⁷⁴ This could be interpreted as a move calculated to please the audience of the European Union, and ease the

⁷³ HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. [2005] IsrSC 58(5) 807, translated in 38 Isr. L. Rev. 83 (2005)

⁷⁴ The Constitutional Court of The Republic Of Lithuania, Ruling On the compliance of the death penalty provided for by the sanction of Article 105 of the Republic of Lithuania Criminal Code with the Constitution of the Republic of Lithuania Vilnius, 9 December 1998, (Official Website of the Lithuanian Constitutional Court, <http://www.lrkt.lt/dokumentai/1998/n8a1209a.htm>) The Court based its decision on Article 19 of the Constitution, protecting the right to life, and on article 21, providing that it shall be prohibited to torture, injure, degrade, or maltreat a person, as well as to establish such punishments. A November 1998 survey showed that 78 percent of Lithuanians were against and 10 percent for the abolition of death penalty. Vladas Gaidys, *Attitudes towards the European Union in Lithuania: 1997-2002*, 1.1 Institute for European Studies Proceedings (November 2002) (available at <http://www.ies.ee/fiesp/gaidys.pdf>)

acceptance of Lithuania to the EU, the Court acting as an ambassador of sorts, in selling Lithuania as a rights protective state. (Saving it from itself, is part of the idea of getting accepted internationally, Barak spoke on several occasions, of the dangers internationally of making the wrong decision internally. One should add to that the new threat of international criticism. The courts brag of being the one to protect Israel from these charges.) The enlightened face rather than the populist one of the nation.

3. The Constitutional Revolution and a False sense of Consensus.

One may view the ratcheting up and the race to the top effects as positive developments.⁷⁵ After all, they drive courts towards greater protections of human rights. However, they also hold obvious problems of legitimacy, since they do not follow a democratic process or a legal principle based locally, but originate from judicial precepts that may diverge from the local one, and influenced by outside influence. In addition, there is another danger in such use of foreign law. Judges who rely extensively on foreign law in interpreting rights, may find in it a false sense of consensus and agreement, which does not exist in their local community. Such judges may be reassured by the fact that their rulings are well accepted abroad, or by the fact that other nations seem to adopt similar interpretations, and disregard strong internal opposition to their rulings. This is aided often by sympathetic reaction from academia, cultural elites, and civil society organization, all of which are also players in the global arena, and find their legitimacy and “compensation” in that arena as well as in the local one.

In a small state, such as Israel, which has a very strong need for international acceptance and legitimacy because of its geopolitical situation, in which the legal and judicial community has strong international ties, in which judiciary has adopted an anti-formalist and activist jurisprudence, this danger is enhanced.

The danger of losing touch with the local community is exacerbated by the shaky grounds on which the Israeli Constitutional Revolution was founded. The Court is moving forward in great leaps adding constantly new rights to the set of constitutional protected rights, basing this move on two Basic Laws, which, as described earlier, provide a very limited textual support for such a move, and which were not meant to create a revolution. The comparative constitutional perspective functions both as a fuel to continue the constitutional revolution, but also as a sedative to the danger of losing legitimacy for it within Israeli society.

Qualification

⁷⁵ See Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN J. INT'L L. 241 (2008).

Two kinds of qualifications are in order. The first is that human rights concerns are not justified solely on democratic grounds. However, even if this is the case, the exact contours of the scope of human rights and the kind of compromises struck between them and other considerations are usually a matter of choice of each society, and reflective to the democratic process.

Secondly, one should distinguish between different uses of foreign law, specifically between uses to convert or distinguish, or what may be called vindication uses versus rebuttal uses. The Navot study has provided us with a fascinating piece of data in this regard, according to which, 70% of all citations of foreign law in the Israeli Supreme Court in the years of the study were positive citations rather than distinguishing citations. It seems therefore that for the argument on ratification and race to the top, the empirical tendency of uses of the citation fits quite nicely.

[which decision by Barak are cited. Daphne Barak-Erez – study – article. Most cited are security decisions. This also has to do with which decisions are translated and which are not.

Conclusion

Israel has many good reasons to use foreign law in its constitutional law. It has a long tradition of using foreign law, it has relied on foreign law to create an impressive judicially made set of constitutional rights, and its constitutional culture is such that it is receptive to the comparative perspective. The use of foreign law has therefore many advantages for Israeli constitutional law, and is not expected to go away. However, seen in a more general perspective of a constant move of ratcheting up the set of rights in Israel, without textual anchoring or strong public support, and as a way of participating in a similar global move in other constitutional courts, the use of foreign law may raise important concerns, and should be evaluated more skeptically.