Testing Standards of Evaluation and Methods of Inquiry in Hirschl's *Towards Juristocracy*: England's Human Rights Act of 1998

Ronald Kahn Department of Politics Oberlin College

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Ran Hirschl bemoans the example of American style-rights discourse and the United States as key example of Juristocracy, the transfer of an unprecedented amount of power from representative institutions to judiciaries, with a Constitution and Bill of Rights, and a national court with power of judicial review. He bemoans the assumption by too many normative scholars and some empiricists that judicially affirmed rights are a source for social change (p.1). Juristocracy is the international trend toward constitutional democracies, that is, nations with a written constitution, including a bill of rights, viewed as fundamental law, a supreme court, and judges who are removed from the direct pressures of partisan politics to enforce those rights. He juxtaposes nations with Juristocracy with those governed by parliamentary sovereignty. Hirschl describes Great Britain (along with New Zealand and Israel) as "last bastions of Western-style parliamentary sovereignty" which have embarked on a "comprehensive constitutional overhaul introducing principles of constitutional supremacy into their respective political systems" (p. 2).

With perception and rigor Hirschl uses New Zealand, Israel, Canada, and South Africa to test the power-diffusing and distributive effects of constitutionalization. He questions the assumptions of scholars, especially those whom he views as normative-prone, regarding the benevolent and progressive benefits of constitutionalism, which he views as untested and abstract (p. 3). Hirschl seeks to question the "democratic credentials of constitutionalism and judicial review;" he says he does not want to center his analysis on the debate over normative issues like "the counter-majoritarian" nature of Supreme Courts.

The bottom-line for Hirschl is what type of institutional system produces practical outcomes that are closest to what he calls social justice. He asks whether parliamentary sovereignty or constitutional democracy is more likely to produce social justice. At the core of the analysis is whether one should use redistribution of economic goods, or the presence of processes of fairness in procedures, as the standard of evaluation for whether Juristocracy has had an important transformative potential, compared to the power of political and economic elites to secure the policies and institutions they seek through the court power in a Juristocracy. Therefore, the key evaluative standard for Hirschl is "the nature of the substantive outcome (p. 3)." He asks whether constitutionalization in these nations reflects a "genuinely progressive revolution in a given polity" or simply a means through which preexisting sociopolitical struggles in that polity are carried out (p. 5)? He wants to explore the impact of the constitutionalization of rights and the fortification of judicial review on national high courts' interpretive attitudes toward progressive notions of distributive justice, while also considering the extrajudicial effects of the constitutionalization of rights and the establishment of judicial review. He wants to center on the political consequences of judicial empowerment through constitutionalization, with social justice as the primary standard of evaluation.

Hirschl finds that the major consequence of the constitutionalization of rights and establishment of judicial review is the transformative effect it has on political discourse and the way fundamental moral and political controversies are articulated, framed, and settled; they do not "advance progressive notions of distributive justice (p. 13)." However, this finding is to be expected, in these nations, the United States, or in any Juristocracy. The United States Supreme Court is not a major force for economic redistribution; it has been a major force for the settlement of moral and political controversies, such as race discrimination, reproductive rights for women, and sexual intimacy for homosexuals. Therefore, if the primary argument is that supreme courts in Juristocracies do not significantly alter capitalism and economic liberalism, this conclusion is to be expected for many reasons, including the public-private split in liberalism. Therefore, the standard of evaluation used by Hirschl for Juristocracy is a problem, if we find, having studied many liberal democracies, that national courts can not change the basic elements of liberalism and capitalism. He had to find this conclusion-given that no national court or expanding rights regime ever has dramatically changed the basic economic and substantive policy allocation of goods. Therefore, it is not surprising that all four nations that Hirschl studies develop a narrow conception of rights than social justice. It is not surprising that national courts center on Lockian individualism and the protection of private economic power and individual choice in personal relations from control by a collectivist state

Thus, Hirschl overstates what can be expected from Juristocracy, when he argues that it should have an independent positive effect of the socioeconomic status of historically disenfranchised groups. Hirschl's definition of "real" egalitarianism is economic gain and the increased power of collective will against economic and political elites, including substantive improvements in employment, income distribution, health, housing and education. He demonstrates that these key indicators of progressive distributive justice were not improved by Juristocracy, especially in this age of economic neo-liberalism. Rather, Juristocracy increases economic neo-liberalism, while allowing for more inter-personal rights, like privacy, which he views as less important and less transformative. Constitutionalization did improve negative liberties, all of which required the state to maintain "merely" procedural fairness and refrain from excessively interfering in the private sphere (pp. 14-15).

Judicial review also provided the necessary framework for the formulation of fundamentally political controversies in constitutional terms. It transferred to courts issues such as secular religious conflicts and the peace process in Israel and foundational nation-building processes like the future of Quebec and the Canadian Federation. Hirschl argues that the reformed constitutional framework "serves to encourage the transfer to the courts issues that ought, prima facie, to be resolved in the political sphere (15)." I simply don't know why such issues ought to be resolved in the political sphere. Hirschl assumes that politics is fairer and produces greater political and distributional justice? Is it that politics allows short-term unrest and unhappiness, while in the long run allows a nation to better deal with, in part by deflection, deep differences in society? Is it that by quieting political and moral conflict, supreme courts allow economic inequality to flourish?

Therefore, Hirschl does seem to take a position on the counter-majority question, with regard to courts. This book is not simply about elite power; it is about trusting politics, rather than courts, to be avenues of change. The risk to politicians is that supreme courts might become autonomous of their power. Yet Hirschl argues that in none of these nations has the reformed judiciary "proved to be a serious threat to the well-orchestrated judicial empowerment game (p.

15)." Those interests who seek a transition to Juristocracy are usually pleased since national constitutional courts rarely diverge from the interests of those who seek Juristocracy. Thus, Juristocracy is viewed a part of a longer term trend by hegemonic elites to transfer policy-making authority from the "vicissitudes of democratic politics." (p. 15)

As a neophyte to comparative constitutional law and institutions, I can't speak to whether Hirschl's facts and analysis are valid or not. His case studies seem very well supported by the evidence he presents. However, I would like to speak to what I consider are inherent normative or evaluative standards in this otherwise excellent work. What does he mean by "progressive constitutional change."? Is the assumption that a change from parliamentary sovereignty to constitutionalization will produce redistribution in economic terms? Why should this be expected? However, a change in fundamental rights, such as declaring the right to vote in the United States and getting rid of the poll tax, can have positive affects on lower economic classes, as can the application of state equal protection clauses on school financing. A more pertinent question for me is to ask whether constitutionalization produces a different role for courts in defining the individual rights of its citizens, and the power of minorities versus majorities in the political system.

Given Hirschl's argument, which is quite critical of the transformative potential of constitutional democracies, especially the United States, what is viewed as the model Juristocracy, I ask whether it might be more fruitful to compare Britain with the United States, using methods of analysis employed by scholars of political development, politics and history. Moreover, Hirschl critiques the notion of the importance of rights revolutions in the United States, and the place of the Supreme Court in such revolutions. He does so in part because most such studies are not comparative. He also argues that such study is not possible "because there is no alternative domestic model against which to measure the achievements of the U.S. Constitution." Hirschl is correct to argue that to only study the United States is to "produce idiosyncratic conclusions not readily transferable to other political and legal contexts. (p. 7)" Thus, he finds the study of constitutionalization, judicial review, and a written Bill of Rights, in Canada (1982), New Zealand (1990), Israel (1992), and South Africa (1990s), "provide [s] fertile terrain for investigating the political origins and consequences" of "the constitutionalization of rights and the fortification of judicial review (p. 9)." These nations can be compared because they are similar; they have changed judicially over the past two decades, while not having major regime changes, are deeply divided along political, ethnic, and economic lines, and depart from the Westminster model of parliamentary supremacy and English tradition of judicial restraint. All national courts have reacted with great enthusiasm to the constitutionalization of rights and fortification of judicial review by seeking to protect fundamental rights. Moreover, as Hirschl points out, all three polities possess a strong British common law tradition, and are established democracies. Hirschl asserts that formal institutional factors can be assessed while accounting for variation in legal and political outcomes.

I ask why the American case can't be systematically studied. I ask why he did not choose England as the primary case for study to be compared with the United States. This would be a test of whether scholars tend to overstate the transformative potential of Juristocracy. I ask whether one could learn more through the application of Hirschl's primary queries, but not his standard of evaluation, by systematically comparing Britain to the United States. Would it not be more fruitful to study the possibilities of change through Juristocracy by comparing the United States and Great Britain, in part because of the thickness of each nation's legal and political institutions. Such study would provide a test of Hirschl's claims that too many scholars are satisfied about the long term impact of American Juristocracy on political, social, and economic change. Such a comparison would be a better test of his central scholarly problematic, and findings, that Juristocracy, and the constitutionalization of politics that has resulted from it, allow political and economic elites to sustain their hegemonic power and limit the impact of "growing popular demands for political representation," from groups within the wider populace. Threatened elites use rights talk to sustain power; Juristocracy allows already influential elites to preserve their hegemony through the constitutionalization of rights (pp. 211-215.)

A start at testing Hirschl's constitutionalization thesis, with a set of standards of evaluation which is not based on an economic concept social justice, is attempted below. I explore what would be required to study the politics and substantive rights changes that have occurred through the incorporation of the European Convention of Human Rights into the law of England with the passage of The Human Rights Act of 1998. Once this is studied, a comparison can be made of substantive changes in rights from this incorporation in England, with substantive rights, and their change in the United States.

Britain and the United States as Exemplars of the Effects of Constitutionalization: The Incorporation of Britain's Human Rights Act of 1998

In November, 1998, Her Majesty=s Government passed the Human Rights Act. This Act incorporated the European Convention on Human Rights into the law of England. Now that the time for study of this document by lawyers and judges has been completed, we can evaluate whether incorporation will result in the creation of a new constitutional order with regard to individual rights in England. Here we simply explore some of the questions which must be considered in deciding whether this legislation is likely to maintain, significantly change, or create a new constitutional order in England, and whether Juristocracy in England provides greater rights for its citizens absolutely, and in comparison to the United States.¹

The Human Rights Act of 1998 incorporated into English law Articles 2 to 12 and 14, Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol of the European Convention on Human Rights, as read with Articles 16 and 18 of the European Convention of Human Rights. In doing so we can consider whether the presence of the concept of parliamentary sovereignty, and the adjacent institutions, such as Law Lords, will keep the Human Rights Act from constituting a different constitutional order in human rights for England. An informal listing of rights, and caveats surrounding these rights, from the European Convention on Human Rights, as formally incorporated into the Human Rights Act of 1998, include the following: procedural rights for prisoners and the accused; rights against torture and for the liberty and security of persons; rights to respect private and family life, home, and correspondence; rights to

¹ In this paper I limit my remarks to England and Wales, not what is commonly known as the United Kingdom, given its history of devolution in constitutional authority. Also, for the purposes of this paper, the term parliamentary sovereignty may be used interchangeably with the term parliamentary supremacy.

freedom of expression, peaceful assembly, thought, conscience, and religion; rights to form and join a labor union; the right to marry and form a family; the right to an education in conformity with one's religious and philosophical convictions; the right to free elections; and the right to enjoyment of the rights in this convention without discrimination on any ground, such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

At the core of the question as to whether the incorporation of the European Convention on Human Rights into English law constitutes the start of a new constitutional order is the role that the principle of parliamentary sovereignty plays in the constitutional regime and system of governance in England. Parliamentary sovereignty has many elements, the most significant of which are the following:

- 1. There is no higher source of law than an act of Parliament, and when two laws conflict, the last law is authoritative.
- 2. Parliament cannot pass a law that binds future parliaments.
- 3. Parliament cannot pass a rule of recognition that binds courts to interpret laws in ways that bind future actions by Parliament.

The concept of parliamentary sovereignty has wide ranging effects, especially when thought about in terms of how the institutions of government and notions of what constitutes a democratic process have developed under this concept. Parliamentary sovereignty is important also because England does not have a written constitution in which powers and limitations on government and individual rights are listed. Nor does it yet have a constitutional court with broad powers of judicial review which can invalidate laws passed by Parliament or actions of the executive. Britain=s constitution is not Athe Constitution@ as fundamental principles above politics. Rather England=s constitution is an amorphous set of principles written into legislation by Parliament, common law interpretations of law and government, and conventions or practices, such as crown prerogatives which allow and limit executive action, which also have been defined case by case by common law. Because England does not have Athe Constitution@ as fundamental, sacred, written law which is above ordinary legislation, there is no limit on the definition of what constitutes individual rights, other than the last piece of legislation on that right that was passed by majority vote in the House of Commons-- and approved by the House of Lords after debate and the Queen, as required by convention.

The Law Lords, members of the House of Lords so named, constitute the highest appellate court in England. They, like all judges, respect the concept of parliamentary sovereignty. The Law Lords accept a quite weak concept of their judicial power. When Lord Denning tried to expand the power of judicial review through interpretation of statutes, common law, and the application of general principles of natural law in the 1950's, he was roundly opposed by fellow Law Lords, lesser judges, and the House of Commons. All viewed Denning=s efforts as a violation of parliamentary sovereignty and overstepping the bounds of proper judicial conduct.

Moreover, Law Lords feel compelled to follow quite limited principles of interpretation when statutes, government actions, and fundamental rights, not clearly listed in law, are at issue. They see the authority of the party in power, through acts of Commons, to make law as almost without limit. Clearly, Law Lords, much less lower appellate judges, are not to replace the will of Commons with their will. For courts to invalidate the last expression in law, that is, to invalidate the will of Commons, is to violate the essence of what constitutes what Dicey called England=s self-correcting democracy. When you add to the impact of the concept of parliamentary sovereignty the fact that there is a quite limited socio-economic base from which barristers, judges, and Law Lords are selected, it is unlikely, but not impossible, that judges will lead the way to a new constitutional order through the incorporation of the European Convention on Human Rights into English law.²

An additional factor which augers against the Human Rights Act of 1998 starting a new constitutional order is the strong desire of any newly-elected government to not have its power to legislate limited. With Thatcherism, there was a growth in Crown (government) power and prerogatives, which were accepted by and not limited by common law, which resulted in the acceptance of a view of the increased inherent powers of government ministers, powers which do not need confirmation by acts of Commons. This means that governments in power are permitted wider powers to act without authorization by Commons. Common law has supported those powers to act without specific delegations of power and authority from Commons. John Redwood, a conservative scholar, like Bridget Hadfield, Eric Barendt, and other liberal scholars, agree that the power of the House of Commons is marginalized, and details actions by the Blair government and the Labour Party to ensure that Commons is not an independent venue for holding the government accountable for its actions.³ The growth of the welfare state and the shift in the allocation of goods from government to the private market also limit the expected role of

³ John Redwood. *The Death of Britain? The UK's Constitutional Crisis*. London: MacMillan Press, 1999: 84-100.

² See Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts,* in Comparative Perspective, University of Chicago Press (1998): 14-23, for the argument that it is Athe process of legal mobilization -- the process [and resources for rights litigation] by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights@ and not the presence of a Bill of Rights or supportive judges that explains the increase in human rights. Epp notes that England is weak in all three regards. Epp writes, AThe growth of judicial protection for individual rights is indeed a widespread, but not universal, development. It has been greatest [between 1960 and 1990] in the United States and Canada, the weakest in India, and, it is present but not vibrant in Britain.@ He finds Britain inhospitable to a rights revolution on many scores including a weak support structure for legal mobilization because of a conservative, homogenous cohort from which barristers, judges, and Law Lords are chosen. See Christopher McCrudden, and Gerald Chambers, eds. Individual Rights and the Law in Britain. Oxford: Clarendon Press, 1994, for a superb analysis by English scholars and practitioners which is highly critical of the diversity and variety of techniques and doctrines that are available in England for the advancement of human rights. See David Robertson, Judicial Discretion in the House of Lords, Oxford: Oxford University Press, 1998, and Alan Paterson, The Lord Lords, Toronto: University of Toronto Press, 1998, for the most sophisticated analyses of the workings of the Law Lords in the House of Commons as the highest appellate court in England.

the House of Commons under the concept of Parliamentary sovereignty to act as an agency of institutional self-correction and citizen accountability, on all issues, including questions of individual rights.

AWe the People@ is defined under Parliamentary sovereignty as equal to the last will of Commons by majority vote. Since the party in power controls Commons and works to reduce opposition from backbenchers, the cards are stacked against Commons becoming an independent venue for significant change in England=s constitutional order with regard to human rights. It is even more questionable that the rights in the European Convention on Human Rights will be viewed as fundamental law by Commons, that is, fundamental law above day to day legislation or the will of a passionate majority on questions of human rights. Moreover, the rejection by Law Lords and lesser judges of the concept of natural law, as fundamental rights above politics {all of which can=t be listed), also suggests a constitutional change of significance on human rights is not to be anticipated.

Ian Loveland, Bridget Hatfield, PP Craig and other scholars argue that courts have not adopted rules of recognition which allow the definition of fundamental rights to inform their interpretation of statutes, common law, and questions of human rights. It is even less likely to occur with regard to the incorporation of the European Convention of Human Rights into English law, given that courts would have to begin to accept a notion of fundamental individual rights, which are above ordinary law, a step which would go even further in undermining the essential elements of the concept of Parliamentary sovereignty.

Another set of factors which will inform the question of whether the incorporation of the passage of the Human Rights Act of 1998 will produce a major change in England=s constitutional order are the many caveats in the Convention as incorporated which list reasons why a government might not be in violation of listed human rights. One can see in the actions of the Commission and Court, explored briefly below, that extreme deference has been given to the institutions, laws, customs, and diverse religious and ethnic populations of the signatory nations to the Convention. An example of such a caveat is that with regard to the right to free expression:

Conditions and restrictions on the right of free expression may be exercised for reasons of national security, territorial integrity, public safety, prevention of disorder or crime, protection of health and morals, protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The deference to nations by the European Commission and Court of Human Rights can be seen in the fact that before a citizen can avail himself of the Court as a venue for a complaint of the denial of a right under the Convention, his nation must have agreed to the use of the Court by its citizens. Citizens must have tried all domestic legal remedies before seeking redress before the European Court on Human Rights. This means that at least two years, but usually far more years elapse before a citizen can secure a decision from the Court. The costs of such litigation are very high indeed. Until quite recently there was a separate European Commission on Human Rights and European Court of Human Rights. The Commission threw out what it considered were frivolous case and tried to settle as many non-frivolous cases as possible through informal mediation between citizen and nation.

One can see the effect of the denial of frivolous rights claims and deference to signatory nations by the European Commission and the Court on Human Rights by the number of appeals which it has accepted. By 1990, only 700 of 17,000 applications for remedy were entertained by the European Commission on Human Rights. Since two-thirds of the ministers on the European Commission on Human Rights had to vote to send a case to the European Court of Human Rights and the impugned nation had the right to vote on the motion, many cases simply died prior to action by the Court or the Commission. The Commission appeared before the Court, not the aggrieved party. Moreover, once the Court made a decision, it was not self-enforcing. Before incorporation England would have to amend its laws by legislation if it were to accept the verdict of the Court that it had violated the European Convention on Human Rights. As explored below, most scholars believe that unless there is a major change in the constitutional order as defined by the principle of parliamentary sovereignty, that formal incorporation of the Convention will not start

change the requirement that Commons must change specific laws if changes in individual rights as decided by the European Court of Human Rights and English courts are to become part of the rights of Englishmen.⁴

Signatory states can opt out of Convention principles for periods of time or not give a high level of presumptive entitlement to a given right. The many escape clauses for nations for reasons of national security, territorial integrity, public safety and protection from crime, is an invitation to England to continue to trust Commons and not view the Convention as a code above politics. Rights entitlements are not presumed, or as absolutist, in England, as they are in the United States. Moreover, case by case decisions by Law Lords, or judges in lesser courts, have less of an impact in defining rights than a constitutional court that is viewed as the final authority to define rights. The European Court=s deference to the will and custom of signatory states means it can decide there is no clear presumption of a right in a nation=s law, and thus choose to give deference to the nation=s lack of presumption in a given case. Moreover, common law can muddy the decision of whether a presumption of a right exists, even with formal incorporation of the Convention. A nation can plead that social, economic, and political conditions argue against the protection of a right. The European Court, and nations, will use different levels of scrutiny depending on issues in a case and the rights involved. Is it possible that the incorporation of the Convention into British law constitutes a revolution in the British constitution if the Convention does not require a nation to clearly place a specific right within positive law?

One can also question whether England meant incorporation to be a major change in the constitutional order. England=s incorporation of the Convention came at a relatively late date, 1998, compared to other EU members. Moreover, the conditions of and view of incorporation of the Convention were far less thorough and clear cut than the incorporation of the economic aspects of European Union in 1972. The deference of parliament and the government to EU decisions and decision-making were more clearly stated than their deference to the Convention on Human Rights, although the incorporation will still be subject to the tradition of Parliamentary sovereignty. The terms of incorporation and the continuing need to pass ordinary legislation if England is to accept a European Court on Human Rights decision against it, suggest

⁴ See Ian Loveland, Constitutional Law, A Critical Interpretation, Second Edition, London: Butterworths Press, 2000: 548, for an excellent discussion of the European Commission on Human Rights

that the rate of constitutional change will be slow. England continues to view the Convention as a statement of international law, requiring Commons action for the operational incorporation of a right.⁵ Any other view would undercut the doctrine of parliamentary sovereignty. If law is still primarily to be based on an election win of the party in power and not enrolled in law for all time as a fundamental right, it is difficult to make the argument that the incorporation of the Convention in and of itself constitutes a change in the constitutional order. Moreover, there continues to be opposition to the notion not only to defining AThe Constitution,@ but also of allowing judges to change the constitution or requiring a supra-majority voting in Commons or by a more complex and difficult process of amendment to change the constitution. These factors suggest that only very incremental changes in rights will be possible even with incorporation of the Convention, and any changes will easily be reversible.

⁵ Throughout the Human Rights Act of 1998, the sovereignty of Parliament is clearly stated. For example, on the interpretation of legislation: ASo far as it is possible to do so, primary legislation and subordinated legislation must be read and given effect in a way which is compatible with the Convention rights;@ however, the above stipulation, Adoes not effect the validity, continuing operation or enforcement of any incompatible primary legislation... or incompatible subordinated legislation if (disregarding any possibility of revocation) primary legislation prevents removal of incompatibility (p.2).@

The decisions of courts do not automatically replace rights as stated in legislation: AWhen a court [House of Lords, Judicial Committee of Privy Council, Courts-Martial Appeal Court, the High Court, or Court of Appeal] makes a declaration of incompatibility between primary legislation or secondary legislation and a Convention right, the declaration under this section does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made (p. 4).@

Although the Act states AIt is unlawful for a public authority to act in a way which is incompatible with a Convention right,@ the term public authority Adoes not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament (p.4)@. Moreover, AAn Act by a public authority in violation of the provisions of the Convention, or the failure to act, Adoes not include a failure to introduce in, or lay before, Parliament a proposal for legislation; or make any primary legislation or remedial order (p. 4).@ This implies the need for legislation if there is an incompatibility between a court finding and legislation. Also, it is not a violation of the Convention if Parliament chooses not to act. Moreover, ANothing in this Act creates a criminal offense (p. 5).@

In the Human Rights Act of 1998, there are clearly worked out procedures for Ministers to seek legislation to change laws when they are in contravention of a ruling of the European Court of Human Rights. Without a specific change in law by Commons, the laws found to be in violation of the Convention remain in effect (pp. 5-8).

Finally, the Act states, AA person=s reliance on a Convention right does not restrict any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom (p. 8).@ Thus, if there is a difference in what constitutes a denial of religious freedom or hateful speech between the Convention and English law, the definition of such rights already in place remain-- until Parliament chooses to change them.

This brief paper cannot explore case by case the impact on individual rights of the Convention before and after its incorporation in law by Commons. However, in recent cases, the European Court has refused to find that a law limiting consensual sado-masochist acts was a violation of privacy rights protected in the Convention.

The Court said that England could have such laws in order to protect the morality of its people. The Court has made quite limited decisions with regard to whether England=s Official Secrets Act, and its administration, is in violation of freedom of speech and press rights in the Convention. The Court refused to consider whether laws against blasphemy, speaking against the Christian religion, were in violation of Article 10 freedom of expression. Also, the Court has refused to take up cases involving laws which set very stringent limits on offensive, hateful speech visited against races, religions, and ethnic groups. Speech that adds to public debate is permitted; hateful speech may be viewed by authorities as not adding to public debate and thus subject to criminal penalty. In the short period of time since incorporation there has yet to be deluge of new cases and a demand for bringing individual rights in England to the level of definition and protection envisioned by the Convention. Nor has there been a movement to accept a notion of fundamental rights, Athe Constitution,@ above politics and the will of Commons, or for more absolutist AFirst Amendment@ principles. But this does not mean that the incorporation could not be the basis for a change in England=s constitutional order in the future.

Various scholars have indicated reasons why a major change in the constitutional order will not occur with incorporation, primarily because there needs to be a change in the way the concept of Parliamentary sovereignty is viewed, and because there are numerous reasons with judges and political leaders will not easily change their view of Parliamentary sovereignty.⁶

Eric Barendt argues that AOne striking consequence of the absence of a codified constitution in the United Kingdom is that the legislative powers of Parliament have never been set out in any definitive form.@He concludes,

Admittedly, under the Human Rights Act 1998, the courts may now rule that a legislative provision is incompatible with a right protected by the European Human Rights Convention. But the principle of parliamentary supremacy still prevents them holding that provision invalid. It is the courts which have accepted

⁶There are numerous books arguing for incorporation of the Convention into English law. Some of the most important books on this subject, which are not quoted in this paper or footnoted elsewhere, include: Ronald Dworkin, *A Bill of Rights for Britain*. London: Chatto & Windus, 1990; Philip Alston, ed., *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*. Oxford University Press, 1999 ; Richard Gordon and Richard Wilmot-Smith, *Human Rights in the United Kingdom*, Oxford University Press, 1996; Ian Loveland, Ian, "Incorporating the European Convention on Rights Into UK Law." *Parliamentary Affairs* 52, no. 1 (January 1999): 113-27, and Basil S. Markesinis, ed. *The Impact of the Human Rights on English Law*, Oxford University Press, 1998.

and formulated this principle; they determine its scope and its relationship with European Community law. Moreover, it is for the courts to determine the question whether Parliament is able to enact legislation which limits the freedom of later Parliaments. Perhaps, in an extreme case, a bold court might now refuse to apply evil legislation.

Barendt notes that now parliamentary supremacy means not the supremacy of the House of Commons, but rather that effective political power is now exercised by leaders of the political party in power. He continues,

The major consequence of the doctrine of Parliamentary supremacy is that the government, and the political party from which it is drawn, can enact its manifesto without constitutional constraints. The courts may not invalidate legislation for infringing the separation of powers, nor, even after the passage of the Human Rights Act 1998, for violation of fundamental rights.

Barendt concludes by emphasizing that the new Labour government is Awedded to the principle of Parliamentary sovereignty as was its predecessors@ because the doctrine is Anaturally popular with politicians, since it allows them more or less unlimited power when they are in government.@⁷

Bridget Hadfield argues that little reliance can be placed upon Parliament as a forum for effectively controlling the exercise of the royal prerogative powers. She argues, AThe courts, in the last quarter of the twentieth century, through the application of judicial review principles, now largely comparable to those employed with regard to statutory powers... meant the defeat of the third claimant, the Crown.@ The degree to which the Court exercises judicial review is still not substantial. This requires Hadfield to call for reform of parliamentary reform of its scrutiny of executive powers. She argues that domestic courts= traditional caution with regard to review of executive power Amay be broken down further by pressures from both the European Court of Justice and the European Court of Human Rights.@ However, she feels A the corollary of the obligation of the Courts not to encroach on the powers of Parliament is the responsibility of Parliament to put its own house in order. There should be no dead ground in the constitution.@⁸

P.P. Craig feels that far more thorough changes are needed in English political thought before there will be a major change in the constitutional order in general, and with specific regard to individual rights. P.P. Craig provides a very subtle analysis of the development of the concept of parliamentary sovereignty from its articulation by A.V. Dicey in the late nineteenth and early twentieth century to its modern day rendition. He documents the relationship between parliamentary sovereignty and concepts of democracy and pluralism in England, emphasizing the

⁷ Eric Barendt, *An Introduction to Constitutional Law*, Oxford University Press, 1998: 86-105. See also Ian Loveland, "Redefining Parliamentary Sovereignty? A New Perspective on the Search for the Meaning of Law." *Parliamentary Affairs* 46, no. 3 (July 1993): 319-32.

⁸ Bridget Hadfield, AJudicial Review and the Prerogative Powers of the Crown,@ in Maurice Sunken and Sebastian Payne, *The Nature of the Crown: A Legal and Political Analysis*. London: Oxford University Press, 1996: 197-232, at 205-231.

impact of the welfare state on reducing the power of Commons and increasing the ability of the party in power to do as it wants, a situation which grew under Thatcherism and has not been changed through constitutional reform under the present Labour government. Craig explains why Dicey=s view that democracy under parliamentary sovereignty would be self-correcting simply is not valid. Craig notes that Apolitical and social developments had undermined many of the premises upon which Dicey had built his constitutional doctrine@ and this Awas never truly appreciated by the immediate successors to Dicey in the field of constitutional scholarship.@⁹ The failure of scholars and political scientists to view the problem of parliamentary sovereignty in light of background liberal and republican political theories is of great concern to Craig.

With regard to the impact of the European Community on the legal sovereignty of England, Craig writes, "The idea of unlimited parliamentary power cannot be regarded, on Dicey=s species of reasoning, as immutable. It is not a static, unchangeable concept but one which is dynamic and capable of transformation.@ Craig argues that Atransformation@ in the concept of parliamentary sovereignty Acould be effected by some other institution@ asserting Acontrol of the subject-matter or form of parliamentary legislation@ or through Aa reassessment of the normative foundations on which Dicey constructed his own analysis.@ Craig writes,

The realization that these foundations were flawed, even at the time when Dicey himself wrote, and that they have been further undermined since then, may well cause some other institution, such as the courts, to consider whether they should be exercising control over parliamentary power.

Craig sees courts as changing their rules of recognition and Astat[ing] expressly that Parliament, while still within the EC, must abide by EC law and accord priority to such law over any UK statute inconsistent therewith.@ Craig writes,

This would be a step towards modifying the rule of recognition [usually found under Parliamentary sovereignty], the effectiveness of which would depend, *inter alia*, upon Parliament=s response.

However, I note many scholars are quite skeptical that judges will read UK statutes in ways that would resolve cases in favor of the EU law. Craig argues

The longer we remain within the Community the more likely that the courts will adopt this rule of construction, which serves to preserve the formal veneer of Diceyan orthodoxy, while undermining its substance.¹⁰

⁹ P.P. Craig. *Public Law and Democracy in the United Kingdom and the United States of America*. Oxford: Clarendon Press, 1990: 54.

¹⁰ The above quotations are from P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*. Oxford: Clarendon Press, 1990: 225-227. See also Ian Loveland, "Parliamentary Sovereignty and the European Community." *Parliamentary Affairs* 49, no. 3 (July 1996): 517-35.

The most significant limit on the EC and the incorporation of the European Convention on Human Rights into English law is that England must first accept, and constitutional lawyers must replace constitutional constructs that accept the view that AThe unitary conception of the state represented by the Diceyan thesis is inaccurate in descriptive terms, and its prescriptive foundations are questionable.@ Craig continues,

Shortcuts are, however, not possible. One must be prepared to reveal the conception of democracy which underlies specific proposals, and be ready to defend the broader political theory on which it is but a part. Only than can one talk sensibly of the content of particular constitutional rights, and only then can terms such as legitimacy be given meaningful content.¹¹

Thus, Craig is arguing, with justification, that fundamental human rights, whether those in the European Convention of Human Rights or in the American Bill of Rights cannot simply be transposed into the English political and legal culture, if there is not an accepted institutional and political theory basis for them.¹²

The continuation of the principle of parliamentary sovereignty, with the concomitant governing institutions and principles, suggests that a major constitutional moment as a source of a change in England=s constitutional order, such as Bruce Ackerman=s analysis of the Supreme Court=s acceptance of the New Deal=s administrative state, is less of a possibility in England. All parties continue to believe that it is undemocratic to place power in supra-legislative majorities, judges, including the Law-Lords, and to even give up the sovereignty of Commons to respond to the will of the people. Political parties, because they will get into power some day, did not want to undercut the moral thrust of the position that they can do what they want, once in power, in order to fulfill what they view as the will of the people.

After incorporation, given the limited power of judicial review, and the continued support of the principle of parliamentary sovereignty and the other factors about English governance, it is questionable whether the incorporation of the Convention will constitute a constitutional revolution. Most importantly, the lack of an idea that there should be a code of moral (and procedural) principles above politics and Commons action, informs how the Convention in law will be viewed.

Moreover, this analysis suggests the possibility that in the future, social and economic upheaval, could produce a significant loss of rights= protections, simply by passage of laws by majority vote in Commons. We have seen some of this in this Post 911 age. The fact that Labour, Conservative, and Liberal-Democratic parties continue to accept the principle of parliamentary sovereignty, for they may be in power next, suggests that formal incorporation of the Convention will produce limited, incremental, and reversible definitions of individual rights.

In this paper, I am not arguing that constitutional revolutions are not possible, or that given extreme fissures in social, economic, and political conditions that the incorporation of the European Convention on Human Rights into English law might be transposed into a revolution

11 Ibid.

¹² P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America*. Oxford: Clarendon Press, 1990: 243.

in rights, constitutional norms, and visions of court and political institution powers.¹³ What is clear from this brief review of issues, is that any effort to radically change the definition of individual rights, and the place of legislature, courts, and government in that process of rights definition, will be stiffly countered by long-held notions of institutional power, as suggested by the principles of Parliamentary sovereignty, and by the expected use of powers by institutions in place. When the needed change involves the acceptance of the notion of a constitution as fundamental law above politics rather than from day to day politics, as is the case now in England, the chances of a significant change in individual rights are even more tenuous.

One can say with confidence, that the incorporation of the European Convention on Human Rights into English law in 1998, and the possible, expected incremental change through common law and Common=s passing specific rights legislation in response to specific European Court of Human Rights cases, means that England has accepted the general principles of the Convention as a goal, the specific attainment of which is remains for deliberation, review, and consideration within the governing and legal institutions, subject to the concept of Parliamentary sovereignty. Permitting its citizens to use the Court to appeal their cases from English courts to the European Court on Human Rights, means that a new public standard of possible individual rights has been created, through which the state of individual rights in England can be evaluated, but only in light of the caveats listed in the Convention and so incorporated into English law. The Convention will be a basis through which rights advocacy groups can gain momentum in their efforts to increase the protection of rights for individuals and groups not adequately protected by the laws passed by Commons. However, for a significant change in human rights in England to occur there will have to be a radical rethinking of the principle of Parliamentary sovereignty, what constitutes present-day democracy, especially since the power of the Crown, the party in power and the bureaucracy it controls, has grown relative to the power of Commons in the Thatcher and post-Thatcher years.

Questions for Future Consideration

In assessing whether the passage of the Human Rights Act of 1998 constitutes the creation of a new constitutional order for England, the following questions should be considered:

- 1. Does the incorporation of the 1998 Act equal a revolution and major regime change as to human rights?
- 2. Do the terms creation, maintenance, destruction, and revolution of constitutional orders offer the most useful terms to study the impact of this Act on English society? Would transmogrification of constitutional order be a better term to use to describe the impact of the passage of this law?
- 3. Should the establishment of the European Union and England=s entry into the E.U. be viewed as a constitutional revolution, but not its acceptance of the

¹³Perhaps, in addition to the critique by numerous scholars that change is usually made by several, or many, lesser constitutional moments, one of the problems with Bruce Ackerman=s notion of constitutional moments is that the concept is backward-looking; it is not predictive.

European Convention of Human Rights and the role of the European Court of Human Rights as an appeal venue for its citizens, given the more equivocal language in the Convention and in the law of incorporation?

- 4. Can a constitutional revolution only occur if the notion of Parliamentary sovereignty itself were changed, so Parliaments today can bind future parliaments by requiring supra-majorities to change the definition of rights?
- 5. Does this listing of rights in law become a statement of rights at time x, which can be changed by the same bodies that made them, or are they to be viewed as fundamental law limiting ordinary legislation by Commons, as formally approved by the House of Lords and Queen?
- 6. Will such a listing of rights lead to the development of a concept of fundamental rights above and prior to ordinary legislation, and an accompanying increase in the power of the Law Lords, the highest legal appellate power in England, and lesser courts, to expand a weak power of judicial review?
- 7. Would a change in human rights only occur that could be considered revolutionary if England developed the concept of fundamental, written rights that are above and limit ordinary legislation and politics?
- 8. Can the formal Aincorporation@ of rights in ordinary law revolutionize a constitutional order, or must the idea of unchangeable fundamental rights as a conceptualization within the political thought and culture of a nation be secured?
- 9. What impact does the refusal of Law Lords, the highest appellate tribunal in England, and judges in lesser appellate courts, to invalidate legislation clearly passed by Commons, and approved by Lords and the Queen, have on the possibility of a constitutional revolution, or even significant constitutional change through the passage of the Human Rights Act of 1998?
- 10. Does the relatively weak power of the Law Lords, and courts in general in defining constitutional law, as opposed to common law, mean that the creation of a new constitutional order is simply not possible?
- 11. Can common law principles, and their application, by Lords and judges increase the fundamental nature of the rights incorporated in the 1998 Human Rights Act?
- 12. Does the fact that the economic aspects of the European Union were incorporated in a more thorough way than the European Convention on Human Rights, change the legal, social, and political effects of those rights, and their fundamentality?
- 13. Will opposition to the replacement of the Pound by the Euro and to full economic incorporation with the E.U. have negative spillover effects to the acceptance of the fundamental human rights in the European Convention on Human Rights?

- 14. Given that there are so many causative/limiting agents, which interact and are related to each other, which limit the establishment of fundamental rights, how do you determine which agents are significant and need change and which are peripheral to creating a constitutional revolution? Can comparative analysis work? With what nation, the United States? Canada?
- 15. Does the formal incorporation of the European Convention on Human Rights in English law so establish a set of fundamental rights standards that it can be called a revolution because there is a new standard of evaluation through which citizens, rights advocacy groups, and political leaders can seek important changes in human rights?
- 16. At what point can we say that the European Convention of Human Rights is actually incorporated into the Constitution, by the Act of 1998, or by the case by case determination of what these rights mean by Courts? By the rewriting of English law in line with the cases and pronouncements of the European Court of Human Rights? Can a common law of incorporation truly incorporate rights, or must action by Commons be required?
- 17. What constitutes change in a constitutional order?-- a change in law, a change in rights as applied by courts, a change in the definition of what constitutes a fundamental right that ordinary legislation can=t change?
- 18. When, and by what criteria could it be said that the Convention on Human Rights is truly incorporated into law and the lives of English citizens.?
- 19. Does the difficulty, and long time it takes for citizens to seek justice before the European Court of Human Rights, mean that no creation of a new constitutional order is possible in England?
- 20. Does the high level of deference the Convention and the Court gives to the laws, procedures, customs, and needs of government mean that the 1998 Human Rights Act can never be considered a major shift or a revolution in England=s constitutional order?
- 21. Does Bruce Ackerman=s theory of constitutional moments help or hinder our analysis of evaluating whether the passage of the Human Rights of 1998 equals a major change in England=s constitutional order? Does comparison with human rights law, process, and change in the United States help in this evaluation? In what ways?
- 22. Without the concept of AWe the People@ above ordinary law in England can Ackerman=s model help in this analysis?
- 23. How does a nation, and major parties when they come into power, so long

committed to Parliamentary supremacy, so radically change its basic notion of AWe the People@?

- 24. Does the passage of the Human Rights Act mean that there will be a change in rights that not are specifically listed, such as the right of bodily integrity, abortion choice, or homosexual rights?
- 25. What does the right of education mean? Does it mean a basic education will be provided all, or simply that government cannot deny educational choice, in religious and philosophical terms, by parents?

Finally, given the above questions, and many more which could be listed, whether the incorporation of the European Convention of Human Rights into law and subsequent developments resulting from incorporation constitute a major change in the England=s constitutional order, can only be successfully studied through the cross-fertilization of ideas among scholars from a wide range of disciplines. Political scientists, who employ quite different paradigms and methods of inquiry in their research, social scientists from other disciplines, and legal scholars who are expert on constitutional law, history, theory, and comparative law must work together in such an effort.

Conclusion

Once one has studied the above questions, and applied similar queries as to the political conditions under which rights change in the United States, we can begin to see the affects of constitutionalization on individual rights and social justice. A study of the British and American cases using tools to study political development would provide a better comparison of the effects of constitutionalization. Why would we not expect the courts of Canada, Israel, New Zealand, and South Africa to take on legal and political forms similar to those in the United States? Such a study of the British and American cases might suggest that change is easier in these nations than in England, and why this is so.

If we look at the British case we find that change is slow. Parliamentary sovereignty as a concept with its accompanying institutions may be an important reason for this. So we can ask why did a similar tradition of Parliamentary sovereignty in Canada, Israel, New Zealand, and South Africa not stifle legal change to the same degree as in England.

At the core of every piece of scholarship is a standard of evaluation, through which the "so what?" question is identified. This communicates why a given finding or set of findings is important to the scholar and academy. For Hirschl "so what" questions are defined is such a way that will lead us to question the transformative possibilities of Juristocracy, especially with regard to his expectation that constitutionalization might actually produce social justice with regard to economic distributions. Hirschl does a superb job in making a Hollow Hope-like case, that supreme courts follow politics, rather than are constructive of politics. However, I wonder whether Canada, Israel, New Zealand, and South Africa are the best cases for such an argument. Would it not be more precise and fruitful to make the comparison of the impact of the presence of Juristocracy by comparing the United States and Great Britain, especially in this period of change in England since the passage of the Human Rights Act of 1998 and events since 911.

In doing so, rather than using a Hollow Hope-like methodology, would it not be wise to bring a wider range of conceptual and methodological tools to the analysis. This would include the concepts that supreme courts define rights by mutually constructing them through a bidirectional process in which legal doctrine, stare decisis, and internal court norms are as important as the social, political, and economic world outside the Court.¹⁴ Hirschl's emphasis on external factors in explaining the impact of Juristocracy in the nations that he studies, does not allow for bi-directionality as sources of explanation and his reliance on social justice as the standard for evaluating the effects of Juristocracy, together lead to findings which are preordained by his legal realist instincts.

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¹⁴ See Ronald Kahn and Ken Kersch, *The Supreme Court and American Political Development* (Lawrence, KS: University Press of Kansas, late 2005 or early 2006), for analyses of this mutual construction process.