The birth of Canada's Charter (1982): A comparative Westminster perspective

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Amongst the most significant political and social phenomena of recent times should be placed both a normative shift towards greater concern for individual human rights (Gearty, 2006) and an institutional power shift towards the judicial branch (Tate & Vallinder, 1995). Symbolic of and a fundamental motor behind both of these phenomena has been the conspicuous spread of Bills of Rights around the world. At least within established democracies, two crucial questions present themselves in relation to the origins of these instruments. Firstly, at a social level, which groups and interests have supported and which opposed such initiatives? Secondly, at an elite political level, why should incumbent elites champion reforms which, by transferring policy-making rights to the judiciary, significantly reduce their own power and discretion? This paper examines these two questions through an analysis of the origins of two of the most important Bill of Rights instruments in the "Westminster" world: the Canadian *Charter of Rights and Freedoms (CORAF)* (1982) and the UK's *Human Rights Act (HRA)* (1998).

Although the literature in this area remains dominated by work examining both the nature and ethical validity of Bill of Rights case law, the questions addressed in this paper have also received some consideration. In particular, Ran Hirschl's Hegemonic Preservation Thesis (HPT) argues that Bills of Rights in established democracies have been forwarded by political elites linked to and supported by neoliberal and other conservative interests groups and also the judicial and legal elite. Such actors, he argues, transfer decision-making to the judiciary via a Bill of Rights when their hegemonic power comes under fundamental threat from within the majoritarian political arena (Hirschl, 2000a-b; 2004). Whilst largely avoiding the puzzle of the elite political origins of Bill of Rights genesis, the Knowledge Class Thesis (KCT) has challenged the HPT's principal socio-political claims. In particular, the KCT has argued that such initiatives have been championed not by neoliberals but rather by "postmaterialist" forces of the "cultural left", namely, social equality actors, civil libertarians and supporters of national authority ("unifiers") (Morton & Knopff, 2000; Bork, 2002).

Through a close examination the Canadian and UK cases, this paper finds much commonality in the social origins of both *CORAF* (1982) and the *HRA* (1998). Moreover, these findings broadly validate the claims of the KCT whilst casting doubt on the HPT's perspective. In particular, although the roles of both the "unifiers" and the judicial and legal did differ, in each case a broadly "cultural left" constituency championed change. In contrast, neoliberal interests exhibited either indifference or outright hostility to the proposals. Although the principal socio-political claims of

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the HPT must be rejected for lacking empirical support, the theory is more enlightening in its analysis of the elite political realm. In particular, the theory is correct to stress that support from elite politicians is invariably a requirement for Bill of Rights genesis, that such actors' attitude to reform will be determined by a rather different set of criteria to the social actors they represent and, therefore, that a specific elite rationale for Bill of Rights genesis is generally required if reform is to take place. Despite this, neither the Canadian nor the UK fits fully with the specific rationale that the HPT proposes. In fact, two commonalities in the elite triggers behind *CORAF* and *HRA* are that, in each case, the incumbent actors who championed change did so from a position of renewed strength within national majoritarian institutions and that, secondly, the initiative they proposed enjoyed a large degree of popular support. Beyond these commonalities, I argue that these two instruments emerged as a result of the opening of two rather different "policy windows" at the elite political level. In the case of Canada (which follows the HPT's logic to the greatest extent), *CORAF* depended on this new resurgent elite seeing it as a mechanism for maintaining national unity in the face of powerful centrifugal threats in the form of Quebecois nationalism. In contrast, elite political support for what became *HRA* in the UK developed in response to a rather different "aversive" reaction to prior negative political experiences under the allegedly authoritarian and illiberal government of Margaret Thatcher.

This paper is structured into four sections. Section one provides some further theoretical consideration of both the HPT and KCT. Section two then examines evidence relating to the social origins of *CORAF* and *HRA* in Canada and the UK, whilst section three directs attention to the elite political vectors behind Bill of Rights genesis in these two cases. Finally, section four offers conclusions.

Section One: HPT and KCT perspectives on reform:

Hegemonic Preservation Thesis (HPT) (Hirschl, 2000a-b; 2004)

The theoretical claims of the HPT build out of a study conducted by Hirschl which examined Bill of Rights genesis in two "Westminster" democracies – Canada and New Zealand – and two other countries – Israel and South Africa. According to the HPT, the "primary catalyst and driving force behind [Bill of Rights] constitutionalization" (Hirschl, 2004, p. 49) derives from the efforts of politicians representing cultural and economic elites who find their interest under threat within majoritarian political institutions by those supporting the claims of "peripheral minority groups". Such elite actors see a Bill of Rights as a mechanism for conserving their hegemony by moving key controversies from the ordinary political realm to the judicial branch, which, they believe, can be relied upon to rule in accordance with "hegemonic ideological and cultural propensities" (Hirschl, 2000b: 138). At a social level, support from both neoliberal economic actors and from the judicial elite is also both crucial and generally forthcoming. Neoliberal groups see the constitutionalization of rights "as a means to promote economic deregulation and to fight what its members often understand to be the harmful "large government" policies of the encroaching state" (Hirschl, 2000b: 104-5). Meanwhile, the judicial elite will see a Bill of Rights as a mechanism for enhancing their "symbolic power" (Hirschl, 2000b: 105) and, with regard to the higher judiciary, their "political influence and international reputation" (Hirschl, 2004: 12). Finally, the logic of the HPT implies that those "peripheral minority groups" whose growing influence the hegemonic actors seek to block will constitute the principal social actors opposed to the specific Bill of Rights project under discussion. Hirschl highlights in particular

advocates of "environmentalism, disarmament, multiculturalism, non-mainstream sexual preferences, regional and religious separatism" (Hirschl, 2000a, p. 433).

In developing this understanding of Bill of Rights genesis, the HPT builds upon a rich seam of scholarship developed by left-wing Marxist or Marxist-inspired scholars in both Canada and the UK. Similarly to the HPT, this scholarship has also argued that modern Bills of Rights have principally been framed to protect neoliberal private property interests (Mandel, 1998, p. 252), that interest in Bill of Rights enactments emerged as a result of growing threats to such interests within the democratic arena (Mandel, 1998, p. 252) and that, in exercising their powers of interpretation, the judiciary will protect "conventional, established, and settled interests" including, most notably, "the protection of private property" (Griffith, 1977, pp. 213-4).

Knowledge Class Thesis (KCT) (Morton & Knopff, 2000; Bork, 2002)

Also developing in large part from analysis of a "Westminster" case – that of Canada – the KCT forwards a very different understanding of the socio-political origins of Bills of Rights in advanced industrialized democracies. Instead of seeing neoliberal and conservative elites as behind such projects, it argues that their social champions have been interests of the "cultural left" (Bork, 2000, p. 9) or "knowledge class" (*Ibid*: 3). Moreover, in contrast to the HPT's understanding of Bills of Rights as conservative mechanisms for entrenching existing power relations, the KCT argues that "cultural left" groups push for a Bill of Rights in order to use it in their radical "cultural war" (*Ibid*, p. 3) against "traditionalists" (*Ibid*, p. 3) and "conservatives" (*Ibid*, p. 153). Understandably, these latter groups, in turn, are presented as the core opponents of this project. Focusing on the genesis of *CORAF* in Canada, Morton and Knopff (2000) argue that three groups comprised this "knowedge class": "unifiers", civil libertarians, and social equality seekers. It is further argued that a more amorphous grouping of "social engineers" will also be supportive. "Unifiers" are those aiming to counter "the forces of decentralizing regionalism and provincialism" (Morton & Knopff, 2000, p. 60). Civil libertarians wish to "set limits to the power which the ruler should be suffered to exercise over the community" (*Ibid*, p. 54). Social equality seekers pursue equality for groups that have faced discrimination based on "life-style issues and politics of identity" (*Ibid*, p. 67), including women, visible and religious minorities, the disabled, homosexuals and those from "multicultural" communities (*Ibid*, p. 68). Finally, "social engineers" "take the view that the social evils are caused not by human nature but rather by defective social institutions" (*Ibid*, p. 74).

The KCT argues that the "cultural left" has been experiencing increasing political salience within advanced industrialized democracies. Whilst the role allegedly played by elite political forces in organizing these groups is not overlooked (*Ibid*, pp. 87-94), "postmaterialist" value change in the wake of moves to a post-industrial society is presented as the principal motor of these changes (*Ibid*, p. 86; cf. Inglehart, 1990). Despite this increasing salience, however, such groups continue to lack "electoral clout" (Morton & Knopff, 2000, p. 2) particularly with regards to specific controversial issues within public debate (Bork, 2002, p. 8). But they possess disproportionate access both to "legal resources" such as skilled lawyers and sympathetic judges (Morton & Knopff, 2000, p. 29) and to other elite actors including in the political realm (Bork, 2002, p. 9 & 163). Given this, such groups find it both possible and in their interests to push for Bill of Rights genesis.

Section Two: Evidence from the Canadian and UK cases:

This paper aims to develop the social scientific understanding of Bill of Rights genesis in advanced industrialized countries through an analysis of the Canadian and UK cases. To what extent can existing theoretical perspectives, notably the HPT and KCT, elucidate these two cases? And what can analysis of these cases contribute to the broader theoretical debates? This section examines the evidence. I first consider the socio-political origins of both *CORAF* and *HRA*, including the attitudes of interest groups (section 2.1) and the judicial elite (section 2.2). I then examine the critical role elite political actors and triggers played in determining the timing and, to an extent, nature of both these instruments.

2.1 – Social interests and the origins of Bills of Rights

The role of social interests in Bill of Rights genesis remains one of the most controversial issues within the literature, the KCT emphasizing the role of the "cultural left", while the HPT stresses the involvement of neoliberals and other conservative forces. This section demonstrates that empirical evidence in both the Canadian and UK cases broadly validate the KCT's analysis. In contrast, the principal socio-political claims of the HPT are rejected for lack of empirical support.

To begin with, the strongest party political support for Bills of Rights came in both countries from centrists, secondarily from the left and least from the right of the political spectrum. In Canada, *CORAF* was spear-headed by the centre-left Liberal Party, whose leader, Pierre Trudeau, was not noted for his support for or sympathy with neoliberal economic interests.[2] In addition, *CORAF* was also strongly supported, at least at the federal level, by the social democratic New Democrat Party.[3] In contrast, the right-of-centre Progressive Conservatives were reluctant to support the initiative citing concerns over not only federalism but also the appropriate role of courts vis-à-vis Parliament.[4] In the UK, the *HRA* was a legislative initiative of the Labour Party that grew out of its manifesto commitment of the previous years (Labour Party, 1996 in Blackburn (ed.), 1999, p. 960). The centre-left Liberal Democrats also strongly backed the reform, even pressing for a stronger model that, similarly to CORAF, would direct challenge the principle of parliamentary sovereignty in relation to human rights (Great Britain, Commons, *Debates*, 24 June 1998, col. 1124). In strong contrast, the right-of-centre Conservative Party sought to scupper the *HRA* entirely by unsuccessfully moving a wrecking amendment "declin[ing] to give the Bill a Second Reading" during its legislative passage in the House of Commons (Great Britain, Commons, Debates, 16 February 1998, col. 781).[5]

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[2] "In a country where politicians and businessmen have traditionally been in lockstep, both the old and new money have always regarded him [Trudeau] with deep suspicion" (Clarkson & McCall, 1990, p. 9).

[3] "Rights Charter would bind provinces as Trudeau presents plan; NDP offers support, Tories will fight move", *Globe and Mail*, 3 October 1980

[4] For parliamentary sovereignty/supremacy arguments see comments of the Conservative Party's constitutional affairs spokesperson Jake Epp during a crucial House of Commons debate in October 1980 (Canada, Parliament, House of Commons, *Debates*, Vol. 76, p. 3306 (6th October 1980)).

[5] The partisan nature of the genesis of both *CORAF* and *HRA* should not, however, be exaggerated. In both cases, some Conservatives, such as the then Premier of Ontario Bill Davies in Canada and Dominic Grieve MP (now Shadow Attorney-General) in the UK, expressed broad support for the reform from the beginning. In addition, by the end of the process, few political figures were willing to offer strenuous opposition. Thus, in Canada, the final House of Commons vote on the constitutional changes was supported by 246 MPs with only 24 continuing (for a variety of reasons) to oppose. Of these, 17 were Conservatives, 5 were Liberals and 2 were from the NDP (McWhinney, 1982, p. 112).

More directly, those interest groups which broadly supported the *HRA* and *CORAF* initiatives mirror the KCT's predictions. Thus, in Canada, of the 70 groups who supported the idea of an entrenched Charter in evidence before the Hays-Joyal Special Joint Committee on the Constitution (Canada, Parliament, Special Joint Committee, 1980-81b), over well over 50% (38 groups) were "social equality seekers" as the KCT defines them. Particularly prominent within this broad group were representatives of Canada's "multicultural" community (32% of the grand total) and women (13% of the grand total). Other major supporters included equality seekers of a more economic bent such as unions and anti-poverty groups, those committed to preserving a bilingual and united Canada and quasi-governmental human rights commissions. Chart one below summarizes these results. Such groups also played a major role in determining the specific drafting of the *Charter*. In the first place, in so far as the initial *Charter* text released in October 1980 was based on provisions in the *Canadian Bill of Rights Act* (1960), the *International Covenant on Civil and Political Rights* (ICCPR) and the drafts produced during and in the wake of the *Victoria Charter* process in the 1970s, the imprint of these groups was already upon the instrument (MacLennan, 2003; Weinrib, 2002, p. 495). More specifically, the advocacy of these interests both in public debate and before the Hays-Joyal Committee itself secured significant changes in the *CORAF* text. In particular, with regards to social equality, the equality clause was strengthened by specifically protecting the mentally and physically disabled, making the provision "open-textured" and adding a right to the "equal benefit" as well as the "equal protection" of the law.[6] New clauses underlying the importance of Canada's "multicultural heritage" and gender equality were also included.[7] In relation to civil liberty, the legal rights section of *CORAF* was strengthened through the inclusion of provisions protecting jury trial, rights against self-incrimination and exclusion of evidence improperly obtained. Finally, the *Charter*'s limitation clause was significantly narrowed by replacing the terms "reasonable" and "generally accepted" with "demonstrably justified" and the complete deletion of the clause's description of Canada as having a "parliamentary system of government" (Erdos, 2006, pp. 80-90).[8]

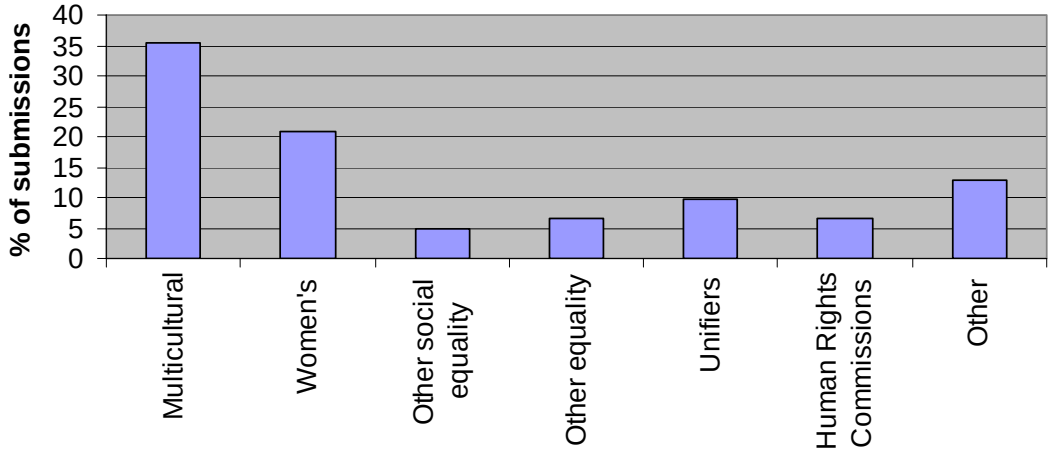
In the UK, the Conservatives did not force a division on the Third Reading of the *HRA* in either the House of Lords or the House of Commons.

[6] This latter change was designed to ensure that, in contrast to the Court's interpretation of equality under *CBORA* (1960), the judiciary developed equality using less proceduralist and more substantive and impact-focused methods. For the most relevant *CBORA* case see *Attorney-General of Canada v. Lavell; Issac v. Bédard* [1974] SCR 1349.

[7] These became sections 27 and 28 of the *Charter*.

[8] Later, women's groups also played a pivotal role in ensuring the exclusion of the gender equality provision (section 28) from the "notwithstanding" clause which, due to a last minute compromise between the Federal and Provincial Governments, granted Parliament and the provincial legislatures a partial opt-out from the legal effect of *CORAF*. See Kome, 1983.

Chart One: Canadian groups supporting idea of entrenched *Charter of Rights* before Hays-Joyal Special Joint Committee (1980-81) (n=68)



Analysis of the UK case is complicated by the more limited nature of the reform (the simple "incorporation" of existing rights found within the *European Convention in Human Rights* into municipal law) and the lack of formal consultation leading up to *HRA*'s enactment (Klug, 2006). Nevertheless, groups of a very similar outlook to those in Canada were also pushing for a Bill of Rights in the UK in the period immediately prior to the *HRA*. The most important of these groups was Charter 88, whose first demand was a Bill of Rights (Evans, 2003, p. 32). Founded by the left-liberal journal the *New Statesman and Society*, Charter 88 belonged to the "postmaterialist" left. Indeed, a survey undertaken by Mark Evans in 1993 demonstrated that Charter 88 members at all levels overwhelmingly shared "postmaterialist" preferences, exhibited much higher trade union membership than the general population and had party affiliations either to Labour or the Liberal Democrats (Evans, 1995, pp. 123-129). Alongside Charter 88, the Institute of Public Policy Research (IPPR) and the National Council for Civil Liberties (NCCL) also played significant roles in the lead up to the *HRA*, publishing influential draft Bills of Rights during the 1990s (IPPR, 1990; IPPR, 1991; Klug, 1991). Although not especially concerned with human rights matters, the IPPR is also left-leaning, having been founded in 1988 as a "progressive" alternative to neoliberal think tanks such as the Adam Smith Institute and the Institute for Economic Affairs.[9] The NCCL, meanwhile, has both links with the left and a long concern with both civil liberty and social equality. Founded in response to the civil liberties abuses associated with the hunger marches during the 1930s depression, this body had always had "strong trade union links" (Klug, 2000, p. 147). The group also had a long history of involvement with social equality movements supporting the rights of racial minorities, children, travellers, gays and lesbians, and women (Dyson, 1994, *passim*). Finally, during the 1990s, NCCL's Bill of Rights campaign was also supported by a range of other social equality groups including the Anti-Racist Alliance, the British Council of Organisations of Disabled People, MIND (a mental health charity), the Fawcett

[9] See e.g. http://www.ippr.org.uk/aboutippr/.

Society (a leading women's equality group) and Stonewall (a leading gay rights group) (Foley, 1994, p. 5).

At a socio-political level, the only significant divergence between the predictions of the KCT and the UK case relates to the unifiers/decentralizers dichotomy. Rather than being supporters of the strengthening of national authority, as the KCT implies should be the case, Charter 88 strongly advocated devolution of power to the regions and nations of the UK (Barnett, 1997). Rather than demolishing the overall socio-political framework of the KCT, however, this fact demonstrates there is no necessary connection between so-called "unifiers" and the "postmaterialist" left. Indeed, in the case of Charter 88, the commitments to both decentralization and a Bill of Rights sprang, in large part, from a broader ideational commitment to the "postmaterialist" goal of a pluralist and open democracy which these reforms were seen as furthering (*Ibid*).

In contrast to the socio-political claims of the KCT, those of the HPT find little validation in either case. The opposition to both *HRA* and *CORAF* which was forthcoming from right-of-centre parties and the clear association between many of the groups who campaigned for these two enactments with both "peripheral minorities" of various kinds (e.g. "multicultural" communities, sexual minorities etc.) and even bodies of the "economic" left such as the trade unions. More particularly, there is no evidence that "influential coalitions of domestic neoliberal economic forces" (Hirschl, 2000b, p. 138) either provided support for these initiatives prior to their enactment or influenced their drafting. In the UK, it is difficult to locate any public statements made by neoliberal involvement in the debate at all. This probably partly reflects the general lack of public consultation in the period leading up to the HRA (Klug, 2006) as well as the a realisation that the nature of the reform – ECHR incorporation – left little room for discussion as to which rights were to be included.[10] Turning to the Canadian case, only 3 groups or 4% of the total giving evidence in favour of an entrenched Bill of Rights before the Hays-Joyal Committee, had a neoliberal economic agenda.[11] In contrast, of the much smaller number of briefs (20) from organizations opposing such a reform, 30% came from groups with a neoliberal outlook. These included a number of business groups including the Chambers of Commerce for Alberta, British Columbia and Calgary. Even more interestingly, unlike many other groups, neoliberals exerted no real influence on *CORAF*'s drafting. In particular, despite their demands, a right to private property was quite deliberately excluded. Hirschl argues this reflected "fierce political resistance" (Hirschl, 2004a, p. 77). But it was not the overall level of support/opposition which proved determinative but rather the strategic make-up of the coalition supporting *CORAF*. Thus, whilst the Hays-Joyal Committee received representation from 23 groups urging inclusion of a right to property, only approximately half this number urged inclusion of various legal rights (e.g. right to jury trial, rights against non-incrimination), which did come to be included. The property rights campaign also

[10] Moreover, even though the *ECHR* does include limited rights to private property (in Protocol One), the *HRA* has still been attacked on the right for instantiating what is seen as a left-wing "entitlement" rather than "freedom" set of rights (Howe, 2002, p. 27). Despite this, it should also be noted that a few individuals with a neoliberal outlook did give their support to the principles what became the *HRA* during UK debate on a Bill of Rights in the 1990s (see e.g. Vibert, 1991).

[11] Moreover it is important to note that two of these groups, the Peterborough Libetarian Association and Human Action to Limit Taxes (HALT) had in mind an instrument very significantly different from both the *Charter* draft and the final *Charter* enactment.

received extensive coverage in the media[12] and strong support from the Progressive Conservatives (see e.g. Canada, *Commons, Debates*, 23 April 1981, pp. 1779-80). At least at the federal level, these supporters of the property rights clause were far more popular and powerful than the core opponents – the New Democratic Party. However, in contrast to the Conservatives, the NDP was a valued part of the *Charter* coalition. In any case, the Liberals' commitment to including a right to property in *CORAF* was very weak.[13] In this situation, it was the NDP's announcement a property clause was unacceptable to them, rather than the overall level of opposition to the idea, that sealed the fate of this initiative (Russell, 1994, p. 168; Erdos, 2006, pp. 69-73).

Overall, the social interests behind both *CORAF* and the *HRA* comprised a coalition of civil liberty and social equality seekers associated with the "postmaterialist" left, as the KCT predicts. These groups were supported by political parties of the left and centre. In contrast, and contrary to the perspective of the HPT, neoliberal economic groups played no significant role in advocating either of these instruments and exercised almost no influence over the drafting. Indeed, in the case of *CORAF*, a property rights clause was deliberately excluded in the face of significant pressure from these very same groups.[14]

2.2 - Judicial roles and attitudes

In addition to stressing the role of neoliberal economic groups in Bill of Rights genesis, the HPT also argues that support from the "judicial elite" and "national high courts" is both essential and generally forthcoming (Hirschl, 2004, p. 12). As this section demonstrates, however, evidence from the Canadian and UK cases is much more equivocal. Whilst a large number of senior judges in the UK did voice their support for a Bill of Rights prior to the enactment of the *HRA* in the UK, the judicial elite in Canada displayed a certain hostility before the enactment of *CORAF* in Canada, seeing such an instrument as a threat to the apolitical and passive understanding of the role of law. Despite this, *CORAF* is a significantly stronger instrument than *HRA*, being both entrenched and, subject to the notwithstanding clause, supreme against all other law. This indicates that elite judicial support is neither essential for Bill of Rights genesis nor guaranteed.

Turning to the Canadian case first, far from being spearheaded by the judiciary, support for *CORAF* partly emerged out of reaction against the elite judiciary's rejection of its institutional role under a Bill of Rights whilst interpreting the statutory *Canadian Bill of Rights (CBORA)* passed in 1960. As Conklin has noted, the judicial interpretation of this instrument demonstrated a profound unease with the idea, implicit in the concept of a Bill of Rights, that the broad rights language found in *CBORA* might mandate the judiciary to challenge directly the parameters of policy enacted by the legislative (Conklin, 1989, p. 98). As a result, and as can be seen most clearly in *Robertson & Rosetani* (1963) in regards to freedom of religion and *Lavall*

[12] See e.g. "PM's push for 'cerebral' rights but not property rights criticised", *Globe and Mail*, 18 October 1980, p. 3.

[13] Thus, it may be noted that when interviewed for this project, former NDP leader, Edward Broadbent, categorically stated: "Trudeau himself I'm quite sure was personally opposed to it [entrenched private property rights]" (Broadbent, interview, 22 April 2005). Similar comments have been made from the right of the political spectrum (see e.g. speech of Conservative MP Hon. Michael Wilson during Charter debate in April 1981 (Canada, Commons, Debates, 22 April 1981, p. 9419)).

[14] For an argument that the genesis of the *New Zealand Bill of Rights (NZBOR)* rested on very similar social supports see Erdos, 2007. As that article notes, similarly to Canada, a right to property was quite deliberately excluded from the *NZBOR* despite significant dissent from business and other neoliberal groupings.

(1974) in regards to equality and gender,[15] a narrow, proceduralist interpretation of the enactment was adopted. The Canadian judicial elite appear to have seen the Bill of Rights model as threatening the cultural conception of their role as "passive" and involved only with enforcing a "vertical hierarchy of all-encompassing, encyclopaedic rules" (Conklin, 1989, p.98). As a result, rather than embracing a Bill of Rights as a mechanism for enhancing their power and authority, they feared its potential for the politicization of the law and, therefore, "rejected *[CBORA]* as a foreign unassimilable object" (Ibid, p. 98). As a result, *CBORA* was rendered largely "ineffective" (Conklin, 1989, p. 85).[16] Finally, although direct judicial involvement in the debate leading up to *CORAF* was limited, it is also possible to point to members of the judiciary who spoke publicly against the idea of a constitutional *Charter of Rights* using a very similar rationale to the above. For example, Mr. Justice Clyde appeared before the Hays-Joyal Committee in late 1980 in order to reject such a reform arguing that it would "put judges in the position of making political decisions" and would thereby lead to their being "politicized" (Canada, Parliament, Special Joint Committee, 1980-81, Issue 12, pp. 101-2).

In contrast, perhaps reflecting a shift in judicial opinion within Westminster political systems, by the 1990s, when the idea of passing a statutory Bill of Rights became a live issue in public debate in the UK, there was clearly majority support for such a reform from the elite judiciary in the UK. Thus, when in 1995 the Liberal Democrat Peer and long-time Bill of Rights campaigner Lord Lester introduced a private member's bill substantially similar (although slightly weaker) than the *HRA*, it was supported by the speech or vote of no fewer than nine Law Lords (Lester, 1995, p. 198). In fact, according to Lord Lester, the Bill was "thought to have the support of most of the Law Lords, both serving and retired" (*Ibid*, p. 198). Moreover, during the *HRA*'s legislative passage a number of sitting and former senior judges made speeches in favour of the enactment, including Lord Bingham, Lord Cooke of Thorndon, Lord Wilberforce, Lord Simon of Glaisdale, Lord Donaldson of Lymington and Lord Ackner.[17] Even in this case, however, the nature of such support should not be exaggerated. In the first place, when making public pronouncements, the senior judiciary tended to support only the less radical proposals under consideration. For example, writing in 1995, Law Lord Lord Woolf did not endorse the entrenched and supreme model of a Bill of Rights then being promoted by powerful political forces (Great Britain, Labour Party, 1993). Instead, he favoured an interpretative model along the lines of the *New Zealand Bill of Rights Act* (1990), which would avoid the "excesses" associated with *CORAF* in Canada (Woolf, 1995, pp. 70-1). Secondly, a number of senior jurists supported the *HRA* only very

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[15] See *Robertson and Rosetanni v. The Queen* [1963] SCR 651 and *Attorney-General of Canada v. Lavell; Issac v. Bédard* [1974] SCR 1439.

[16] Of course, it would be wrong to suggest that *CBORA* had no effect at all. *CBORA* was occasionally invoked to give a more expansive effect to certain legal rights already recognized under the common law. For example, in *Brownridge v. The Queen* [1971] SCR 926, the Canadian Supreme Court used *CBORA* to require motorists be given a right to counsel before taking an alcohol breath test. Similarly, in *Lepper v. The Queen* [1974] SCR 195 the Supreme Court found that CBORA required a right to a hearing before sentencing. Finally, in one celebrated case, *R v. Drybones* [1970] SCR 282, a provision in the *Indian Act* making it an offence for an Indian to be intoxicated off a reserve was actually declared ineffective. The basic rationale for this decision, however, appeared to be overruled in the later *Lavall* decision (see above) which found no conflict between the discriminations Indian women faced under the *Indian Act* and the equality provision in *CBORA.*

[17] See Second Reading debate on *Human Rights Bill* in Great Britain, Lords, *Debates*, 3 November 1997.

reluctantly on the basis that the development of the *ECHR* system had made it essential that British judges were given an opportunity to rule of these matters before any appeal to Strasbourg might proceed.[18] Finally, it should be noted that there were dissenters even from this lukewarm support. For example, Lord McClusky, a life peer and then Scotland's highest judge, vigorously attacked the *HRA* during its parliamentary passage (Great Britain, Lords, Debates, 3 November 1997, colns. 1265-1268).

2.3 - Elite politics, triggers and Bill of Rights genesis

The empirical record in both the UK and Canadian cases broadly validates the socio-political claims of the KCT whilst casting extensive doubt on those of the HPT. In some contrast to this, I argue below that the HPT is more enlightening in its stress on the important role which elite politicians play in Bill of Rights genesis. As Hirschl correctly notes, "[j]udicial power does not fall from the sky; it is politically constructed" (Hirschl, 2004, p. 49). Elite politicians do effectively exert a power of veto over such a reform (Hirschl, 2000b, p. 102; cf. Ginsburg, 2003, p. 29). Moreover, due to the fact that Bills of Rights work only by "limit[ing] the flexibility of [such] decision makers" (Hirschl, 2000b, p. 103), these actors will ordinarily have cause to react warily to such a reform and seek to block it. Such wariness is only likely to be transformed into active support in the presence of a clear rationale and impetus for Bill of Rights genesis which is directly cognizable by elites (*Ibid*).

Despite shining welcome light on the elite political modality of Bill of Rights genesis, however, this section questions the specific elite rationale or trigger which the HPT forwards and, relatedly, the claims it derives from this in terms of the perceived democratic illegitimacy of and lack of "systemic social need" (Hirschl, 2000b, p. 105) behind such reforms.

As discussed above in relation to the elite political trigger behind reform, the HPT argues that Bills of Rights in established democracies have resulted from the efforts of politicians who, facing a fundamental "erosion in their popular support", opt to entrench their threatened preferences (Hirschl, 2000b, p. 105). Though cogently argued, there are a number of reasons to doubt at least aspects of this logic. In the first place, incumbent elites whose values or position are fundamentally threatened within majoritarian institutions will generally be more focused on efforts to secure their day-to-day survival than in planning fundamental legal reform. Even where this is not the case, such actors will be too weak to enact "constitutional" reforms such as Bills of Rights, particularly, as in the case of *CORAF*, where the hurdles to such reform are high. The HPT argument that a Bill of Rights entrenches values increasingly challenged in majoritarian systems also sits uneasily with the fate of such enactments subsequent to their passage especially in cases, including both *CORAF* and *HRA*, where they can be rendered largely nugatory through simple parliamentary vote.[19] Finally, the puzzle of the general popularity of these instruments at the time of enactment is also left largely explained. Opinion polls conducted throughout 1981 in

[18] See, for example, Lord Donaldson of Lymington's speech during the Second Reading of the Human Rights Bill. Great Britain, Lords, *Debates*, 3 November 1997, colns. 1191-4.

[19] The *HRA* is formally an ordinary parliamentary statute subject to repeal in the normal fashion. Although *CORAF* is constitutional entrenched, most of the civil and political rights which it instantiates may, through the invocation of section 33 (the "notwithstanding clause"), be rendered legally nugatory through simple majority vote in Parliament which must be renewed at least once every five years. Despite this, and contrary to the *HPT*'s logic, it has never been invoked at the national level and rarely utilized to practical effect at the provincial level either.

Canada consistently showed strong majorities for *CORAF*. In May 1981, for example, a Gallup poll indicated that 62% of Canadians favoured an entrenched Charter of Rights whilst only 15% were opposed.[20] Another poll completed at the same time for the Canada West Foundation found 84% "support" for the *CORAF*.[21] Finally, a poll released in November 1981 conducted by the Canadian Human Rights Commission found 72% in favour of *CORAF*.[22] A similar picture emerges in the UK. In 1991, for example, a MORI opinion poll suggested that 72% of the public favoured enactment of a Bill of Rights with only 11% opposed.[23] Although the importance of these polling results can be exaggerated, these findings do appear to suggest at the very least a majority of the electorate saw both *CORAF* and the *HRA* as serving some kind of "social need" (Hirschl, 2000b, p. 105).

Contrary to the HPT's implications, the democratic trigger perspective forwarded in this paper finds these various findings unsurprising. The veto powers of elite politicians, combined with their special wariness of reform, actually provides a theoretical reason to expect that when reform does take place it should generally enjoy a good deal of support both within civil society and amongst the general public. Moreover, the fundamental or constitutional nature of the enactments in question also provides a reason for expecting that the elite politicians who champion them will often do so from within a position of strength within the majoritarian arena. Empirically, this reality of strength can be observed in relation to the elite politics of both *HRA* and *CORAF*. Thus, in the UK case, the *HRA* was initiated in the same year as Labour's landslide general election victory; subsequently, the party won two more decisive national majorities at the polls. Similarly, in Canada, Trudeau's successful championing of his *Charter* vision depended crucially on the federal Liberal Party's decisive general election victory in February 1980[24] combined with his credible threat (given the popularity of the *Charter*) to take the matter to a popular plebiscite if enough provincial leaders could be persuaded to cooperate.[25] Moreover, despite

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[20] Question: Much of the opposition to the patriation plan centres on the issue of including a *Charter* of rights and freedoms in the constitution. In your opinion, should such a *Charter* be included or not? Sample: 1,032 personal, in-home interviews with adult individuals across Canada. Result: 62% Yes; 23% Don't Know; 15% No. Source: "Most feel Trudeau patriation plan will help unite country, poll says", *Globe and Mail*, May 14th 1981, p. 8.

[21] Question: Do you support a Bill of Rights which would provide individual Canadians with protection against unfair treatment by any level of government in Canada? Sample: 1,900-2,000 Canadians nationwide. Nationwide result: 84% in favor. Regional results: Atlantic Canada - 86%, Quebec – 84%, Ontario – 85%, Western provinces – 80%. Source: "Westerners favour rights bill by 80% survey shows", *Winnipeg Free Press*, October 22nd 1981, p. 18.

[22] Question: Do you support the general principle of including a *Charter* of Rights in the constitution? Sample: 1,960 adults nationwide. Result: 32% strongly agree, 40% somewhat agree, 11% don't know, 1% no answer, 8% somewhat disagree, 8% strongly disagree. Source: "Poll shows 72 per cent questioned favor rights Charter in constitution", *Globe and Mail*, November 10th 1981, p. 10.

[23] Survey: MORI opinion poll for Joseph Rowntree Trust's State of the Nation 1991 based on face-to-face questioning of 1,034 adults aged 18 plus in 146 constituencies from March 7th to 25th 1991. In Scotland, an additional 513 adults were interviewed in 34 constituencies (unclear whether this "additional" sample related only to Scottish devolution question). Source: "Plea for more referendums as one in two endorses PR", *The Times*, April 25th 1991, p. 4.

[24] The Liberals gained 146 seas, the Conservatives 103 and the New Democratic Party 32 seats. Trudeau's success in Quebec was particularly overwhelming – the Liberals gained 68% of the vote and 73 out of 74 seats here (McNaught, 1988, p. 346).

[25] As is well know, in the 5 November 1981 Accord, all the provincial Governments bar Quebec eventually agreed to the enactment of *CORAF* subject to the inclusion of the "notwithstanding" clause (*Constitution Act*, 1982, § 33).

setbacks, the Liberals have remained the dominant national force in Canadian electoral politics down to the present day.

Beyond these "democratic trigger" commonalities, there is little reason to expect that the elite political forces favouring Bill of Rights genesis even in established democracies will be the same in each case. Thus, subject to the provisos noted above, in some cases, the elite political triggers behind Bill of Rights genesis have, as the HPT suggests, been linked, at least partially, to a desire to counter forces which threaten fundamental political interests. The Canadian case may largely fit within this rubric. Here, it seems clear that the emergence of federal elite political support for *CORAF* was related to a belief that it could act as counter to the centripetal forces which were posing an increasing threat to federal political power. With the growth of Quebec nationalism, growing discontent and alienation in the Western provinces (McNaught, 1988), and, especially the rise to power of the sovereigntist Parti Quebecois in Quebec City in 1976, the fundamental stability of Canada's federal institutions came under threat. This placed pressure on those actors (most notably, federal elite politicians) whose role and power was intimately connected to both the continuance and continued supremacy of these institutions, and it generated a pressing need to find some centripetal mechanism to reassert the relevance of and allegiance to federal Canada. Passage of a constitutional Charter of Rights offered a way forward. It was hoped that such an instrument would have both a powerful symbolic and a practical effect. As Donald Milne states:

> This shift towards defending matters of overriding national significance through a federal judiciary armed with a national charter, rather than a federal Parliament armed with rusty imperial legal tools and old-fashioned moral superiority, was nothing short of a masterstroke, since by this means a new and politically acceptable way was found to preserve the centre against centrifugal pulls on the balance. (Milne, 1986, p. 38)

As a result, and despite the significant immediate costs to power and discretion such an instrument entailed, elite politicians at the federal level began to display an openness and even enthusiasm for such a project. The new *zeitgeist* can particularly be seen in the strong endorsement which both the Molgat-Maguigon and the Hays-Joyal Special Joint Committees of the Canadian Parliament gave to the idea of a constitutional Bill of Rights in their concluding reports (Canada, Parliament, Special Joint Committee, 1972; Canada, Parliament, Special Joint Committee, 1980). Finally, this new environment was exploited by the leadership of Pierre Trudeau. With his strong commitment both to a liberal federalism and to a defence of personal liberty, Trudeau had as his central political goal the achievement of such a Charter. As a Prime Minister of long-standing and clear dominance over other politicians both within his own Liberal Party and in opposition, he was crucially able to prioritize such a project and bring it to concrete fruition.

In contrast, the elite political impetus behind Bill of Rights projects may have an entirely different basis to that suggested by the HPT. This was certainly the case in the UK. Here, as in other cases,[26] Labour political elites were attracted to a Bill of Rights not out of a desire to preserve their powers but rather in an "aversive" reaction to prior negative political experiences under a previous Government. In particular,

[26] Most notably, New Zealand (see Erdos, 2007). Although limits of space prevent an analysis of this case, the lack of any appropriate elite political trigger may go a long way to explaining the absence national Bill of Rights genesis in Australia (see Erdos, 2006, pp. 324-406).

the Thatcher Government (1979-90) was widely seen by Labour and the Left as illiberal, authoritarian and disregardful of traditional checks and balances. This perception partly related to specific policies, especially in the area of freedom of expression. Such policies included vociferous legal action against the divulging of information by Clive Pointing in relation to the Falklands War and Peter Archer in relation to the operations of the intelligence services (Ewing & Gearty, 1990, pp. 143-169), the 1988 broadcasting ban on interviews with Northern Irish terrorists and their supporters (which was implemented without notice)[27] and the passage of legislation in the same year which sought to prevent local authorities from "promot[ing] homosexuality" or promoting the "teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship".[28] Perhaps even more troubling for many was what was seen as the government's imperious attitude towards democratic checks and balances. Writing in 1989, left-wing social theorist Paul Hirst stated:

> For Mrs Thatcher democracy means no more than a periodic plebiscite which selects *who* should rule. A 'mandate' from a general election should allow the governing party to do virtually whatever it likes; it should not be forced to submit to discussion, consultation, judicial scrutiny or constitutional check whilst in office. Why should she listen to those she has beaten, let alone accept that they might have been the constitutional power to check her? (Hirst, 1989, p. 45).

It was in this context that many on the Left, including within the Labour Party, began to question their erstwhile support for the UK's streamlined constitutional structure. As Hirst continued:

> In Mrs Thatcher Britain has found a politician to expose the nakedness of the constitutional checks and guarantees to public view. She has helped puncture our insular and incorrigibly ignorant view of ourselves as the premier democracy, and helped show the need for a break with our political history, with the institutions that we have celebrated to the point where we have ceased to think about them. (Hirst, 1989, p. 45)

After several years of flirting with the idea, in 1991 the Labour leadership finally endorsed the need for some kind of Bill of Rights.[29] Two years later, under the leadership of John Smith, this policy was fleshed out further and an ambitious two-stage process announced which would begin with full incorporation of the *ECHR* into UK law and culminate in the framing of a genuinely autochthonous, entrenched rights instrument (Labour Party, 1993, pp. 29-31). Although the party's commitment to such a radical reform later weakened as it sensed a fundamental shift in its electoral fortunes, the "aversive" momentum which had been built up since the early 1990s still ensured the passage of the statutory *Human Rights Act* (1998) shortly after Labour was returned to power.

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[27] It sould be noted that the ban explicitly excluded reporting dealing with Parliament and elections (Thornton, 1989, p. 12).

[28] *Local Government Act* (1988) § 28.

[29] "Kinnock promises to put Britain in the first division", *The Times*, 2 October 1991, p. 9 [Noting commitment to a Bill of Rights made by Labour Leader Neil Kinnock in his speech at the Labour Party Conference].

Section Three: Conclusion

Comparative analysis of the processes that generated *CORAF* in Canada and the *HRA* in the UK helps to both broaden and deepen our understanding of the nature of Bill of Rights genesis in the advanced industrialized world. At a socio-political level, as the Knowledge Class Thesis (KCT) suggests, a "cultural left", "postmaterialist" constituency of civil libertarians and social equality seekers have acted as the social champions of these initiatives. In contrast, echoing the Hegemonic Preservation Thesis (HPT), elite political support for Bill of Rights genesis is not only crucial but, because Bills of Rights restrict politicians' power and discretion, rarely forthcoming. Thus, Bill of Rights genesis in only likely to occur when a specific elite rationale or trigger for reform is present. The HPT argues that elite impetus for reform will emerge when, seeing that their values are increasingly challenged within majoritarian institutions, they pursue Bill of Rights genesis as a mechanism for entrenching these threatened values. Despite its cogency, the implications of this approach are challenged by aspects of the empirical record in both the UK and Canadian cases. These include the popular nature of both *CORAF* and *HRA* at the time of their genesis and the fact that they were championed by parties (Liberal and Labour respectively) that were enjoying renewed strength in the democratic arena and that have remained the major forces in national politics in their respective countries down to the present day. Beyond these findings, which underline the "democratic" pedigree of Bill of Rights genesis in these cases, this paper stresses the divergent nature of the elite political triggers behind reform in the two cases. Thus, subject to the above provisos, the HPT is correct to argue in the Canadian case that the Liberal Party leadership championed *CORAF* in order to strengthen national unity and thereby counter emerging centrifugal threats. In contrast, the Labour leadership in the UK was converted to the idea of the *HRA* not out of a desire to preserve its own powers but rather in an "aversive" reaction to prior experiences under the previous Thatcher Government, which was widely seen as authoritarian and illiberal.

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