

# THE IMPACT OF ALTERNATIVE CONSTITUTIONAL REGIMES ON RELIGIOUS FREEDOM IN CANADA AND ENGLAND

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**Abstract:** This Article examines whether the global trend of codifying rights in entrenched bills accompanied by judicial review to broaden rights protection is justified. By comparing the religious freedom regimes in Canada and England, this Article finds that although the Canadian constitutional transformation in the late Twentieth Century contributed to strengthening religious freedom, its overall effect has not been broader than the protection afforded by its primordial English statutory model. As such, the Article challenges the ongoing legal debate over judicially enforced constitutional systems of rights. Proponents of such systems praise their extensive contribution to rights protection, while opponents warn against their obstructive impact on the separation of powers. This Article concludes that both sides of the debate overstate their arguments by incorrectly presupposing the actual effects of a judicially enforced constitutional system of rights.

## INTRODUCTION

Observers have detected a trend in the late Twentieth Century of states opting to better protect fundamental rights by enacting authoritative constitutional texts that entrust courts with the power to invalidate legislation infringing on these rights.<sup>1</sup> This Article examines the trend toward constitutional adjudication of rights protection through a comparison of Canada and England.<sup>2</sup>

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<sup>1</sup> See generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); Tom Campbell, *Human Rights: A Culture of Controversy*, 26 J. LAW & SOC'Y 6 (1999); David M. Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131 (1996).

<sup>2</sup> Great Britain is composed of England, Wales, Scotland, and Northern Ireland, each with its own legal system. England is the largest of these in both size and population. Eng-

Canada underwent a transformative constitutional reform in the early 1980s, culminating with the adoption of an entrenched bill of rights known as the Canadian Charter of Rights and Freedoms (Charter).<sup>3</sup> While the Canadian public reacted positively to the enactment of the Charter, a fierce debate has taken place in Canada's academic circles regarding this change.<sup>4</sup> Charter supporters embrace the possibilities for judicial enforcement of rights and fundamental freedoms. Charter critics, on the other hand, portray its enactment as a perilous development, with right-leaning critics blaming the Charter for creating a power shift from parliamentary supremacy to judicial supremacy, and left-leaning critics pointing to its failure to advance social justice in Canada.<sup>5</sup>

England is among the few remaining states without a codified constitution. Sharing Canada's desire to broaden rights protection, England also debated whether to join the global trend and adopt an entrenched constitutional text.<sup>6</sup> Committed to its fundamental principle of parliamentary sovereignty, famously articulated by A.V. Dicey,<sup>7</sup> England has thus far refrained from undertaking such a transformation. Nevertheless, in 1998 the English Parliament enacted the Human Rights Act (HRA), incorporating the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) into English law.<sup>8</sup> Although the content of the Convention is similar to many constitutional texts around the world, it includes several constructions that effectively block the entrenchment of rights in Eng-

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land is also the only country in Great Britain with an established church. For these reasons, and because this Article is concerned with the effects of alternative religious freedom regimes, the analysis that follows will focus exclusively on England.

<sup>3</sup> Canada Act (UK) 1982, c. 11, sched. B.

<sup>4</sup> Joseph F. Fletcher & Paul Howe, *Canadian Attitudes Towards the Charter and the Courts in Comparative Perspective*, 6 CHOICES 4, 9–10 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 281–343 (5th ed. 1997). See generally IAN WARD, *THE ENGLISH CONSTITUTION* (2004); *REFORMING THE CONSTITUTION* (Peter Catterall et al. eds., 2000); Richard Clayton, *Judicial Deference and "Domestic Dialogue": The Legitimacy of Judicial Intervention Under the Human Rights Act of 1998*, 2004 PUB. L. 33; Anthony Bradley, *Judicial Independence Under Attack*, 2003 PUB. L. 397; Brigid Hadfield, *Towards an English Constitution*, 55 CURRENT L. PRAC. 189 (2002).

<sup>7</sup> Dicey's famous quote: "The Principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . [had], under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39–40 (10th ed. Macmillan 1959) (1885).

<sup>8</sup> Human Rights Act, 1998, c. 42 (Eng.).

land as well as the possibility of judicial encroachment on parliamentary supremacy. As such, England, under the HRA, remains committed to its traditional model of statutory protection of rights.

Because the practice of safeguarding rights and freedoms is among the fundamental principles of a liberal democracy, any meaningful policy debate on the merit of a constitutionally entrenched legal system should involve a factual assessment of the scope of protection afforded to fundamental rights. Accordingly, this Article critically appraises the effects of the two legal regimes—a judicially enforced constitutional system of rights in Canada and a statutory protection model in England—on the right to religious freedom, a keystone in Western human rights ideology that has continually remained “the most common form of human rights violation in the world.”<sup>9</sup>

The following analysis is organized in four parts. Part I lays out the contextual foundation for this comparative study by explaining its warrant in the context of the controversy over rights protection. Part II analyzes the developments of the Canadian legal framework with respect to religious freedom, including the changes caused by the enactment of the Charter. Part III traces the protection of religious freedom within the English system. Finally, Part IV compares specific issues concerning religious freedom that have arisen in both states and the effects of each model on the scope of protection afforded to religious freedom.

## I. RATIONALE FOR COMPARING CANADA AND ENGLAND

The extensive ties between Canada and England motivate a comparison of the two states for a number of reasons, three of which have particular relevance. First, England’s historic dominance in Canada (although never exclusive due to strong French influence in Quebec), generated lasting social and cultural links in addition to strong political and legal ties. Canada’s Confederation in 1867 was prescribed under English legislation, the British North America Act 1867 (B.N.A. Act),<sup>10</sup>

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<sup>9</sup> NORMAN DORSEN ET AL., *COMPRATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 923 (2003). On the centrality of religious freedom in Western human rights ideology see DONNA GOMIEN ET AL., *LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER* 263 (1996).

<sup>10</sup> The British North American Act, 1867, 30 & 31 Vict., c. 3, *reprinted in* R.S.C. app. § 2, no. 5 (1985). In this Article, following Professor Peter W. Hogg, I will continue to use the Act’s historical name when discussed in a historical context.

ultimately preserving Canada's status as a British colony.<sup>11</sup> Moreover, despite adopting a federal system upon Confederation, Canada continued to follow the English model of parliamentary supremacy as its federal and provincial legislatures all had full legislative powers.<sup>12</sup> Over the years the legal ties between Canada and England loosened, but the fundamental termination of these ties correlates with the adoption of the Charter by Canada.<sup>13</sup> As such, a comparison between Canada and England highlights a particular point in time—the adoption of a judicially enforced constitutional system by Canada in 1982—from which it is possible to measure the effects of alternative legal systems.

Second, the strong historical, cultural, and political ties between these two countries have generated a reasonable academic tendency to group them together in many legal studies, most notably when contrasted with their distant cousin, the United States.<sup>14</sup> Nevertheless, Canada chose to transform its English-based model of parliamentary supremacy by adopting a constitutional model, limited somewhat by the Charter's section 33 override (authorizing federal and provincial legislatures to declare legislation operative “notwithstanding” the Charter for a renewable period of five years).<sup>15</sup> An argument can be

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<sup>11</sup> The Preamble to the B.N.A. Act proclaimed the adoption of a federal system in the Dominion of Canada with “a Constitution similar in principle to that of the United Kingdom.” Hogg argues that “apart from the changes needed to establish the new federation, the British North Americans wanted the old rules to continue in both form and substance exactly as before.” Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in INTERPRETING CONSTITUTIONS 55–105 (Jeffrey Goldworthy ed., 2006). This conclusion is further supported by the fact that the B.N.A. Act did not include an amendment procedure, leaving the main constituent powers in British Parliamentary hands. Peter Oliver argues that this was “not an oversight,” but a “constitutional understanding” that “the Canadian constitution [was] also necessarily Imperial.” PETER C. OLIVER, THE CONSTITUTION OF INDEPENDENCE 111 (2005).

<sup>12</sup> See Gardbaum, *supra* note 1, at 719.

<sup>13</sup> OLIVER, *supra* note 11, at 2. Although Canada remained connected to the English monarchy, Oliver rightly argues that this does not detract from its “constitutional independence” as a separate legal system, since Canada “can at any moment put a permanent end to that arrangement of its own volition.” *Id.*

<sup>14</sup> JAMES B. KELLY, GOVERNING WITH THE CHARTER: LEGISLATIVE AND JUDICIAL ACTIVISM AND FRAMERS' INTENT 263 (2005). Canada and England are often grouped together (along with Australia and New Zealand) under the characterization of the “commonwealth model of constitutionalism.” *Id.* See generally Gardbaum, *supra* note 1.

<sup>15</sup> See Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act 1982, § 33(1) (“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 [the substantive rights provisions] of this Charter.”). Sections 33(3) and (4) declare that such a legislative override of a Charter right is limited to five years but may be reenacted. See § 33(3), (4).

made that the inclusion of section 33 undermines the constitutional status of the Charter. The framers' intent, however, was that section 33 would only be used in "rare instances where the legislature was in disagreement with judicial interpretation regarding major matters of public policy,"<sup>16</sup> and with time this extremely controversial section has been increasingly viewed as a dead letter.<sup>17</sup> Canada's departure from the traditional parliamentary supremacy model necessitates this comparison in order to assess the effects of such a choice on the legal protection of fundamental rights and freedoms.

The last motivation for comparing Canada and England hinges on the fact that neither state opted for the classic liberalist formula of separating religion and political affairs as the means to protect religious freedom.<sup>18</sup> In England, religious independence from Catholicism in the Sixteenth Century was linked to the establishment of Anglicanism as the state's religion. In Canada, religion played a central role at the time of Confederation in establishing a bicultural Anglo-Protestant and French-Catholic nation.<sup>19</sup> Also, while the historical effects of religion on the political arrangements of these states have been quite different, contemporary times are marked by a growing convergence in the role of religion. In the latter part of the Twentieth Century, both Canada and England relaxed their immigration policies, yielding increased religious diversity in these formerly Christian

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<sup>16</sup> David Schneiderman, *Prologue*, in Peter Loughheed, *Why a Notwithstanding Clause?*, 6 POINT OF VIEW, at iii (1998).

<sup>17</sup> See, e.g., W.A. BOGART, COURTS AND COUNTRY: THE LIMITS OF LITIGATION AND THE SOCIAL AND POLITICAL LIFE OF CANADA 311 (1994) ("[Section] 33 has been so excoriated that it is 'politically speaking . . . almost unusable.'"); Julie Debeljak, *Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights*, 26 MELB. U. L. REV. 285, 322 (2002) ("The use of § 33 has gained a reluctant acceptance in Quebec and only once to date has it been used to directly overturn a judicial decision. Outside of Quebec, use of the override clause appears to be politically unacceptable."); Gardbaum, *supra* note 1, at 726 ("[A] constitutional convention appears to have arisen . . . that the override provision should not be used at all."); Howard Leeson, *Section 33, The Notwithstanding Clause: A Paper Tiger?*, 6 CHOICES 3, 20 (2000) (arguing that although § 33 is available in theory, "the less it is used, the less likely it will be used.").

<sup>18</sup> See JOHN LOCKE, A LETTER CONCERNING TOLERATION 1689 (Hackett 1983) (1689) (setting forth the idea of separating religious and state affairs in the interest of religious liberty).

<sup>19</sup> Shannon Ishiyama Smithy, *Religious Freedom and Equality Concerns Under the Canadian Charter of Rights and Freedoms*, 34 CAN. J. POL. SCI. 85, 88 (2001). Legal guarantees were made to ensure the continuation of this cultural distinctiveness, most notably through the funding of minority religious education for the Catholic and Protestant minorities in each of the provinces.

nations.<sup>20</sup> During this period, both countries experienced sharp declines in active worship within the long-established Christian churches<sup>21</sup> and the emergence of new religious movements.<sup>22</sup> These transformations of the religious demography in England and Canada gave rise to growing social discontent in both states against the original church-state arrangements, and created the need for political and legal reforms (detailed in the next two sections) to overcome the newly emerging religious tensions.<sup>23</sup>

The contemporary religious demography of the two states is similar. As of 2001, approximately 74% of the Canadian population self-identified as Christian; roughly 43% were Catholic, and 31% belonged to a variety of Protestant denominations. Muslims comprised 2%, while Jews, Buddhists, Hindus and Sikhs each comprised approximately 1%. Roughly 17% self-identified as non-religious, and 2% either did not state their religion or belonged to a religion comprising less than 0.1% of the total population.<sup>24</sup> According to the British Office of National Statistics, approximately 72% of the British population currently identifies as Christian; at 29% of the total, Anglicanism is the largest denomination. Muslims comprise nearly 3% of the population, with Hindus, Sikhs, Jews and Buddhists each comprising 1% or less. An additional 15% claim no religion at all.<sup>25</sup>

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<sup>20</sup> John Biles & Humera Ibrahim, *Religion and Public Policy: Immigration, Citizenship and Multiculturalism—Guess Who's Coming to Dinner?*, in PAUL BRAMADAT & DAVID SELJAK, RELIGION AND ETHNICITY IN CANADA 154–77 (2005). See generally ROBERT WINDER, BLOODY FOREIGNERS: THE STORY OF IMMIGRATION TO BRITAIN (2004).

<sup>21</sup> Sociologists differ on the explanation of this phenomenon. Proponents of the secularization thesis attribute the drop in number of churchgoers to the secularization process. See generally STEVE BRUCE, RELIGION IN MODERN BRITAIN (John Scott ed., 1995); DAVID MARTIN, THE RELIGIOUS AND THE SECULAR STUDIES IN SECULARIZATION (1969). Opposite approaches include Grace Davie, who argues that the decline in churchgoers should be explained as “believing without belonging.” See generally GRACE DAVIE, RELIGION IN MODERN BRITAIN SINCE 1945: BELIEVING WITHOUT BELONGING (1994). Rodney Stark and Laurence Iannaccone advance the model that disestablishment generates increased religiosity. See generally Rodney Stark & Laurence Iannaccone, *A Supply-Side Representation of the “Secularization” of Europe*, 33 J. SCI. STUD. RELIGION 230 (1994).

<sup>22</sup> See generally Eileen Barker, *New Religion Movements in Britain: The Context and the Membership*, 30 SOC. COMPASS 33 (1983).

<sup>23</sup> JOHN M. BUMSTEAD, CANADA’S DIVERSE PEOPLES: A REFERENCE SOURCEBOOK 253 (2003); Tariq Modood, *The Place of Muslims in British Secular Multiculturalism*, 47 SOC. COMPASS 41–55 (2000).

<sup>24</sup> Selected Religions for Canada, Provinces and Territories, <http://www12.statcan.ca/english/census01/products/highlight/index.cfm> (last visited Dec. 8, 2008).

<sup>25</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT: UNITED KINGDOM (2008), available at <http://www.state.gov/g/drl/rls/irf/2008/108478.htm>.

There is general agreement among Canadian scholars that the enactment of the Charter was a watershed point in Canadian constitutional history. This consensus, however, is overshadowed by bubbling controversy over the extent of the Charter's significance and its scope of influence within Canada's parliamentary democracy. To clarify, there are primarily two interrelated debates. The first centers on the legitimacy of institutionalizing judicial activism through the enactment of the Charter. Taken together, section 52 of the Constitution Act<sup>26</sup> and section 24(1) of the Charter<sup>27</sup> establish the power of judges to restrain the other branches of government by invalidating their actions on constitutional grounds. Supporters of this structural change characterize it as a fundamental revolution in the scope of rights protection in Canada. Lorraine Weinrib argues that the Charter granted legitimacy to minority claims that would otherwise have been blocked by majoritarian calculations, substantially transforming Canadian politics.<sup>28</sup>

This view, however, is widely criticized by scholars from all over the academic spectrum. Socially progressive academics emphasize the Charter's inability to rectify social injustices in Canada; the deeply political nature of Charter adjudication processes, existing social and political power structures, economic inequalities, and institutionalized support for majoritarianism all undermine the possibility of generating any real progressive change under the Charter.<sup>29</sup> Conservative critics focus on the institutional power shift from parliamentary sovereignty to judicial supremacy. The power of judicial review authorized by the new constitutional principles, critics argue, enables an unelected and unaccountable group of judges to make policy and shape political discourse. Legislative power is weakened, thus undermining

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<sup>26</sup> Constitution Act, 1982, § 52 ("the Constitution of Canada is the Supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.").

<sup>27</sup> Canada Act (UK) 1982, c. 11 sched. B, § 24(1) ("[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.").

<sup>28</sup> Lorraine Eisenstat Weinrib, *Canada's Constitutional Revolution: From Legislative to Constitutional State*, 33 ISRAEL L. REV. 13, 22 (1999). Analyzing the post-Charter developments in the context of religious freedom, one commentator concludes that "[t]he Charter thus appears to have worked a significant change in the direction of Canada's religious freedom jurisprudence." David H. Moore, Comment, *Religious Freedom and Doctrines of Reluctance in Post-Charter Canada*, 1996 BYU L. REV. 1087, 1139.

<sup>29</sup> See generally JOEL BAKAN, JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS (1997); MICHAEL MANDEL, THE CHARTER OF RIGHTS AND FREEDOMS AND THE LEGALIZATION OF POLITICS IN CANADA (1994); Alan Hutchinson, *Private Rights/Public Wrongs: The Liberal Lie of the Charter*, 38 U. TORONTO L.J. 278 (1988).

the potential for reaching political compromises, a particularly worrisome problem in light of Quebec's separatist movement.<sup>30</sup> The main problem with this latter rationale, however, lies in the fact that the expansion of judicial review in Canada was intended by the framers and established by a democratic process. The framers chose to substitute the English model of parliamentary supremacy (limited by section 33 of the Charter) with a constitutional model aimed at broadening the protection to fundamental rights and freedoms.<sup>31</sup>

The other debate within Canadian academia focuses on the Charter's overall political influence, effectively curbing the debate on judicial review. Critics of the Charter's far-reaching effects, most notably Charles Epp, downplay the importance of the Charter as an instrument of rights protection, perceiving it as insignificant without what Epp identifies as "a support structure for legal mobilization."<sup>32</sup>

Contrasting with this view are those emphasizing the Charter's invaluable contribution to the task of generating a shared political responsibility for rights protection in Canada. Among those who view the Charter as a positive development, two primary approaches are identifiable. Peter W. Hogg and Allison A. Bushell described the Charter as altering the relationship between the legislative and the judicial branches, forcing them to relate to and reflect on each other's decisions as they formulate social values and decide on the scope of rights protection in Canada.<sup>33</sup> James B. Kelly, alternatively, advances a "cabinet-centered approach" to rights protection. The significance of the Charter, Kelly argues, lies much earlier in the legislative process,

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<sup>30</sup> See generally RORY LEISHMAN, *AGAINST JUDICIAL ACTIVISM* (2006); ROBERT IVAN MARTIN, *THE MOST DANGEROUS BRANCH* (2003); CHRISTOPHER P. MANFREDI, *JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM* (2d ed. 2000); F.L. MORTON & RAINER KNOPFF, *THE CHARTER REVOLUTION AND THE COURT PARTY* (2000). This debate is not limited to Canadian commentators. For a recent summary of this global debate, see W.J. WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW* 74–179 (2007).

<sup>31</sup> This rationale has been described in Justice Lamer's opinion in *Re B.C. Motor Vehicle Act* 1985 SCC 36; see also KELLY, *supra* note 14, at ch. 2.

<sup>32</sup> See CHARLES R. EPP, *THE RIGHTS REVOLUTION* 181–86 (1998) (noting that this support structure includes rights-advocacy organizations, government or foundation funding of test cases, and the availability of sympathetic and competent lawyers).

<sup>33</sup> See generally; KENT ROACH, *THE SUPREME COURT ON TRIAL* (2001); Janet L. Hiebert, *A Rational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities*, 35 J. CAN. STUD. 161 (2001); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L. J. 75 (1997).



namely in transforming the way in which the cabinet and its bureaucracy address and transmit Charter values into their activities.<sup>34</sup>

English politicians and commentators have also been engaged in a long and lively debate as to whether the adoption of a bill of rights would improve the protection of rights in England.<sup>35</sup> Reminiscent of the Canadian narrative, opponents of a constitutional transformation raised concerns that it would undermine the democratic nature of parliamentary supremacy, empowering and politicizing the non-elected judicial branch and weakening the flexibility of England's existing political arrangements.<sup>36</sup> Nevertheless, as a growing consensus argued that the common law and existing legal documents afforded insufficient protection to fundamental rights and freedoms,<sup>37</sup> a number of possible solutions were suggested.<sup>38</sup> Eventually, a majority emerged in favor of incorporating the Convention into English law, believing this to be the best fit for English legal and political traditions.<sup>39</sup> In 1998 the New Labor government made this idea a reality when it enacted the HRA, incorporating most Convention provisions (subject to reservations and derogations made by Britain) to England.

The HRA made several significant changes to the English system. It created the first explicit statutory protection of rights and implemented anti-discrimination measures that were enforceable by English courts.<sup>40</sup> It also authorized courts to scrutinize whether legislation violated human rights standards, thereby requiring legislators to give

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<sup>34</sup> KELLY, *supra* note 14, at 16 ("The increasing frequency with which cabinet introduces amendments to ensure the constitutionality of nullified statutes and attempt to develop legislation that is more consistent with the Charter highlights . . . the emergence of coordinate constitutionalism in Canada.").

<sup>35</sup> Gardbaum, *supra* note 1, at 732.

<sup>36</sup> For prominent objections to a judicially-enforced bill of rights, see generally BRUCE F. NORTON, *POLITICS IN BRITAIN* (2007); LORD MCCLUSKEY, *LAW, JUSTICE AND DEMOCRACY* (1987); Cyril Adjci, *Human Rights Theory and the Bill of Rights Debate*, 58 MOD. L. REV. 17 (1995); J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979); Dennis Lloyd of Hampstead, *Do We Need a Bill of Rights?*, 39 MOD. L. REV. 121 (1976).

<sup>37</sup> See generally IAN HARDEN & NORMAN LEWIS, *THE NOBLE LIFE: THE BRITISH CONSTITUTION AND THE RULE OF LAW* (1986); NEVIL JOHNSON, *IN SEARCH OF THE CONSTITUTION* (1977).

<sup>38</sup> See generally Christopher D. Jenkins, *The Institutional and Substantive Effects of the Human Rights Act in the United Kingdom*, 24 DAL. L. J. 218 (2001) (providing a survey of the different suggestions).

<sup>39</sup> This idea is usually traced back to the famous 1968 pamphlet of Lord Lester of Herne Hill. See generally MICHAEL ZANDER, *A BILL OF RIGHTS?* (4th ed. Sweet & Maxwell 1997); RONALD DWORKIN, *A BILL OF RIGHTS FOR BRITAIN* (1990); LESLIE SCARMAN, *ENGLISH LAW: THE NEW DIMENSION* (1974); ANTHONY LESTER, *DEMOCRACY AND HUMAN RIGHTS* (1968).

<sup>40</sup> K.D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79, 79 (1999) (discussing the scope of the incorporation of the HRA into English law).

effect to Convention rights.<sup>41</sup> Nevertheless, these institutional reforms have not transformed the English system into a quasi-constitutional system. Parliamentary supremacy continues to define the English system, and it is statutory, not constitutional protection, that remains the primary mechanism for protecting rights.<sup>42</sup> These conclusions stem from the following five indicators.

First, the legislative process of the HRA undoubtedly signals that any change in rights protection in England is confined to the boundaries of parliamentary supremacy. The White Paper introducing the HRA Bill declared that the government:

[H]as considered very carefully whether it would be right for the Bill to go further, and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights. . . . The Government has reached the conclusion that courts should not have [such] power. . . . Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament.<sup>43</sup>

Second, the HRA was enacted as an ordinary piece of legislation with an ordinary majority and its amendment does not require any special procedure as is common with entrenched texts. Furthering the conclusion that the HRA was not intended to transform the English system into a constitutionally entrenched system is the fact that the HRA was enacted in 1998, but its application was delayed until 2000, bestowing the Joint Committee on Human Rights with the power to scrutinize the conformity of legislation to the HRA rather than leaving it to the judicial branch.

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<sup>41</sup> Human Rights Act § 3(1) ("So far as it is possible to do, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.").

<sup>42</sup> PETER EDGE, *RELIGION AND LAW: AN INTRODUCTION* 65 (2006).

<sup>43</sup> Rights Brought Home: The Human Rights Bill, 1997, Bill [3782] (U.K.), *available at* <http://www.archive.official-documents.co.uk/document/hoffice/rights.rights.htm> (last visited Dec. 8, 2008).

Third, although the HRA created a new rule for statutory interpretation, its ability to impose constitutional constraints is highly limited. The HRA requires the English domestic courts to “take into account” the case law of the European Court of Human Rights (ECHR) and the European Commission of Human Rights when “determining a question which has arisen in connection with a Convention right.”<sup>44</sup> It also requires the courts to interpret English legislation “so far as it is possible” in a manner “compatible with the Convention rights.”<sup>45</sup> English courts, however, are not bound to follow the ECHR’s jurisprudence, and an attempt to impose a stronger constraint on the English courts has been rejected.<sup>46</sup>

Fourth, Parliament has retained the ability to legislate in violation of fundamental rights. When there is an incompatibility between an English provision and a Convention right, the HRA authorizes the English courts to “make a declaration of that incompatibility,”<sup>47</sup> alerting the government of the inconsistencies. Despite this, such a declaration does not automatically invalidate the legislation as it does in Canada. Instead, the government is given three options: (i) the legislature can choose to ignore the declaration of incompatibility altogether, leaving the incompatible legislation in force;<sup>48</sup> (ii) the legislature can choose to repeal or amend the incompatible legislation by the ordinary legislative process; or (iii) a minister can take remedial action to correct the incompatibility.<sup>49</sup> In any case, rectifying incompatibility with a Convention right remains beyond the competence of English courts.

Fifth, the scope of human rights protection under the Convention lends further support to the argument that a constitutional transformation has not taken place in England. The ECHR has generally afforded a wide margin of appreciation (deference) to domestic authorities. Its guiding principle has been that European states have autonomy in de-

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<sup>44</sup> Human Rights Act, § 2.

<sup>45</sup> *Id.*, § 3(1).

<sup>46</sup> Ewing, *supra* note 40, at 85; see also Mark Hill, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom*, 19 EMORY INT’L L. REV. 1129, 1130 (2005); Christina M. Kitterman, *The United Kingdom’s Human Rights Act of 1998: Will the Parliament Relinquish Its Sovereignty to Ensure Human Rights Protection in Domestic Courts?* 7 ILSA J. INT’L & COMP. L. 583, 591 (2001).

<sup>47</sup> Human Rights Act, § 4.

<sup>48</sup> See ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 50 (1998) (criticizing the compromise resulting from the English tradition of parliamentary supremacy, and noting that “[t]he reliance on government to put things right shows . . . the political character of the United Kingdom Constitution.”).

<sup>49</sup> Human Rights Act, § 10 and Sch. 2.

termining how the government will interact with religion.<sup>50</sup> This has often translated to non-intervention on the part of the ECHR and, by extension, the perpetuation of human rights violations. Moreover, this policy of nonintervention has generated inconsistent European human rights jurisprudence, and led to an operative difficulty on the part of English courts in extracting clear or systematic authoritative principles from ECHR case law. Under these circumstances, the effectiveness of incorporating European standards as a vehicle to extend the scope of protection afforded to religious freedom in England seems fundamentally lacking.<sup>51</sup>

In light of these indicators, it seems that England's adoption of the HRA allows the state to remain loyal to its Dicean heritage as it continues to place the principal responsibility of protecting fundamental rights in the hands of the legislators and the executive branch.<sup>52</sup> As such, it is safe to conclude that the primary contribution of the HRA is not to be measured as a constitutional transformation of the English system. A more accurate description may be that the HRA facilitated communication between Parliament and the courts regarding how best to advance the protection of rights. This can be seen in the way that "disagreements about their interpretation are mediated by a new relationship between courts and Parliament, both of which have an explicit role in pronouncing on human rights issues."<sup>53</sup>

To conclude, the theoretical deliberations in Canada and England remain primarily confined to the debate over the institutional outcomes and effects stemming from the legal changes in each state. This Article seeks to shift the focus toward a much more fundamental quest; namely, a factual evaluation of the success of each model in perfecting the protection of rights by way of comparing the Canadian constitutional model to its ancestral parliamentary supremacy model. In other words, while most commentators assume a similar level of rights protec-

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<sup>50</sup> See *Darby v. Sweden*, (1991) 13 Eur. H.R. Rep. 774.

<sup>51</sup> See Helen Fenwick & Gavin Phillipson, *Direct Action, Convention Values and the Human Rights Act*, 32 L. STUD. 535, 553–54 (2001). See generally Roger Masterman, *Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" Under the Human Rights Act*, 54 INT'L & COMP. L. Q. 907 (2005).

<sup>52</sup> See Ariel L. Bendor & Zeev Segal, *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model*, 17 AM. U. INT'L L. REV. 683, 686 (2002) (sharing the conclusion and arguing that, following the enactment of the HRA, the British system "does not focus on the judiciary as a guardian of human rights. Rather, it revolves around Parliament and Government's heightened sensitivity to their traditional roles as the dominant protectors of human rights"); see also Campbell, *supra* note 1, at 6.

<sup>53</sup> Murray Hunt, *The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession*, 26 J. L. & SOC'Y 86, 89–90 (1999).

tion in either state, focusing their contentions on the institutional division of power, the quest here is to put to the test this very assumption and to determine the actual progress in protecting religious freedom by each model—the judicially enforced Canadian constitutional system versus the English model it sought to replace.

## II. RELIGIOUS FREEDOM PROTECTION IN CANADA AND ENGLAND

### A. *The Development of the Canadian Religious Freedom Regime*

As subordinates to English Imperial rule, Canada's Confederation arrangements had deep English roots. Evidence of this connection can be seen in Canada's establishment of religion as an integral factor in public affairs<sup>54</sup> as well as in its lack of any formal articulation of the right to religious freedom. The protection of religious freedom, prior to the Charter, was therefore a result of piecemeal and often cumbersome English-Canadian legislation and judicial interpretation.

Two issues relating to the protection of religious freedom were notable in the early decades of the Twentieth Century: Sunday observance laws and the public actions of Jehovah's Witnesses. On both matters, Canada's highest court limited its intervention in legislation to federalism grounds. That is, the court did not focus on evaluating the alleged infringement on religious freedom. Rather, it determined the validity of a challenged piece of legislation by considering its conformity with the division of powers between federal and provincial governments under sections 91 and 92 of the B.N.A. Act.

In 1903, the Privy Council found Ontario's Act to Prevent the Profanation of the Lord's Day 1897 to be "beyond the competency of the Ontario Legislature."<sup>55</sup> The Council found that such a statute was part of the criminal law, which was reserved for the exclusive power of the federal government under section 91(27) of the B.N.A. Act. This rationale was followed by the Supreme Court of Canada in a series of subsequent cases challenging provincial and federal Lord's Day Acts throughout Canada.<sup>56</sup>

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<sup>54</sup> See, e.g., B.N.A. Act § 93 (guaranteeing public funding for denominational schools of the Catholic minority in Ontario and the Protestant minority in Quebec that, in time, became highly contentious).

<sup>55</sup> Ontario (Attorney-Gen.) v. Hamilton St. Railway, [1903] 7 C.C.C 326, 326 (Can.).

<sup>56</sup> See, e.g., Lieberman v. The Queen, [1963] S.C.R. 643 (Can.); Lord's Day Alliance of Can. v. British Columbia (Attorney Gen.), [1959] S.C.R. 497 (Can.); Lord's Day Alliance v. Manitoba (Attorney Gen.), [1925] 1 D.L.R. 561 (Can.); La Corporation de la Paroisse de

During the 1950s, the Duplessis government in Quebec exercised suppressive measures against Jehovah's Witnesses to limit their public activities in the province.<sup>57</sup> As part of this concerted effort, municipal bylaws were used to prosecute Jehovah's Witnesses who distributed written materials in the streets. When these measures came under judicial evaluation, the doctrine of division of powers was still the courts' primary mechanism for reviewing the Jehovah's Witnesses' appeals.<sup>58</sup> *Saumur v. the City of Quebec*<sup>59</sup> marked the ascent of religious freedom discourse in the Supreme Court of Canada's review process. The Court invalidated a municipal bylaw prohibiting the distribution of literature as applied against Jehovah's Witnesses. Justice Rand, writing for the majority, constructed the right to religious freedom in Canada by tracing it back to legal sources as early as 1760.<sup>60</sup> The Canadian legal system, according to Justice Rand, recognized religious freedom as one of the "original freedoms which are . . . the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."<sup>61</sup> Such freedoms are the foundation of Canadian democracy, and "[d]emocracy cannot be maintained without its foundation."<sup>62</sup>

The majority of the justices in *Saumur* did not join in Justice Rand's rationale of invalidating the municipal legislation as an infringement of the fundamental right to religious freedom. Nevertheless, due to a complex overlap between different parts of the nine opinions, this construction of religious freedom as a possible tool to invalidate discriminatory legislation became part of the majority opinion.<sup>63</sup> As a result, the *Saumur* precedent represented a substantial expansion in the scope of protection to religious freedom in Canada, albeit still as part of the Court's application of the division of power doctrine.

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St. Prosper v. Rodrigue, [1917] 56 S.C.R. 157 (Can.); Ouimet v. Bazin, [1912] 46 S.C.R. 502 (Can.).

<sup>57</sup> See generally Roncarelli v. Duplessis, [1959] S.C.R. 121, 131-32 (Can.); WILLIAM KAPLAN, STATE AND SALVATION: THE JEHOVAH'S WITNESSES AND THEIR FIGHT FOR CIVIL RIGHTS (1989).

<sup>58</sup> See Patrick Macklem, *Freedom of Conscience and Religion in Canada*, 42 U. TORONTO FAC. L. REV. 50, 55 (1984).

<sup>59</sup> See generally *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 641 (Can.).

<sup>60</sup> *Id.* at 688.

<sup>61</sup> *Id.* at 670.

<sup>62</sup> *Id.* at 672.

<sup>63</sup> See Macklem, *supra* note 58, at 54-55 (discussing the Court's internal division in *Saumur* and how the majority opinion was constructed).

The *Saumur* decision (along with several other decisions on other issues) led some scholars to conclude that an implied Bill of Rights exists in Canada; that is, fundamental rights appeared to be judicially enforced.<sup>64</sup> Nevertheless, the doctrine of an implied Bill of Rights was deficient in its protection of religious freedom. First, it was nonsystematic and depended upon the ability of an ever-changing combination of justices to reach a consensus.<sup>65</sup> Second, the scope of the protection afforded to fundamental rights under the implied Bill of Rights doctrine remained limited, employed only as part of the larger context of the Canadian federal division of powers.

Between Confederation and the mid-Twentieth Century, Canada's demographic composition changed dramatically as a result of vast immigration, creating a need for legal reform to reflect these sweeping changes.<sup>66</sup> After much controversy, the 1960 Canadian Bill of Rights was enacted to answer this need.<sup>67</sup> Its provisions provided an English-type statutory protection of fundamental rights applicable only at the federal level. The Preamble proclaimed deference to parliamentary supremacy,<sup>68</sup> and section 1 textually restricted the judiciary to protect only those rights that "have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex." Commentators explained the legislative choice of opting for statutory protection for fundamental rights instead of the judicially enforced constitutional model with two arguments. First, they pointed to a continued impasse between federal and provincial governments on the appropriate procedure to self-amend the B.N.A. Act, a power which had remained in English hands since 1867. This impasse effectively shelved any possibility of adopting an entrenched document in Canada. Second, they indicated that the lingering Eng-

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<sup>64</sup> See generally CANADIAN CONSTITUTIONAL LAW IN A MODERN PERSPECTIVE (J. Noel Lyon & Ronald G. Atkey eds., 1970); 2 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA §§ 34-10 to -13 (5th ed. 1992).

<sup>65</sup> Fowler notes that the Court "largely abandoned its activist role with the retirement of Justices Kellock and Rand at the end of the 1950s." Dulcey B. Fowler, *The Canadian Bill of Rights—A Compromise Between Parliamentary and Judicial Supremacy*, 21 AM. J. COMP. L. 712, 717 (1973); see also Moore, *supra* note 28, at 1093-96; Edward McWhinney, *The New Canadian Bill of Rights*, 10 AM. J. COMP. L. 87, 91 (1961).

<sup>66</sup> See MARGARITE H. OGILVIE, RELIGIOUS INSTITUTIONS AND THE LAW IN CANADA 25-44 (1994) (arguing that while Canadian society has been changing rapidly, laws still reflected notions of Western European Christianity).

<sup>67</sup> Canadian Bill of Rights, 1960 S.C., ch. 44 (Can.).

<sup>68</sup> *Id.* (The Preamble proclaims that it is "desirous of enshrining . . . human rights and fundamental freedoms . . . in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority . . .").

lish legacy of parliamentary supremacy left legislators wary about redefining the role of the courts in an entrenched Bill of Rights.<sup>69</sup>

Echoing these textual constraints, the Supreme Court of Canada afforded very limited protection to religious freedom under the Canadian Bill of Rights. In *Robertson and Rosetanni v. The Queen*,<sup>70</sup> operators of a bowling alley open on Sundays challenged as unconstitutional the federal 1906 Lord's Day Act, which prohibited commercial activities and the performance of work on Sundays. Justice Ritchie, writing for the majority, refused to identify the Lord's Day Act as a violation of the religious freedom of minority religions in Canada.<sup>71</sup> Rights, he said, can be restricted in "in an organized society . . . based upon considerations of decency and public order." To allow these limitations on rights, Justice Ritchie employed the purpose versus effect doctrine: even if the purpose of the Lord's Day Act is "safeguarding the sanctity of the Sabbath," its effect (regulating the official day of rest) is a "purely secular and financial one."<sup>72</sup> By refusing to invalidate the Lord's Day Act, Justice Ritchie essentially legitimized the process of translating the majority's religious values into law at the expense of economic hardship to minority religious groups.

Because the Canadian Bill of Rights placed no limitations on provincial legislatures, the Supreme Court of Canada continued to review challenges to municipal legislations under the division of powers doctrine. In *Walter v. Attorney General of Alberta*,<sup>73</sup> a group of Hutterians challenged Alberta's Communal Property Act,<sup>74</sup> a law that limited their ability to purchase communal land. Hoping to benefit from the *Saumur* precedent,<sup>75</sup> the Hutterians argued that the law infringed on their ability to exercise a central tenet of their religion, the communal holding of land, and was therefore beyond the powers of the Province.<sup>76</sup>

The Supreme Court of Canada was unwilling to follow the line of reasoning Justice Rand established in *Saumur*, choosing instead to ex-

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<sup>69</sup> See Macklem, *supra* note 58, at 58; Fowler, *supra* note 65, at 718; McWhinney, *supra* note 65, at 92. See generally WALTER S. TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS (1966) (analyzing circumstances surrounding enactment of Canadian Bill of Rights).

<sup>70</sup> [1963] S.C.R. 651 (Can.).

<sup>71</sup> *Id.* at 658.

<sup>72</sup> *Id.* at 657-58.

<sup>73</sup> [1969] S.C.R. 383 (Can.).

<sup>74</sup> An Act Respecting Lands in the Province Held as Communal Property, R.S.A., ch. 52 (1955).

<sup>75</sup> Walter, [1969] S.C.R. at 390.

<sup>76</sup> See *id.*



ercise a highly restrained approach to rights protection.<sup>77</sup> It found Alberta's Act to be *intra vires*, because it regulated the control of land ownership, consistent with section 92(13) of the B.N.A. Act.<sup>78</sup> The Court reasoned:

While it is apparent that the legislation was promoted by the fact that Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal properties, it does not forbid the existence of the Hutterite colonies. . . . The Act is not directed at Hutterite religious beliefs or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property.<sup>79</sup>

Using the distinction between "religious belief" and the "profession of religious belief," the Court upheld a law enacted specifically against the Hutterians.<sup>80</sup> This was a regrettable outcome in the context of rights protection, for it undermined the primary rationale of affording protections to minorities: safeguarding them against the exertion of power by a majority that often finds their practices strange and threatening.<sup>81</sup>

This restrictive approach to rights protection was also unhelpful to another minority group, the Salish Indians, who were convicted for hunting contrary to the British Columbia Wildlife Act of 1979 (Wildlife Act).<sup>82</sup> The appellants invoked religious freedom, arguing that they hunted a deer in order to burn its meat and offer it to the spirits of their ancestors, a practice which the Court held to be a historic fundamental religious ritual.<sup>83</sup> Although already in force, the Charter was not applied in this case, as the hunting incident occurred prior to its proclamation. The prohibition by the Wildlife Act of killing deer, asserted the Court, does not affect religious freedom because the hunt took place "in preparation for a religious ceremony" rather than "as part of the ceremony."<sup>84</sup> The Court went on to suggest that the appellants could have stored deer meat obtained during the hunting season, consistent with the Wildlife Act, to be used at a later time.<sup>85</sup>

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<sup>77</sup> *Id.* at 393.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 392.

<sup>80</sup> Walter, [1969] S.C.R. at 394.

<sup>81</sup> See Moore, *supra* note 28, at 1097–99.

<sup>82</sup> Jack and Charlie v. The Queen, [1985] 2 S.C.R. 332 (Can.).

<sup>83</sup> *Id.* at 335–37.

<sup>84</sup> *Id.* at 344.

<sup>85</sup> *Id.*

This rationale seems to undermine the purpose of protecting wildlife under the Wildlife Act, as it implicitly encourages the Salish to kill as many animals as possible during those times when hunting is allowed.

The narrow scope of protection afforded by the Supreme Court of Canada to religious freedom was characteristic of the limited protection afforded to other fundamental rights, and prompted a protracted political process for constitutional change. Prime Minister Pierre Elliott Trudeau, Canada's principal architect for constitutional reform, envisioned the enactment of Canada's Charter as providing a double benefit: entrenching the protection of fundamental rights, and countering Quebec's separatism by strengthening Canadian national unity.<sup>86</sup> Already a visionary Minister of Justice in Pearson's government, Trudeau outlined his proposed constitutional transformation in the abandonment of the English legislative model in favor of a constitutionally entrenched system of rights.<sup>87</sup> The constitutional process, however, proved to be a complex political endeavor that was repeatedly jeopardized by Quebec's separatist movement, power bargaining by the provincial premiers, and a number of baffling judicial rulings documented elsewhere.<sup>88</sup> The end result was a constitution that did not fit the single document constitutional model, as seen in the U.S. example. Rather, Canada's constitution groups together historic legal arrangements (Constitution Act, 1867) with the newly enacted Charter, reflecting the long and gradual process of Canada's evolution from English rule.

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<sup>86</sup> See Michael D. Behiels, *Pierre Elliott Trudeau's Legacy: The Canadian Charter of Rights and Freedoms*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: REFLECTIONS ON THE CHARTER AFTER TWENTY YEARS* 139–40, 148 (Joseph Eliot Magnet et al. eds., 2003).

<sup>87</sup> PIERRE ELLIOT TRUDEAU, *THE CANADIAN CHARTER OF HUMAN RIGHTS* 11, 14 (1968) ("A constitutional bill of rights in Canada would guarantee the fundamental freedoms of the individual from interference, whether federal or provincial. It would as well establish that all Canadians, in every part of Canada, have equal rights. . . . A bill of rights so enacted would identify clearly the various rights to be protected, and remove them henceforth from governmental interference. Such an amendment . . . would involve a common agreement to restrict the power of governments. The basic human values of all Canadians—political, legal, egalitarian, linguistic—would in this way be guaranteed throughout Canada in a way that the 1960 Canadian Bill of Rights, or any number of provincial bills of rights, is incapable of providing.").

<sup>88</sup> See KELLY, *supra* note 14. See generally EDWARD McWHINNEY, *CANADA AND THE CONSTITUTION, 1979–1982: PATRIATION AND THE CHARTER OF RIGHTS* (1982); EDWARD McWHINNEY, *QUEBEC AND THE CONSTITUTION, 1960–1978* (1979); Behiels, *supra* note 86; Peter H. Russell, *Canada: A Pioneer in the Management of Constitutional Politics in a Multinational Society*, in *THE POLITICS OF CONSTITUTIONAL REFORM IN NORTH AMERICA* (Rainer-Olaf Schultze & Roland Sturm eds., 2000).

The Charter accords an entrenched constitutional status to religious freedom.<sup>89</sup> It prohibits discrimination on the basis of religion<sup>90</sup> and prescribes the conditions that must be met in order to derogate from this fundamental right.<sup>91</sup> The Charter also bestows the courts with the power of judicial review, authorizing them to nullify federal and provincial legislation conflicting with the protected rights.<sup>92</sup>

After the enactment of the Charter, the Supreme Court of Canada had several opportunities to develop a constitutional test for protecting religious freedom. Post-Charter constitutional jurisprudence generated a robust definition of religious freedom and overcame many of the drawbacks characterizing the pre-Charter era. The Court reinvigorated the importance of protecting minority religions as well as non-believers from “the tyranny of the majority.”<sup>93</sup> It also limited the applicability of the purpose/effect distinction used historically to dismiss claims of rights infringement only to situations in which legislation carries a valid purpose.<sup>94</sup> Furthermore, the Court endorsed a “subjective understanding” of freedom of religion in Charter analysis, asserting that once an individual demonstrates the sincerity of his or her beliefs, it is irrelevant that such a belief or practice may not be “required by official religious dogma or is in conformity with the position of religious officials.”<sup>95</sup> Finally, under the Charter regime, the Court significantly extended the protection afforded to freedom of religion on a case by case basis. For example, confidential communications with religious advisors were recognized as privileged in particular circumstances and as such were protected from forced disclosure as evidence in criminal proceedings.<sup>96</sup> Also, the private sphere of influence for religious communities was recognized within the larger society when the Court upheld a private

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<sup>89</sup> Canadian Charter of Rights and Freedoms § 2 (“Everyone has the following fundamental rights: (a) freedom of conscience and religion.”).

<sup>90</sup> *Id.* § 15.

<sup>91</sup> *Id.* § 1 (“[rights in Canada are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”).

<sup>92</sup> *Id.* § 24 (1); *see also* Constitution Act, 1982, § 52 (1). As discussed above, a solid consensus has emerged against the override in § 33. Consequently, § 33 has never been used in the context of a religious freedom issue.

<sup>93</sup> *See R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 337 (Can.).

<sup>94</sup> *Id.* at 334 (“[T]he effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.”).

<sup>95</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 580 (Can.).

<sup>96</sup> *See R. v. Gruenke*, [1991] 3 S.C.R. 263, 291 (Can.).

Evangelical university's teacher training program that discriminated on the basis of homosexual behavior.<sup>97</sup>

Nevertheless, this constitutional transformation has not afforded an absolute protection to religious freedom. Employing section 1 of the Charter, the Court has recognized limits to religious freedom in situations where it collided with the constitutional rights of others or with compelling state interests. Such a conflict has been reconciled according to the *Oakes* test,<sup>98</sup> assessing: (i) whether a legislative objective is sufficiently important to permit a limitation on constitutional rights; and (ii) whether means chosen by the state are proportional to that legislative objective. Using this test, the Court has authorized emergency medical help to a child, against the wishes of the parents, who were Jehovah's Witnesses.<sup>99</sup> The Court has also used the test to allow the dismissal of a teacher who made anti-Semitic statements, based on his religion, to ensure an educational environment free from discrimination.<sup>100</sup>

The Supreme Court of Canada has also been hesitant to extend Charter protection of religious freedom claims in family-related disputes. For example, in child custody battles, the Court has deferred to the child's best interest, refusing to accommodate religious freedom claims raised by non-custodial parents.<sup>101</sup> Similarly, the Court has upheld a judgment for damages against a Jewish husband for his unilateral breach of a divorce contract which left his wife unable to remarry and have children under Jewish law for an extended period of time.<sup>102</sup>

### *B. The Development of the Legal Freedom Regime in England*

The diffused structure of the Canadian Constitution pales in comparison to the complexity of the rights protection regime in England.

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<sup>97</sup> *Trinity Western Univ. v. B.C. Coll. of Teachers*, [2001] 1 S.C.R. 772, 773, 817–19 (Can.).

<sup>98</sup> *See* *R. v. Oakes*, [1986] 1 S.C.R. 103, 138–39 (Can.); and subsequent applications.

<sup>99</sup> *B. (R.) v. Children's Aid Soc'y of Metro. Toronto*, [1995] 1 S.C.R. 315, 385–86 (Can.).

<sup>100</sup> *Ross v. N.B. Sch. Dist. No. 15*, [1996] 1 S.C.R. 825, 886 (Can.).

<sup>101</sup> *Young v. Young*, [1993] 4 S.C.R. 3, para. 42 (Can.); *P.(D.) v. S. (C.)*, [1993] 4 S.C.R. 141, para. 107 (Can.).

<sup>102</sup> *See* *Braker v. Marcowitz*, [2007] 3 S.C.R. 607, 642, 646 (Can.). The court discussed the balancing test under section 9 of the Quebec Charter of Human Rights and Freedoms which prescribe that in exercising fundamental rights persons "shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec." *Id.* at 640; Quebec Charter of Human Rights and Freedoms, R.S.Q., ch. C-12, § 9.1 (1975) (amended 1982).

There is no written document declaring the constitutional sources of England, and rights do not enjoy an entrenched status.<sup>103</sup> The first explicit recognition of the right to religious freedom in English law came with the enactment of the HRA in 1998. Until then, two sources of law protected religious freedom: (i) common law, which recognized religious freedom as a negative right (meaning that religion could be manifested in any way that was not legislatively restricted); and (ii) piecemeal legislation from the Sixteenth Century. This early legislation focused on different aspects of religious beliefs and often provided uneven protection to the different religious groups in England. As parliamentary supremacy continues to be the central element of the English system, this legislation remains legally unhindered in principle.

This precarious framework of rights protection resulted in periods of overt discrimination against non-Anglican.<sup>104</sup> Nevertheless, it also generated attempts on the part of English law makers to accommodate the diverse religious needs of England's many minorities. Beginning in the Seventeenth Century, after Anglicanism had established religious supremacy, concessions were made to religious minorities which gradually allowed them to publicly exercise their faith.<sup>105</sup> By the Twentieth Century, the legal and political framework that developed in England with regard to religion consisted of the legally established privileged status of the Church of England,<sup>106</sup> along with specific legal provisions

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<sup>103</sup> The 1215 Magna Carta, providing the historic cornerstone to English constitutionalism, has mostly been repealed in subsequent English legislation, primarily through Statute Law Revision Acts of 1856, 1861 and 1863. The symbolic importance of the Magna Carta has receded in England, and today greater prestige is attributed to it in the United States. See generally Ralph V. Turner, *The Meaning of the Magna Carta Since 1215*, 53(9) HISTORY TODAY 29 (2003).

<sup>104</sup> RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* 962–63 (2000). Following England's break from Rome, efforts to solidify the Church of England's status resulted in the exclusion of non-Anglicans from public life. See, e.g., Coronation Oath Act, 1688, 1 W. & M., c. 6 (making Anglicanism a precondition of succession to the throne); Corporation Act, 1661, 13 Car. 2, c. 1 (effectively barred non-Anglicans from taking part in political affairs); Act of Uniformity, 1559, 1 Eliz., c. 1 (imposing a range of punishments on those who failed to adhere to Anglican Protestantism).

<sup>105</sup> See, e.g., Jewish Relief Act, 1845, 8 & 9 Vict., c. 53; Roman Catholic Relief Act, 1791, 31 Geo 3, c. 32; Schism and the Occasional Conformity Acts, 1719, 13 Ann., c. 7 (granting limited rights to non-Anglican Protestants); Toleration Act, 1689, 1 W. & M., c. 18. See generally CLAYTON & TOMLINSON, *supra* note 104.

<sup>106</sup> The established status of the Church of England is reflected in the following features of the English system: a legal requirement that the monarch be an Anglican; twenty-six of the most senior Anglican bishops are members of the House of Lords; the ecclesiastical law of the Church of England is part of English law; the Church of England is protected by the common law offence of blasphemy; only Christian festivals are public holidays; and several universities reserve specific posts in their theology faculties to Anglican

enacted separately for non-Anglican Protestants, Catholics and Jews, facilitating limited manifestations of their faiths.

This system remained unchallenged during the first part of the Twentieth Century. By the 1960s, however, social developments within English society were exposing the system's limitations. The mass immigration from South Asia, the Caribbean, East Africa and the Middle East generated blatant intercultural clashes.<sup>107</sup> The flourishing of these new religious movements was met with suspicion and resentment. This generated calls for stronger measures against discrimination.<sup>108</sup>

English law makers responded by enacting the Race Relations Act, 1965.<sup>109</sup> The Race Relations Act outlawed discrimination on the basis of "color, race, nationality or ethnic and national origins," but not religion. In retrospect, addressing these pluralistic tensions through the legal prism of race (as opposed to religion) resulted in the creation of a new form of religious inequality.<sup>110</sup> When questions of discrimination came before the English courts, they afforded racial protection to certain religious groups, such as Sikhs<sup>111</sup> and Jews,<sup>112</sup> but withheld this protection from other religious, multi-ethnic groups such as Muslims,<sup>113</sup> Rastafarians<sup>114</sup> and Jehovah's Witnesses,<sup>115</sup> who

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priests. See David McClean, *State and Church in the United Kingdom*, in STATE AND CHURCH IN THE EUROPEAN UNION 307 (Gerhard Robbers ed., 1996). See generally James W. Torke, *The English Religious Establishment*, 12 J.L. & RELIGION 399 (1995/1996).

<sup>107</sup> See generally Winder, *supra* note 20.

<sup>108</sup> Barker, *supra* note 22, at 39; James A. Beckford, *The Public Response to the New Religious Movements in Britain*, 30 SOC. COMPASS 49 (1983).

<sup>109</sup> Race Relations Act, 1976, c. 74, § 3 (Eng.), available at <http://www.statutelaw.gov.uk/>.

<sup>110</sup> For an examination of the inequities that can result when this type of practice is perpetuated, see generally Nathaniel Stinnett, *Defining Away Religious Freedom in Europe: How Four Democracies Get Away With Discriminating Against Minority Religions*, 28 B.C. INT'L & COMP. L. REV. 429 (2005).

<sup>111</sup> *Mandla (Sewa Singh) v. Dowell Lee*, (1983) 2 AC 548 (H.L.) (appeal taken from Eng.).

<sup>112</sup> *Hamlets London Borough Council v. Rabin*, [1989] ICR 693; *Simon v. Brimham Associates*, [1987] ICR 596, [1987] IRLR 307; *Seide v. Gillette Indust. Ltd.*, [1980] IRLR 427.

<sup>113</sup> In *Niyazi v. Rymans*, EAT/6/88 [1988], the Employment Appeal concluded that Muslims do profess a common religion; however, this religion "is widespread, covering many nations, indeed many colours and languages, and it seems to us that the common denominator is religion." Islam, it concluded, was therefore not an "ethnic group" under the meaning of the Race Relations Act.

<sup>114</sup> *Property Services Agency v. Dawkins* [1993] ICR 517, [1993] IRLR 284.

<sup>115</sup> *Lovell-Badge v. Norwich City College of Further and Higher Education*, Case No. 1502237/97 (1999).

were seen as less socially cohesive than the former groups and therefore not “races” in the legal sense of the word.<sup>116</sup>

These developments reflected the insufficient protection of religious freedoms under existing English law, which ultimately prompted passage of the HRA.<sup>117</sup> The HRA included the first explicit protection of religious freedom in England, drawing from Article 9 of the Convention.<sup>118</sup> While the protection fell short of creating an entrenched right, it did include anti-discrimination measures that recognized religion as a protected characteristic.<sup>119</sup>

Because the HRA only came into force in 2000, it may be too early to provide a comprehensive assessment of its impact in protecting religious freedom in England.<sup>120</sup> Two substantial effects, however, are already apparent. First, citing Canada’s *Syndicat Northcrest* precedent, the House of Lords set down a broad interpretation of what may be identified as a religious belief for the purpose of evaluating religious freedom claims under the HRA.<sup>121</sup> Like the Supreme Court of Canada, the House of Lords concluded that it need not evaluate a claimant’s belief against any objective criteria to determine its sincerity.

A second observation regarding the HRA involves its apparent influence on the jurisprudence of the lower courts, prompting broad judicial protection to religious freedom on a case-by-case basis. For ex-

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<sup>116</sup> Grace Davie, *Religion in Modern Britain: Changing Sociological Assumptions*, 34(1) SOC. 113, 122 (2000); Peter Cumper, *Religious Liberty in the United Kingdom*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 205, 232 (Johan Van Der Vyver & John Witte eds., 1996).

<sup>117</sup> David Feldman, *Civil Liberties*, in THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY 401, 403 (Vernon Bogdanor ed., 2003).

<sup>118</sup> Article 9 of the Convention prescribes: “(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.” Conv. for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, Europ. T.S. No. 155, 213 U.N.T.S. 221 [hereinafter Convention].

<sup>119</sup> Article 14 of the Convention prescribes: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>120</sup> There are studies beginning to assess the HRA’s impact on the human rights culture in England. See, e.g., CONOR GEARTY, PRINCIPLES OF HUMAN RIGHTS ADJUDICATION 205 (2004).

<sup>121</sup> *R. (Williamson) v. Sec’y of Educ. & Employment*, [2005] UKHL 15, 2 All E.R. 1, 10–14 (Eng.).

ample the High Court accepted a father's challenge to enroll his daughter in an oversubscribed same-sex school on religious grounds, asserting that "since the coming into effect of the Human Rights Act 1998, the religious conviction of a parent is something to which due weight must be given in considering admission to a particular school."<sup>122</sup> But the House of Lords, whose decisions are binding upon lower courts, has thus far proven much more reluctant to employ the HRA in broadening the protection afforded to religious freedoms. An example of this resistance may be seen in the *Begum* case.<sup>123</sup> There, a public school had a uniform with a specific dress option designed for Muslim girls. Shabina Begum, a student at the school, wanted to wear a more traditional Muslim dress, but the school refused to allow it, arguing that it would generate divisiveness among the students. The House of Lords unanimously rejected Begum's claim that the school was infringing on her religious freedom protected by Article 9 of the Convention.

The holding in *Begum* is somewhat problematic, considering the Lords' choice to consult ECHR jurisprudence on employment cases where there was a voluntary acceptance of conditions unaccommodating to religious beliefs; education is mandatory in England and therefore does not fit the Lords' analogy.<sup>124</sup> The case, however, provides significant support for the conclusion that the HRA has not changed the division of power within the English system. While the House of Lords acknowledged that the HRA afforded greater scrutiny to review human rights claims, the Lords explicitly stated that this power has not shifted to "merits review," but instead remains confined to finding proportionality in connection to the pursued aim.<sup>125</sup> Moreover, the Lords' decision also acknowledges that incorporating the Convention has not broadened the protection of rights in England.<sup>126</sup>

Statutory exemptions have been another well-accepted method of expanding the protection of religious freedom in England. Samantha Knights observed that these exemptions "have been ad hoc rather than systematic and largely confined to major world religions with greater

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<sup>122</sup> R. (K) v. London Borough of Newham, [2002] EWCA (QB) 405 (Admin), [2002] ELR 390, ¶ 29.

<sup>123</sup> See generally R. (SB) v. Governors of Denbigh High School, [2006] UKHL 15.

<sup>124</sup> Knights rightly questions the relevance of employment precedents to the field of education, especially when the assumption about Begum's free choice was questionable without a feasible education alternative for her in the area. SAMANTHA KNIGHTS, FREEDOM OF RELIGION, MINORITIES, AND THE LAW 48 (2007).

<sup>125</sup> *Governors of Denbigh High School*, UKHL 15, at ¶ 30.

<sup>126</sup> *Id.* ¶ 24.



bargaining power vis-à-vis the state.”<sup>127</sup> Recently, the protection against discrimination on the grounds of religion or belief has been reinforced with the enactment of the 2003 Employment Equality (Religion or Belief) Regulations and the 2006 Equality Act. Together, these laws made discrimination on the grounds of religion or belief unlawful in the contexts of employment and the provision of goods, services, or education.<sup>128</sup> This enhanced protection for members of minority religions and nonbelievers against both direct and indirect discrimination.<sup>129</sup>

### III. COMPARING THE EFFECTS OF DIFFERENT LEGAL MODELS ON RELIGIOUS FREEDOM

Next we compare the effects of alternative religious freedom regimes—the judicially enforced Charter in Canada and the statutory protection of religious freedom in England—on the scope of protection that each affords to religious freedom. We do so by examining the legal outcomes under each constitutional framework arising from similar circumstances.

#### A. *Definitions*

Religious freedom and its limitations have been defined differently in Canada and England. In Canada, section 2(a) of the Charter declares a right to religious freedom without defining what this means.<sup>130</sup> The Supreme Court of Canada has established a generous interpretation of the right, leading to a safe assumption that Canada operates with an expansive definition.<sup>131</sup> The adoption by England of Article 9

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<sup>127</sup> KNIGHTS, *supra* note 124, at 24. For example, turbaned Sikhs are exempted from wearing motorcycle helmets under the Road Traffic Act 1976, § 17, and the Jewish and Muslim religious methods of slaughter are exempted under the Slaughterhouses Act 1976 § 36.

<sup>128</sup> See generally NEIL ADDISON, RELIGIOUS DISCRIMINATION AND HATRED LAW (2007); KNIGHTS, *supra* note 124.

<sup>129</sup> For example, the 2003 Regulations resolved the lack of explicit protection against indirect discrimination towards shop workers and betting workers who wish to observe their Sabbath on a day other than Sunday, because § 41 of the Employment Rights Act, 1996 prescribes the possibility to opt out of work only on Sunday. See Gay Moon & Robin Allen, *Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of Rights and Their Implication*, 5(6) EUR. HUM. RTS. L. REV. 580, 586 (2000) (observing indirect discrimination prior to the enactment of the 2003 Regulations).

<sup>130</sup> Canadian Charter of Rights and Freedoms § 2. (“Everyone has the following fundamental rights: (a) freedom of conscience and religion.”).

<sup>131</sup> See *supra* text accompanying notes 89–93.

of the Convention provides statutory proclamation of religious freedom, along with specific examples for this right.<sup>132</sup>

The limitations on religious freedoms are also prescribed differently in the two states. Section 1 of the Charter declares a general limitation clause to all protected rights, subjecting them to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In England, Article 9(2) of the Convention places more specific limitations on religious freedom: only the *manifestation* of the right is qualified, not the right itself.<sup>133</sup> Such limitations occur when they “are prescribed by law and public order, health or morals or for the protection of the rights and freedoms of others.”<sup>134</sup>

### B. Sunday Closing Laws

In its history, Canada has adopted two primary approaches to Sunday closing: (i) federal and provincial legislation that prohibited different activities on Sundays, typically entitled “Lord’s Day” legislation; and (ii) provincial legislation enacted in the second part of the Twentieth Century that focused on employment standards, restricting commercial activity on Sundays and holidays.<sup>135</sup> Directly following the enactment of the Charter, these two types of Sunday closing laws were challenged as inconsistent with freedom of conscience and religion, as they coerced religious minorities and nonbelievers to conform to majoritarian religious tenets. In *R. v. Big M Drug Mart*,<sup>136</sup> the first post-charter religious freedom case, the Supreme Court of Canada examined the constitutionality of the 1906 Lord’s Day Act formerly upheld under the Bill of Rights. Striking it down, the Court found this imposition of the majority’s religious tenets inconsistent with section 2(a) of the Charter.

The following year, in *R. v. Edwards Books and Art Ltd.*,<sup>137</sup> the Court examined the constitutionality of Ontario’s Retail Business Holiday Act of 1980, a law that criminalized retail business on Sundays and other holidays. Distinguishing *Big M*, the Court found a secular legislative purpose for the provincial act: securing a uniform “pause” day for retail workers. Furthermore, the Court found the infringe-

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<sup>132</sup> Convention, *supra* note 118, art. 9.

<sup>133</sup> *R. (Williamson)*, 2 All E.R. at 9.

<sup>134</sup> *Id.*

<sup>135</sup> See Mike Brundrett, *Demythologizing Sunday Shopping: Sunday Retail Restrictions and the Charter*, 50 U. TORONTO FAC. L. REV. 1, 6–11 (1992).

<sup>136</sup> [1985] 1 S.C.R.337.

<sup>137</sup> [1986] 2 S.C.R. 713, 714.

ment on religious freedom to be sufficiently small and justified under section 1 of the Charter, primarily because the Act contained an exemption to smaller retailers who close on Saturdays.<sup>138</sup> The decision was controversial, and public pressure throughout Canada eventually led to a legislative resolution that saw most of the provinces opt for the deregulation of commercial activity on Sunday.<sup>139</sup> From a religious freedom perspective, however, *Edwards Books* stands as an abrupt retreat from the promising path shown in *Big M*. This retreat once again left religious minorities with limited protection, despite living in a post-Charter Canada.

The history of Sunday trading in England is long and multifaceted. Commercial activity on Sundays was banned in England as early as the Fifteenth Century for the purpose of preserving the Christian Sabbath.<sup>140</sup> In the Nineteenth Century, the issue of Sunday closings became hotly debated in relation to the possibilities of selling certain goods on Sunday, as well as to the importance of protecting shop-workers. These debates resulted in the enactment of several laws<sup>141</sup> and court interpretations that discussed which goods came under the different legislative exemptions.<sup>142</sup> The ongoing endeavor to protect the Christian Sabbath, however, transformed in the 1980s to a broad coalition of stores, workers associations, family organizations and Christian groups campaigning to “Keep Sunday Special.”<sup>143</sup> This coalition generated a statutory compromise in the form of the Sunday Trading Act of 1994. The new law, which remains in force today, repealed the Shops Act of 1950 and allowed commercial activity on Sunday. The only shops it continued to restrict were those with an area larger than 280 square

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<sup>138</sup> See generally Retail Business Holidays Act, 1990, c. 30 (Eng.) (exempting essential and recreational services, as well as businesses that used less than a certain amount of square footage on Sundays).

<sup>139</sup> See Human Resources and Skill Development Canada, *Sunday Closing and Weekly Day of Rest Periods: Historical Evolution and Current Situation*, LABOUR LAW ANALYSIS, 2006, available at [http://www.hrsdc.gc.ca/en/lp/spila/cli/eslc/weekly\\_rest\\_narrative.pdf](http://www.hrsdc.gc.ca/en/lp/spila/cli/eslc/weekly_rest_narrative.pdf).

<sup>140</sup> See, e.g., Sunday Fairs Act, 1448, 27 Hen. 6, c. 5 (Eng.); Sunday Observance Act, 1677, 29 Car. 2, c. 7 (Eng.) (repealed 1969).

<sup>141</sup> See, e.g., Retail Meat Dealers Shops (Sunday Closing Act), 1936, 26 Geo. 5, ch. 30 (Eng.); Shops Act, 1950, 14 Geo. 6, ch. 28, §§ 47–67 (Eng.).

<sup>142</sup> See *Wardale v. Binns*, [1946] K.B. 451; *London County Council v. Lees*, [1939] 1 All E.R. 191; *Ritz Cleaners Ltd. v. W. Middlesex Assessment Comm.*, [1937] 2 K.B. 642. See generally TONY ASKHAM, *A GUIDE TO THE SUNDAY TRADING ACT 1994* (1994).

<sup>143</sup> See generally Keep Sunday Special Campaign, <http://www.keepsundayspecial.org.uk> (last visited Dec. 9, 2008).

meters. Unless exempt for another reason,<sup>144</sup> these large stores may open on Sunday for a maximum of six hours, between 10:00 AM and 6:00 PM. Trading remains forbidden for large stores on Easter Sunday and on Sundays that coincide with Christmas Day. The Sunday Trading Act does include an unqualified exemption to store owners who, for religious reasons, close their stores on Saturday.<sup>145</sup>

The comparison between the two countries suggests that the statutory protection for religious minorities under English law was broader than that achieved under constitutional adjudication in Canada. While the rhetoric of *Big M* employed the multicultural nature of post-Charter Canada to invalidate the Christian law, the Court later furnished a secular explanation for the provincial act in order to justify upholding the burden on religious freedom. England, on the other hand, never fully abandoned the religious motivation of its Sunday closing arrangement, as reflected in the Act's title and as evident from its legislative history. At the same time, the Act afforded broad protection to religious minorities by including a complete religious exemption for Saturday observers.

### C. Religious Objects

In England, the House of Lords in the *Begum* decision interpreted the right to wear the Jilbab narrowly.<sup>146</sup> Muslim female attire has not yet produced any legal proceedings in Canada, and according to Côté and Gunn, it has not been a point of contention for students or teachers.<sup>147</sup> In both countries, however, legal concerns arose with respect to the kirpan, a ceremonial metal dagger carried by Sikh men as a sacred symbol of Sikhism's commitment to protect the weak and promote justice.

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<sup>144</sup> Exempt shops include farm shops, shops selling motor and cycle accessories, pharmacies, shops at airports, railway stations and ports, gas stations, motor service stations, and stands at exhibitions. See Sunday Trading Act, 1994, ch. 20, § 1(1), sched. 1 (Eng.).

<sup>145</sup> Askham explains the procedure as follows: "Any person of the Jewish religion who wishes to open a large shop on Sundays outside the six-hour provision gives a notice to the relevant local authority stating that he is a person of the Jewish religion and that he intends to keep the shop closed for the serving of customers on the Jewish Sabbath (Saturday). . . . In the case of a partnership or a company such certificate will be given in respect of each of the persons by whom a notice has been given, i.e. by the majority of the partners or directors. . . . Sch 2, para 9 of the 1994 Act also accepts that other religious bodies observe the Jewish Sabbath. In respect of such other religions, the appropriate certificate is given by the Minister of the religious body concerned." ASKHAM, *supra* note 142, at 46.

<sup>146</sup> *Governors of Denbigh High School*, UKHL 15, at ¶ 2.

<sup>147</sup> See Pauline Côté & T. Jeremy Gunn, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Canada*, 19 EMORY INT'L L. REV. 685, 740 (2005).

In Canada the issue of carrying a kirpan arose in the school environment in *Multani v. Commission Scolaire Marguerite-Bourgeoys*.<sup>148</sup> The school's governing board, pursuant to its authority to approve safety measures under the Education Act, prohibited a Sikh student from carrying the kirpan in school, as it was considered a dangerous object. The Supreme Court of Canada unanimously nullified the school board's decision, but disagreed on its rationale. The majority applied a constitutional standard of review, finding the prohibition on carrying the kirpan to be a considerable violation of the student's freedom of religion and not proportionate to the objective of school safety. As such, the governing board's decision could not be upheld under section 1. The majority emphasized the importance of religious tolerance in Canada, asserting that "the absolute prohibition [of carrying a kirpan] would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of others."<sup>149</sup> The concurring judgment applied an administrative law standard of review, finding the decision of the school's governing board to be simply unreasonable.

In England, the right to carry religious weapons is exempted from criminal prosecution.<sup>150</sup> In fact, this exemption is even applicable on school premises.<sup>151</sup> The protection afforded to religious beliefs manifested by the carrying of weapons is, therefore, far wider under English law than in Post-Charter Canada. In England, the religious exemption is neither limited to a specific religious group nor to a specific environment. Any person with a religious obligation to carry a dangerous object enjoys the exemption and is free to do so in any public place. Druids, for example, who are religiously obliged to carry a sword, were covered by this exemption.<sup>152</sup> In Canada, the *Multani* case only discussed the Sikh practice. There is no guarantee that courts will extend the same protection to other religious practices. Moreover, the *Multani* decision limits the exemption to the school's premises, and decisions by lower Canadian tribunals have prohibited Sikhs from carrying kirpans

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<sup>148</sup> [2006] 264 D.L.R. 577 (Can.).

<sup>149</sup> *Multani*, 264 D.L.R., at ¶ 78.

<sup>150</sup> See Criminal Justice Act (1988), c. 33 § 139 (entitled "Offence of having article with blade of point in public place," and prescribing that "[i]t shall be a defense for a person charged with an offence under this section to prove that he has the article with him . . . for religious reasons").

<sup>151</sup> See Chapter 26 of the Offensive Weapon Act 1996 (incorporating the language of the Criminal Justice Act, § 139A, to the carrying of sharp articles for religious reasons in schools).

<sup>152</sup> See KNIGHTS, *supra* note 124, at 189.

in courts<sup>153</sup> and on airplanes.<sup>154</sup> Justice Charron, writing for the majority in *Multani*, distinguished these cases, asserting that:

[T]he school environment is a unique one that permits relationships to develop among students and staff . . . [making] it possible to better control the different types of situations that arise in schools. . . . [E]ach environment is a special case with its own unique characteristics that justify a different level of safety, depending on the circumstances.<sup>155</sup>

Such limitations do not exist in the English system.

#### D. Religious Education

Education is one of the spheres where the political choices by Canada and England to not separate religious and state matters has the most potential for volatility. Education is a state's primary vehicle for transmitting values, creating a sense of national identity, and facilitating social integration. When religion is endorsed by the state, religious values are bound to be communicated through the educational system, generating multicultural tensions particularly amongst the nonreligious and the smaller religious minorities. In Canada and England, these tensions arose as a result of religious prayer in the public schools and in response to state funding of religious schools. Section 93 of Constitution Act, 1867, grants the provinces the exclusive power to legislate on education. As such, provincial legislation on both religious prayer and education has generated a number of judicial challenges. Meanwhile, England is constantly trying to adjust its web of statutes, which currently grant Anglicanism a privileged status in the education system, in order to better reflect England's current multicultural reality.<sup>156</sup>

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<sup>153</sup> R. v. Hothi, [1985] 33 Man. R.2d 180 (Man. Q.B.), *aff'd on appeal*, [1986] 35 Man. R.2d 159 (Man. C.A.).

<sup>154</sup> Nijjar v. Canada 3000 Airlines Ltd., [1999] C.H.R.D. No. 3 (Q.L.), ¶ 129.

<sup>155</sup> *Multani*, 264 D.L.R. 577, ¶¶ 65–66.

<sup>156</sup> For sample statutory authority on religious instruction and funding of religious schools, see School Standards and Framework Act, 1998, ch. 31 (U.K.); Education Act, 1996, ch. 56 (U.K.); Education Reform Act, 1988, c. 40 (U.K.); Education Act, 1944, 7 & 8 Geo. 6, c. 31 (U.K.).

## 1. Religious Education in Public Schools

Public education in Canada, introduced by Christian denominations, historically included compulsory Christian education and daily exercises such as reading scriptures and singing hymns. Beginning in the 1960s, Canada experienced a slow transformation of the Christian-based education system to fit its increasingly diverse society.<sup>157</sup> Once the Charter was enacted, minority religious groups and nonreligious people initiated judicial challenges against the enduring privileged status of Christianity in the public schools.<sup>158</sup> The issue has not yet reached the Supreme Court of Canada, but was successfully brought in the courts of appeal in Ontario and British Columbia.<sup>159</sup> In *Zylberberg v. Sudbury Board of Education (Director)*,<sup>160</sup> the court struck down a regulation requiring public schools to conduct daily religious exercises, explaining that it was a violation of section 2(a) of the Charter. The court held that the available exemption to non-Christians did not negate the coercive characteristic of the required exercise.

Similarly, in *Canadian Civil Liberties Ass'n v. Ontario (Minister of Education)*,<sup>161</sup> the court concluded that the challenged program of religious education was a form of religious indoctrination, even for those who could exempt themselves. Explaining its conclusion, the court stated:

The right to be excused from class, or to be exempted from participation does not overcome the infringement of the Charter freedom of conscience and religion by the mandated religious exercises. On the contrary, the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as nonconformists and setting them apart from their fellow students who are members of the dominant religion. In our opinion, the conclusion is inescap-

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<sup>157</sup> See David Seljak, *Education, Multiculturalism, and Religion*, in RELIGION AND ETHNICITY IN CANADA 178–96 (Paul Bramadat & David Seljak eds., 2005).

<sup>158</sup> *Id.*; MARGUERITE VAN DIE, RELIGION AND PUBLIC LIFE IN CANADA: HISTORICAL AND COMPARATIVE PERSPECTIVES 13–14 (2001).

<sup>159</sup> See *Russow v. B.C.*, [1989] 4 W.W.R. 186 (Can.).

<sup>160</sup> [1988] 52 D.L.R. 577 (Can.).

<sup>161</sup> See *Canadian Civil Liberties Ass'n v. Ontario*, [1990] 65 D.L.R. 1.

able that the exemption provision fails to mitigate the infringement of freedom of conscience and religion.<sup>162</sup>

By recognizing that exemptions from religious instruction and prayer in public schools may not be enough to overcome discrimination, Canada went much further than England in affording protection to minority religious groups and the non-religious. In England, religious education is part of the core curriculum of public schools. Its statutory framework requires each school to create a syllabus that reflects Christianity as England's main religious tradition, while taking into account the practices of the country's other principal religions.<sup>163</sup> Each school decides separately on the content of the syllabus, based on the recommendation of the Local Advisory Council on Religious Education, which is required by law to consist of Christian representatives and representatives from other religious denominations that "appropriately reflect the religious traditions in the area."<sup>164</sup> As such, in areas with a non-Christian majority, greater consideration is given to alternative religions.

In addition to religious education, English state-schools are required to conduct a daily act of Christian worship.<sup>165</sup> The collective worship "is of broadly Christian character . . . without being distinctive of any particular Christian denomination."<sup>166</sup> Children may be excused from religious education and the daily religious worship at the request of their parents (subject to the approval of the school), and the Advisory Council has the authority to waive the requirement of religious worship altogether if it considers the practice inappropriate for some or all students. According to the 2006 Religious Freedom Report on the United Kingdom, published annually by the U.S. Department of State,<sup>167</sup> religious prayer in schools has been greatly criticized, primarily by teacher's organizations.

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<sup>162</sup> *Id.*; see also Michael Mysak, *Houses of the Holy? Reconciling Parliamentary Privileges and Freedom of Religion*, 12 NAT'L J. CONSTIT. L. 353, 358-59 (2001) (discussing cases addressing provisions in violation of the Canadian Charter of Rights and Freedoms § 2).

<sup>163</sup> School Standard and Framework Act, 1998, c. 31, §§ 69-70 (U.K.); Education Act of 1996, §§ 352(10)(a), 375(3); Education Reform Act of 1988, § 8(3); Education Act of 1944, §§ 26, 29.

<sup>164</sup> Education Reform Act of 1988, § 11.

<sup>165</sup> See School Standard and Framework Act, § 20.

<sup>166</sup> See *id.*

<sup>167</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006: UNITED KINGDOM, available at <http://www.state.gov/g/drl/rls/irf/2006/71416.htm>.



## 2. Public Funding of Religious Schools

Section 93 of Constitution Act, 1867, requiring Ontario and Quebec to fund denominational education for their respective Catholic and Protestant minorities, developed into a controversial arrangement as Canada's population became increasingly diversified. In recent decades, all provinces except Ontario amended these legal requirements in order to generate greater equality among religious groups, either by extending financial support to the other minorities, or by abolishing the historic privileges of the Christian denominations.<sup>168</sup>

As for Ontario, Canada's most populous province, two demographic developments since the time of Confederation are worth mentioning. First, the number of Catholics has increased in proportion to Protestants, who have historically been the province's largest religious group. Second, Ontario's population has grown increasingly diverse, as previously miniscule religious groups have developed into substantial minorities. Accordingly, the continued public funding of Catholic schools, a reflection of historic Christian biases, has become overtly discriminatory in recent decades.<sup>169</sup>

Following the enactment of the Charter, the Catholic schools' privileges were challenged in court. In *Reference re an Act to Amend the Education Act (Ontario)*,<sup>170</sup> also known as *The Bill 30 Case*, the Supreme Court of Canada was asked to review the constitutionality of Bill 30, which extended the funding of Catholic education through high school.<sup>171</sup> The Court found the Bill immune from Charter review pursuant to section 29 of the Charter, which states that "[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed under the Constitution of Canada in respect of denominational, separate or dissentient schools." Justice Wilson's rationale was that this special treatment of Catholics is exempt by section 29, "even if it sits uncomfortably with the concept of equality embodied in the *Charter*," because it represents "a fundamental part of the Confederation compromise."<sup>172</sup>

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<sup>168</sup> See ANNE F. BAYESKY & ARIEH WALDMAN, STATE SUPPORT FOR RELIGIOUS EDUCATION: CANADA VERSUS THE UNITED NATIONS 1–17 (2007).

<sup>169</sup> *Id.* at 16–17.

<sup>170</sup> [1987] 1 S.C.R. 1197 (Can.).

<sup>171</sup> Until Bill 30, Catholic education in Ontario was funded from kindergarten only through the tenth grade. See BAYESKY & WALDMAN, *supra* note 168, at 18.

<sup>172</sup> *The Bill 30 Case*, 1 S.C.R. 1197, § 62.

The issue was litigated again in *Adler v. Ontario*.<sup>173</sup> The parents of children attending Jewish and other independent religious schools sought the extension of public funding to all minority religions in the province based on the Charter guarantees of religious freedom and equality. The Supreme Court of Canada, affirming its earlier rationale, refused to employ the Charter to reform the historic arrangement, however discriminatory it became.

Ontario's discrimination in religious education was challenged internationally as well.<sup>174</sup> When a complaint was filed with the U.N. Human Rights Committee, Canada was found to be in breach of "rights under Article 26 of the Covenant to Equal and Effective Protection Against Discrimination."<sup>175</sup> Nevertheless, Ontario has still not extended its funding to other religious schools, nor has it discontinued its practice of funding Catholic schools.

In England, Anglicanism's established status has generated a continuing challenge for minority religious groups, as well as law makers attempting to dilute Christianity's privileged position. Nearly a third of the schools in the state-funded education system are religious schools.<sup>176</sup> According to the 2006 International Religious Freedom Report, out of approximately 25,000 state-funded schools there were 6874 religious schools. Of these, 4659 were Anglican, 2053 were Roman Catholic, 115 represented other Christian denominations, thirty-six were Jewish, seven were Muslim, two were Sikh, one was Greek Orthodox and one was Seventh-Day Adventist; additional Jewish, Muslim and Sikh schools have been tentatively approved.<sup>177</sup> While Christian and Jewish schools have been well-established in England for many years, the approval of state funded schools for Muslims and Sikhs, who are newer to England, occurred only recently, after years of robust cam-

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<sup>173</sup> See [1996] 3 S.C.R. 609, 610 (Can.).

<sup>174</sup> See *Waldman v. Canada*, U.N. Human Rights Comm., Communication No. 694/1996, U.N. Doc CCPR/C/67/D/694/1996 (1996).

<sup>175</sup> See BAYEFSKY & WALDMAN, *supra* note 168, at 25.

<sup>176</sup> These are state funded religious schools, independent of the private religious schools, which are funded by the different religious communities, and educate about eight percent of the children in England and Wales. See Claire Dwyer & Astrid Meyer, *The Establishment of Islamic Schools: A Controversial Phenomenon in Three European Countries*, in *MUSLIMS IN THE MARGIN: POLITICAL RESPONSES TO THE PRESENCE OF ISLAM IN WESTERN EUROPE* 218, 221 (Wasif A.R. Shadid & P. Sgoerd van Koninsveld eds., 1996); see also David Harte, *The Law of Employment and Education*, in *RELIGIOUS LIBERTY AND HUMAN RIGHTS* 159, 159–84 (Mark Hill ed., 2002) (discussing the place of religion in the modern English education system).

<sup>177</sup> See generally BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *supra* note 167.

paigning.<sup>178</sup> Interestingly, this campaigning has not yet produced any legal challenges on the basis of religious discrimination.

The principal lessons to draw from the comparison of religious education are as follows. Canadian courts played a strong activist role in protecting the individual manifestation of religious beliefs, both in their decisions regarding religious objects and in the context of religious education. The Supreme Court of Canada, however, refused to interfere in Ontario's funding arrangements, ultimately deferring to the established historical considerations. This rationale is somewhat odd in light of the English developments, where the elevated status of Anglicanism has not proven to be an obstacle to achieving greater equality in educational funding. One possible explanation for this discrepancy is the distinction between an individual rights approach, broadly safeguarded by the courts, and a group rights approach, which has been afforded a lower level of protection.<sup>179</sup> This explanation is weakened, however, by the explicit recognition in the Charter of group rights with respect to language. It is clear that the protection of religious minorities in Canada, bolstered by the Charter, fell short of the English statutory protections, as exemplified by the examples of religious objects and Ontario's funding of religious schools. Nevertheless, as far as religious education is concerned, the incremental progress in England in reducing inequalities between religious minorities and the privileges of the Anglican Church has placed England almost at the point of pre-Charter Canada.

### E. *Parental Religious Freedom Rights*

The last issue to generate similar legal challenges in both countries thus far concerns the conflict between the rights of parents to educate their children in accordance with their religious beliefs and the states' interest in supervising education. In Canada, this conflict arose when a pastor who was home schooling his children was convicted of truancy, after neglecting to obtain the required certification from the education authorities under the Alberta School Act. He claimed that the statutory requirement was a violation of his religious freedom because it would be a sin for him "to request the state to permit him to do God's will."<sup>180</sup>

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<sup>178</sup> See KNIGHTS, *supra* note 124, at 108; Cumper, *supra* note 116, at 235.

<sup>179</sup> See Greg M. Dickinson & W. Rod Dolmage, *Education, Religion, and the Courts in Ontario*, 21 CAN. J. EDUC. 363, 379 (1996).

<sup>180</sup> See *R. v. Jones*, [1986] 2 S.C.R. 284 (Can.).

This case was one of the earliest to interpret section 2(a) of the Charter, and the Supreme Court of Canada had yet to establish its *Syndicat Northcrest* doctrine, requiring a low threshold for a belief to come under a section 2(a) evaluation.<sup>181</sup> The Court unanimously agreed that the claim of a limitation on religious freedom should be dismissed, but was again divided on the rationale. A minority of three justices recognized an infringement on the father's religious belief, only to find that it was justified as a compelling interest of the province to ensure adequate education for children (citing section 1 as authority). The majority did not find the statutory requirement for certification offensive to section 2(a), as it accommodates the right of parents to make educational decisions for their children, including whether or not to home school them. Justice Wilson resorted to the purpose-effect distinction, finding that the purpose of the certification requirement was to ensure efficient education to all, and that the effect of such a requirement on the appellant's religious freedom was an "extremely formalistic and technical one" not rising to a violation of section 2(a).<sup>182</sup>

In England, the issue of parental religious freedom rights arose when a statutory ban on corporal punishment in schools was challenged. In *R. (Williamson) v. Secretary of Education and Employment*,<sup>183</sup> parents of children in Christian independent schools sought the authorization of their children's schoolteachers to administer physical punishment for disciplinary purposes as part of their religious belief. The House of Lords agreed that the statutory ban on corporal punishment in schools interfered with the parents' religious beliefs guaranteed under Article 9(1) of the Convention. They found this interference to be justified, however, as a necessary protection of the children's well-being under Article 9(2).

The courts of both states have taken similar paths when demarcating the limitations on the right of parents to raise their children in the tenets of their faith. Supervising the education of the young has been identified in both countries as a compelling state interest prevailing over the parents' right to religious freedom. Neither the supposed difference in constitutional protection between the two models nor the differences in the elements constructing the balancing test between fundamental rights and state interest in each state was material, as both courts reached identical results.

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<sup>181</sup> See generally *Syndicat Northcrest*, 2 S.C.R. 551.

<sup>182</sup> *Jones*, 2 S.C.R. 284, ¶ 69.

<sup>183</sup> UKHL 15, 2 All E.R. 1.

## CONCLUSION

Is a judicially enforced bill of rights the best instrument to protect religious freedom? A comparative analysis reveals that both sides of the debate on the value of an entrenched system of rights overstate their positions. In Canada, critics of the Charter who caution against judicial intervention in public policy choices can certainly support their arguments with cases such as *Big M*, *Syndicat Northcrest*, *Zylberberg* and *Canadian Civil Liberties*. At the same time, *Bill 30*, *Adler* and *Edwards Books* severely contradict this argument, as those respective courts staunchly refused to substitute their own judgment for that of the legislature. Those who value the Charter as a vehicle for advancing rights protection in Canada are surely content with the outcome of *Multani*, but must realize that the statutory protection, which the Charter was supposed to transform, has proven to be much more expansive in England, as exemplified by the legislation on dangerous objects and the Sunday Retail Act. The English statutory protections that the Canadians sought to replace proved resilient.<sup>184</sup> Nevertheless, deficiencies still exist within the English model, as exemplified by *Begum* and the reality of religious education, where the HRA was not helpful in broadening the protection of religious freedom.

Advocates of an entrenched bill of rights generally raise several arguments to support their position.<sup>185</sup> First, fundamental rights receive better protection under a bill of rights that clearly states and outlines their meanings. Second, a bill of rights charts the division of powers, enabling courts to impose restraints on the legislative or executive branches that may be more susceptible to political influences. Finally, a bill of rights has educational value, as it generates greater awareness of human rights and a culture of rights protection.

While the first two arguments are still open for debate, the third argument, as a matter of legal policy, seems to hold true for Canada: a bill of rights was useful in creating an institutional foundation for advancing the protection of rights in that state. On its twenty-fifth anniversary, we can confidently conclude that the Charter did contribute to a change in tone and discourse on the part of the Supreme Court of Canada in relations to rights protection, and facilitated the devel-

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<sup>184</sup> Fowler somewhat overstates that the unwritten constitutional English model "more adequately protected civil liberties than has *any* written instrument in other societies." Fowler, *supra* note 65, at 725 (emphasis added).

<sup>185</sup> See generally Charles Alan Wright, *A Bill of Rights: Does It Matter?*, 32 TEX. INT'L L.J. 381 (1997).

opment of clearer tests to evaluate infringements on rights. Moreover, it provided Canada with a fast track to broaden the pre-Charter protection that had been sporadically afforded as part of a limited enforcement of rights created by the federal and provincial division of power. At the same time, the greatest achievements of the Canadian system concerning religious freedom simply brought Canada, in most cases, to the level of protection afforded under the English legislative system—one which the English themselves find insufficient.<sup>186</sup>

Opponents of a bill of rights focus on its obstructive effect on the separation of powers. The comparative findings of this Article suggest that it might not be realistic to attribute such revolutionary powers to a bill of rights, as they have proven rather limited as a paradigm for optimizing rights protection even in one of the world's most progressive democracies.<sup>187</sup> These findings suggest that the focus of the debate should shift from its current emphasis on institutionalism toward critically evaluating the role that societies bestow upon the law in their quest for the protection of rights. Newly emerging or struggling democracies continually seek guidance in existing Western constitutions to overcome their social tensions, yet those documents have produced only mediocre results in improving the protection of religious freedom. Should we conclude that the possibility of perfecting rights protection lies beyond the legal realm and focus our attention on the social and political theaters instead? Perhaps the answer can be found in the words of Learned Hand:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>188</sup>

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<sup>186</sup> BARENDT, *supra* note 48, at 32.

<sup>187</sup> *But cf.* RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (reaching a similar conclusion in comparing the recent constitutional transformations in Israel, Canada, New Zealand and South Africa).

<sup>188</sup> Learned Hand, *in* *IN THE SPIRIT OF LIBERTY: PAPER AND ADDRESSES OF LEARNED HAND* 189–90 (Alfred A. Knopf ed., 1952).