

inevitably boils down to the fundamental debate on the nature and the structure (if there is any) of international law as a whole. The challenge for the international lawyer remains, as O. Korhonen put it, 'how a synthetic order, which is both common enough to produce cohesion and pluralistic enough not to reduce the various cultural differences, can be achieved without succumbing to either hegemony or unmanageable fragmentation'.²³ The debate continues.

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Hirschl, Ran. **Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.**

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As in the classic Dylan song, something's happening but we don't know what it is; what we do know, however, is that it goes by names such as constitutionalism and judicial review. Both together and separately, constitutionalism and judicial review have become staples of present-day legal and political discussions in a host of states (some have already identified a 'rise of world constitutionalism'¹), and they are making their way into international legal debates as well. There has already been a considerable number of contributions on judicial review of Security Council acts; judicial review in EC law has come

to be accepted as normal fare, with discussions merely raging on such issues as the standing of individuals or NGOs; so too in the WTO, review has become an issue, in the guise of heated debates on the pros and cons of allowing *amicus curiae* briefs; and within the World Bank system, the Inspection Panel is a novel way of institutionalizing something approximating judicial review.

Yet for all the attention, the discussions remain remarkably inconsequential: few have studied conditions under which judicial review can best come about, fewer have even specified whether they have constitutional review or administrative review in mind, let alone whether judicial review would be at all suitable for the international legal system (assuming in any case that it is suited to domestic legal systems).²

In this light, the publication of Ran Hirschl's *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, is to be welcomed. Hirschl, a political science professor at the University of Toronto, has written a comparative study in public law (and, to some extent, political theory), and as might be expected with a book endorsed on its back cover by the likes of Mark Tushnet, Ian Shapiro and Joseph Weiler, it is indeed quite a good book.

Hirschl studies in depth the 'constitutionalization' (to give it a name) which has taken place over the last decade or two in Canada, New Zealand, South Africa and, in particular, Israel, with a view to discovering under what conditions, and why, states institute mechanisms of

²³ O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (2000), at 42.

¹ See Ackerman, 'The Rise of World Constitutionalism', 83 *Virginia LR* (1997) 771.

² Some of these issues are addressed in Klabbers, 'Straddling Law and Politics: Judicial Review in International Law', in R. St. J. MacDonald and D.M. Johnston (eds.), *Towards World Constitutionalism* (2005, forthcoming).

judicial review, and (less prominently perhaps) how this affects those political communities.

Hirschl's innovative thesis suggests that states do not create constitutionalism or judicial review out of sheer altruism, or a sense of propriety, or sympathy for human rights. Instead, they tend to do so when political, economic and judicial elites in a state see their power positions threatened, such as when social cleavages deepen and they may find themselves being subjected to mass sentiments. Those elites then wish to see their power positions maintained, and thus transfer political power from the democratic decision-making process to the courts. In other words: when the masses threaten to revolt, elites turn away from democracy and advocate judicial review, in order to clinch their power positions; Hirschl speaks of 'hegemonic preservation'.

This is a powerful, and intuitively plausible, thesis, and Hirschl presents compelling evidence: the adoption of fundamental rights charters in Canada and New Zealand, the adoption of a new constitution in South Africa and the de facto adoption of a constitutional regime in Israel can all be explained at least to some extent by means of Hirschl's model. And while he refrains from discussing it in any detail, his model might also help explain the adoption of the Human Rights Act in the UK: similar, if less systematic, arguments have been made by UK authors about the Act.³

Yet, powerful as it is, Hirschl's hegemonic preservation thesis does raise some questions. One relates to the motivations he ascribes to elites; all too vulgar perhaps. Particularly with regard to judicial elites, it is not immediately obvious that they would always be motivated by the urge to strengthen their respective power positions: while lawyers may have a natural tendency to judicialize everything, they may be less obviously interested in enhancing 'political influence and international reputation' (at 43).

Whereas his main focus rests on the four above-mentioned states, he does make the point that his thesis is not limited to those states but also has international application. Yet, his brief attempt to invoke supranational constitutionalism in support does not prove to be an unqualified success. The system of judicial review in the EC seems to defy any analysis in terms of hegemonic preservation:⁴ the system was put in place before any elites could even feel their positions threatened. Indeed, as Joseph Weiler has suggested, causality may have gone the other way, with Member State elites only realizing the potential impact of the ECJ *after* it had started to revolutionize things with *Van Gend & Loos* and *Costa v. ENEL*.⁵

With respect to the rights revolution under the auspices of the Council of Europe (also only discussed in passing) he relies, all too heavily perhaps, on Andrew Moravcsik's article which explains the attractions of the European

³ See, e.g., Norrie, 'Criminal Justice, Judicial Interpretation, Legal Right: On Being Sceptical about the Human Rights Act 1998', in T. Campbell, K.D. Ewing, and A. Tomkins (eds.), *Sceptical Essays about Human Rights* (2001), 261.

⁴ Unless he would argue that the very creation of the EC was a way for domestic elites to preserve their power. But this is not his argument.

⁵ See e.g. Weiler's 'The Transformation of Europe', as reproduced in his *The Constitution of Europe* (1999), 10, e.g. at 34.

Convention on Human Rights for domestic elites.⁶ Especially those states with a reputation to restore after the Second World War (Germany and Italy obviously, but Moravcsik also includes France in this category) had domestic elites who wanted to preserve liberal regimes, and aimed to do so by locking themselves into a set of commitments under the European Convention. Again, however intuitively plausible, questions remain on points of detail: the thesis on this topic ought to address why it took France so long to ratify, and why it took Italy so long to accept the individual right of petition. But perhaps this is Moravcsik's problem rather than Hirschl's; at worst, one may chide Hirschl for his uncritical endorsement of Moravcsik's thesis.

These are minor comments though, as the focus of the work clearly rests on states. More relevant, therefore, is the fact that Hirschl's model may meet with empirical objections. To what extent can this model help explain situations where, despite the existence of the required circumstances at the national level (deep social cleavages, elites under fire), a solution was not sought in judicial review or constitutionalism? This remains an open question.

The textbook example is the Netherlands, where many believe that social cleavages, until at least the 1960s, were mitigated by means of intense cooperation between the leaders of the various 'pillars' comprising Dutch society: liberals and socialists, Catholics and protestants. Here, the rise of mass democracy could have been (and should have been,

perhaps) expected to stimulate calls for judicial review, but none were forthcoming; instead, so the leading interpretation goes, a politics of accommodation was put in place, often referred to as 'pillarization'.⁷

In the end, it is also less than clear where Hirschl really stands on judicial review, and it would seem that the book suffers a little from two unresolved political tensions. The first is that, whereas at times Hirschl aims to take a principled stand against judicial review, at other times his attitudes seem largely instrumental: it is not so much judicial review itself that is the problem, but rather the fact that the courts almost invariably take conservative decisions. In other words, he would probably be a lot happier with judicial review if the courts were to render more 'progressive' judgments involving social and economic rights. Part of the critique then relates to the conservative tendencies often associated with judicial review, and Hirschl even goes so far as to downplay those instances where courts have strived to find innovative means to enforce such rights. A prime example is his all-too-austere treatment of the *Grootboom* decision of South Africa's Constitutional Court.⁸ Like so many on the left, he risks shooting the messenger because the message is not quite up to expectations.

Second, a radical preference for majority decision-making in a democracy may

⁷ See A. Lijphart's classic study, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (1976 (1965)). It is no coincidence that later Lijphart would come to advocate a similar solution for South Africa: see his *Power-Sharing in South Africa* (1985).

⁸ Compare, for instance, his treatment (at 132–133) with C.R. Sunstein, *Designing Democracy: What Constitutions Do* (2001), at 221–237.

⁶ See Moravcsik, 'The Origins of Human Rights Regimes', 54 *Int. J. Org* (2000) 217.

occasionally produce results that are offensive to Hirschl's political sensitivities and, conversely, judicial review might help protect values close to his heart. His discussion of such issues as the authority of Israel's secular courts over the conservative rabbinical courts suggests a deep ambivalence on the issue. And here the second tension feeds back into the first: if a court takes non-progressive decisions, it may well be because the law does not offer much room for progressivism.⁹ The law itself results (at least in theory and at least in nominally democratic states, such as the ones central to his study) from democratic, majoritarian decision-making; hence, it may well be that democratic majorities are not nearly as progressive as Hirschl would like them to be.¹⁰ Judicial review, in other words, might not be the problem, but merely the symptom.

Perhaps, with this dual tension in mind, the answer resides not so much in either rejecting or accepting judicial review wholesale, but rather in recognizing that in some forms, judicial review can actually help the political process along and stimulate a more inclusive form of democracy by guaranteeing rights related to political participation and expression. Such an idea was formulated by John Hart Ely in his classic

*Democracy and Distrust*¹¹ and, while much reviled, it is difficult to think of any working alternatives: the alternatives either collapse into rightsism, paralyzing political processes, or give free rein to special interest politics. Indeed, it is perhaps no coincidence that on one point (at 189), Hirschl comes close to endorsing Ely's process-oriented views, without however doing much with them in the end.

In sum, Hirschl has written a fine study, which can serve as a useful antidote to overzealous and thoughtless judicial review advocacy. In particular, his 'hegemonic preservation' thesis holds a powerful promise, even though it may not be able to provide a comprehensive explanation for all events – but then again, few theories in the social sciences can, except perhaps on unhelpfully high levels of abstraction. Moreover, the very enterprise of engaging in comparative public law is to be welcomed. As it is, comparative public law is a relatively rare phenomenon, since public law is usually deemed to be too tied up with particular political communities to lend itself to profitable comparison.¹² Yet, especially if conducted in a theoretically informed way (as it is here), it may yield useful insights. The international lawyer concerned with issues of constitutionalism and judicial review would be well advised to take a closer look.

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⁹ This is not to endorse anything resembling Dworkin's 'right answer' thesis; but it is to suggest that there are only so many ways in which norms can plausibly be interpreted and applied.

¹⁰ And, of course, labels such as 'progressive' or 'conservative' depend a lot on perspective and context: it may be conservative for the Israeli courts to aim to suppress the secular authority of rabbinical courts; it might be more conservative not to do so.

¹¹ See J.H. Ely, *Democracy and Distrust: A theory of Judicial Review* (1980).

¹² With the publication some time earlier of the fine study by T. Koopmans, *Courts and Political Institutions* (2003), perhaps a trend is in the making.