HUMAN RIGHTS AFTER BLAIR

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This paper examines several potential scenarios for post-Tony Blair human rights policy-making in the United Kingdom. Beginning with a review of the Blair government's human rights record, it then analyzes developments likely to occur under Gordon Brown's premiership during the remainder of this Parliament and in the event of a Labour victory in the next general election. Next the paper considers what human rights policy might look like in a future Conservative government led by David Cameron and in a coalition government involving Labour and the Liberal Democrats. (Polls reported during the writing of this paper, showing declining Tory and Lib Dem electoral prospects, help account for the relative brevity of these two sections.) The paper concludes with some observations about the status of human rights in the UK at the end of the Blair Decade.

1. The Blair Human Rights Record

Tony Blair's policy agenda upon taking office included a commitment to strengthen the protection of rights in the UK. The centerpiece of the project was the Human Rights Act 1998 (HRA) which incorporated the European Convention on Human Rights into British law and subjected all public authorities in Britain, including Parliament, to Convention restrictions. Civil and political rights that had previously been available to Britons only through litigation in the

European Court of Human Rights in Strasbourg could now be claimed in domestic courts as well. The HRA empowered British courts to declare legislation "incompatible" with the ECHR (if no compatible interpretation could be found), but it did not permit them actually to nullify such laws. Decisions about whether and how to correct incompatible legislation were reserved to the government and Parliament.

Despite the Blair government's sponsorship of the Human Rights Act, there were always reasons to doubt the depth of its commitment to the principles underlying the law. Certainly Blair himself never was an instinctive civil libertarian. His human rights policy was part of the legacy of John Smith. During his short tenure as party leader Smith had managed to reverse Labour's longstanding opposition to ECHR incorporation, and had even raised the possibility the possibility of developing a "homegrown" bill of rights as well. As shadow home secretary Blair had dutifully supported Smith's plans without ever seeming particularly passionate about them. After becoming Labour leader, Blair included incorporation of the Convention in his rather vague and inchoate plans for the "empowerment" of British citizens, along with devolution, House of Lords reform, and electoral reform. Blair made this connection explicit in a speech to the Council Of Europe in 1997:

> Incorporation [of the European Convention], I have to confess, is a case of Britain catching up with its partners in Europe. I hope we can also lead the way. The new Labour Government is committed to a major decentralization and devolution of power across the United Kingdom, as well as to a Freedom of Information Act. I believe that by bringing decision-making closer to the people, we will be better able to protect their fundamental rights and freedoms. Remote, centralized Governments, cut off from their citizens, are much more likely to infringe those rights than local administrations responsive to people's needs. (Blair 1997)

Both before and after the 1997 election Labour's low-key human rights rhetoric reflected the issue's lack of political salience. In arguing for ECHR incorporation the factor most frequently cited by party leaders was "efficiency:" a number of already-existing rights previously accessible only by taking "the long road to Strasbourg" would now be available at home. (The government titled its green paper on incorporation "Bringing Rights Home," and its white paper "Rights Brought Home.") The government's human rights point men, Jack Straw (Home Secretary) and Derry Irvine (Lord Chancellor), further downplayed the Act's significance by taking pains to tie its provision of "rights" to an acceptance of "responsibilities." As Straw put it in 1996:

> Intellectually we all know that rights cannot exist without responsibilities, freedoms without obligations, liberties without duties. But it is crucially important that we spell this out. . . . Putting rights and responsibilities together brings our constitutional agenda down to earth, gives it real relevance to Britain's families and communities. (Quoted in Fisher 2006)

Two years later, as he was steering Labour's Human Rights Bill through Commons, Straw said:

> One of the problems which has arisen in Britain in recent years is that people have failed to understand from where rights come. The philosopher David Selbourne has commented on the generation of an idea of dutiless rights, where people see rights as consumer product which they can take, but for nothing. The truth is that rights have to be offset by responsibilities and obligations. There can and should be no rights without responsibilities, and our responsibilities should precede our rights. (Quoted in Fisher 2006)

Despite their frequent references to the interdependence of rights and responsibilities, Straw and his colleagues never developed a coherent explanation of what this connection consisted of, nor

did they make clear how their Human Rights Act would put such a relationship into practice. But simply by asserting that there *was* such a connection they were able to remind skeptics that all the Convention rights, except the protections against torture and the right to life, were subject to restrictions "necessary in a democratic society" to ensure public safety, order, health or morals, "or for the protection of the rights and freedoms of others."

Though warmly welcomed by civil liberties lobbyists, the Human Rights Act still fell short of some of their hopes. Contrary to what many had expected, the law did not establish a commission with investigatory and enforcement powers, along the lines of the US Civil Rights Commission included in the 1964 Civil Rights Act. In deferring further consideration of a human rights commission the government clearly wanted to avoid a turf battle with the already-existing Commission on Equality. However, an equally obvious factor in the delay was the government's growing recognition of the difficulties that could result from an overly aggressive commission.[1] Some interest groups were disappointed that the Act adopted of the relatively limited definition of standing used by the European Court of Human Rights in Strasbourg, restricting third-party involvement to the representation of injured parties, instead of a more permissive standard that had evolved in conventional judicial review cases under which groups sometimes could litigate on their own behalf. And finally, despite New Labour's earlier pledge that ECHR incorporation would be followed by bill of rights legislation to supplement and expand the Convention's somewhat limited protections, that idea was dropped even before the HRA was drafted. Rather than being the first step in a more ambitious government-led human rights campaign, the Human Rights Act became the sum total of Blair's domestic human rights policy.

[1] A full decade later, in October 2007, the government will finally launch a much-negotiated Commission on Equality and Human Rights.

Some of the government's obviously diminished enthusiasm for the HRA after 1997 was due to the Old Labour thinking which persisted in Blair's supposedly modernized party. The entrenchment of non-economic rights had never been popular with Labour rank-and-file, the traditional socialists who were instinctively opposed to limiting Parliament's authority and actively hostile to expanding the power of judges, whom they regarded as deeply reactionary protectors of class privilege. The HRA's relatively narrow scope, including its rejection of expansive American-style judicial review, only partly assuaged fears of how judges might use it to damage welfare state legislation. Whether Blair shared these concerns or not, he clearly was unwilling to expend any more political capital on the HRA than was required to keep his manifesto pledge. And once the law took effect in 2000, the rightwing tabloid papers' relentless attacks on it as a "sellout to Europe," a "criminals' charter," a "terrorists' dream," and a "threat to traditional British values," obviously reinforced the government's disinclination to revisit the issue of augmenting it with a written bill of rights.

It is hardly surprising that once in power Labour found the idea of placing limits on government authority less attractive than it had in opposition. A measure originally intended to highlight the party's opposition to Thatcher's authoritarianism could now be used to thwart its own ambitions. Human rights advocates soon began invoking the law to challenge the government in court. Although the number of judicial declarations of incompatibility has been small, not infrequently they have caused the government considerable difficulties in carrying out its plans. The most dramatic example was the House of Lords decision in late 2004 that a post-9/11 anti-terror law permitting indefinite detention of foreign nationals who could not be deported to their own countries, was incompatible with the European Convention (*A and others v Secretary of State for the Home Department* [2004] UKHL 56). This decision came on the

heels of other judgments that had complicated the government's efforts to discourage asylum seekers from arriving and remaining in the UK (*R on the Application of Q and ORS v Secretary of State for the Home Department* [2003] EWCA Civ 364). Home Secretary David Blunkett reacted angrily to one such decision by accusing the judiciary of failing to understand its proper role in a democracy. "Frankly," he said, "I'm fed up with having to deal with a situation where parliament debates issues and judges then overturn them." His comments brought an immediate response from Lord Woolf, the lord chief justice, who said, "The law now includes the Human Rights Act. By upholding the law the courts are not interfering with the will of parliament." (Dyer 2003).

Responding to a growing number of adverse judicial decisions, Blair began suggesting that the HRA might have to be revised to ensure that its interpretation by judges did not stand in the way of dealing appropriately with terror suspects. After a court ruling in 2006 prohibiting the government from deporting a group of Afghani plane hijackers Blair ordered formal reviews of the Human Rights Act by both the Department of Constitutional Affairs and the Home Office. While rejecting arguments for the Act's repeal, these reviews did not rule out amending the law to put judges on notice that "public safety comes first," meaning that in interpreting the HRA their first responsibility was to the public rather than the claimant. Blair never actually proposed such changes; he took the position that amendments were unnecessary because the law as written *already* permitted such an interpretation. In an exchange during Prime Minister's Questions on May 17, 2006, Blair said:

> It is important to emphasize that because it incorporates the European convention on human rights, the Human Rights Act allows for a balance between the rights of the individual and the wider collective rights of society. If that balance is interpreted wrongly, we must look at that. It is always open to the House to decide that we will

> legislate, irrespective of the Human Rights Act. It is perfectly possible, both under the European convention and under the Human Rights Act, for that balance to be more sensible. Most people would agree, for example, that if someone is inciting hatred and inciting people to kill others in this country, it is absurd if we cannot return them to their own country. (Blair, PMQ 2006)

Arguing that the judiciary should give the government more room to maneuver, Blair pointed out that Britain seemed to be facing interpretive problems that other countries also bound by the ECHR did not have. The government's ire was not directed at the judiciary alone. Home Secretary John Reid complained that among those who still "just don't get it" when it comes to understanding the magnitude of the terrorist threat, were the human rights organizations bringing "repeated challenges under the Human Rights Act, which I continue to contest." (August 10, 2006).

After September 11, 2001, Blair's increasingly anti-libertarian rhetoric repeatedly invoked the need for government to have the tools it needed for the global war on terror. Later he added another dimension to his campaign as well, this one much closer to home. After the 2005 election Blair unveiled what he called his "respect" agenda, aimed at eliminating anti-social behavior at the neighborhood and community level. In it were a host of measures intended to augment the tools available to police for fighting street-level crime and misbehavior, including expanded use of the judicially-imposed "ASBOs" (Anti-Social Behavior Orders) that the government had earlier introduced. Describing his plan as a "radical new approach to restore the liberty of the law-abiding citizen, " Blair asserted that his "view is very clear - their freedom to be safe from fear comes first." In a published exchange over his government's civil liberties record, Blair again made it plain that the civil liberties his government cared most about were those of the law-abiding majority:

> Of course the offender has rights; but so has the victim. If the practical effect of the law is that people live in fear because the offender is unafraid of the legal process then, in the name of civil liberties, we are allowing the vulnerable, the decent, the people who show respect and expect it back, to have their essential liberties trampled on. (Porter 2006)

Stating that "[t]raditional thinking will have to be overthrown if we are to get to grips with practical reality," Blair explicitly rejected the classic formulation of civil liberties as protections of individuals against government power, recasting them instead as individuals' freedoms from threats by other individuals, to be secured if necessary by the power of government. This came close to saying that the only rights worth talking about were those defined and protected by government -- a far cry from the postwar fears about uncontrolled government authority that had given rise to the European Convention in the first place.[2]

Thus it is fair to say that at the end of the Blair Decade, the government's enthusiasm for its original domestic human rights project, never overwhelming to begin with, was approaching a vanishing point. Though Blair and his ministers usually avoided criticizing the Human Rights Act directly, they did not go out of their way to praise or even defend it. Nor did they hesitate to fault the way the Act was being interpreted by the judiciary and even by Parliament, implying that a proper understanding of the law would lead to much more restrictive applications of Convention rights. In 2006 the Joint Parliamentary Committee on Human Rights (a group that has assumed some of the functions that a statutory Human Rights Commission might have

[2] In his "debate" with *Observer* columnist Henry Porter, Blair made a perhaps misleading slip of the tongue when he said, "The point about the Human Rights Act is that it does allow the courts to strike down the act of our 'sovereign Parliament.' The anti-terrorist legislation was struck down in precisely this way." (Porter 2006) In fact, the Act deliberately *does not* permit judges to strike down legislation, but only to declare it "incompatible" with the European Convention.

performed), issued a scathing report accusing "senior ministers, from the prime minister down," of deliberately misleading the public into thinking that it was the Human Rights Act or its interpretation that had caused certain problems. "The Human Rights Act has been used as a convenient scapegoat for unrelated administrative failings within government." (Joint Committee On Human Rights 2006).

By the time his premiership came to an end, Blair had long since stopped claiming credit for fathering the Human Rights Act, and nor were his critics still willing to give him any. Typifying the view of most civil liberties professionals was this assessment of the government's record by the human rights/legal reform group JUSTICE: "Despite the introduction of the Human Rights Act, Blair ultimately set the tone for a government that was dismissive of human rights concerns." The significant blots on Blair's copybook cited by JUSTICE included "indefinite detention without trial, the use of evidence obtained under torture, control orders, and the attempt to extend pre-charge detention to 90 days." One of Blair's fiercest critics, the *Observer* columnist Henry Porter, issued this sweeping indictment of Blair's human rights legacy: "[T]here has been no government in the last 60 years, possibly the last century, that has withdrawn or compromised the very freedoms that . . . define our culture as much as New Labour. In terms of privacy, defendant's rights, the liberty to protest when and where we want, to say what we want and to move about and communicate without being observed by the state, we are far less free than we were in 1997" (Porter 2007).

2. Gordon Brown's Unexpected Constitutional Agenda

From the foregoing account, this much can be taken as read: if Tony Blair had still been prime minister on 2 July 2007, he certainly would *not* have been found presiding at a cabinet

meeting devoted to discussion of proposals for constitutional reform. Nor would his justice minister/lord chancellor a few days later have issued a green paper that, after proposing to transfer certain royal prerogatives from the prime minister to Parliament, also called for "public consultation" on whether a written bill of rights should be developed and what it might include. Indeed, nothing about Gordon Brown's first weeks as prime minister was quite so surprising as his fervent embrace of constitutional reform, a subject for which he had previously shown no obvious ardor. As chancellor, Brown's capacious domestic policy brief did not include constitutional matters and for a decade he managed (aside from his parliamentary votes) to avoid public involvement with most of the government's constitutional policies -- the prominent exception being his strong support for Scottish devolution.

However, as Brown prepared for his premiership he began to provide some broad hints of a newfound interest in reexamining Britain's constitutional arrangements. Launching his leadership campaign in May 2007, Brown spoke of wanting "to build a shared national consensus for a programme of constitutional reform that strengthens the accountability of all who hold power; that is clear about the rights and responsibilities of being a citizen in Britain today; that defends the union and is vigilant about ensuring the hard won liberties of the individual" (Brown 2007). When Jack Straw, Brown's campaign manager and subsequent choice as justice minister and lord chancellor, announced his support for a written constitution, it was widely assumed that the chancellor had become a convert as well.

Brown in fact had been laying down such markers for some time without much notice. His speech in early 2006 to the Fabian Society on the subject of "Britishness" attracted media attention mainly because it was seen as part of an effort to deal with the potential awkwardness of being a prime minister and a Scot. *Guardian* columnist Mary Riddel later noted that the

chancellor's call for a "new constitutional settlement" at the time was "greeted with all the torpor you would expect. Brown's dentistry, his questionable Arctic Monkey-mania and the fact that his hairdresser was called Kevin all elicited more interest than any wish to be the founding father of a British constitution" (Riddell 2007). Brown discussed Britishness again before the Labour party conference in September 2006, explaining that his zeal for the subject had nothing to do with his own background, but rather stemmed from his conviction that "valuing our shared purpose as a country will be as critical to our success and cohesion in this new century as it was in the last when we together defeated fascism and build the NHS and together in the century before when we led the industrial revolution." While making no explicit reference to constitutional change, Brown did pointedly note that that "*while we do not today have a written constitution* (emphasis added) it comes back to being sure about and secure in the values that matter: freedom, democracy and fairness. The shared values we were brought up with and must not lose: fair play, respect, a decent chance in life" (Brown 2006).

Brown's ideas on a written constitution, including a bill of rights, are a work in progress, but a number of conclusions can reasonably be drawn from his remarks to Parliament and the green paper titled "The Governance of Britain." One notable feature of the latter document is its forthright reference to the original New Labour plan to deliver both ECHR incorporation *and* a bill of rights:

> One of the Government's first actions on coming to power was the introduction of the Human Rights Act which was intended to be a first, but substantial step towards a formal statement of rights, articulating the relationship between individuals and between the state and the citizen. . . . During the parliamentary debates in 1997 and 1998, incorporating the Convention rights and freedoms into UK law was described as the first step in a journey (Straw 2007).

By signaling his intention to deliver on this unfinished business of the Blair government, Brown was seeking to establish himself as an independent leader of both the party and the nation. But while implicitly criticizing Blair for nor keeping his promise, Brown also invited association with early New Labour by unequivocally reviving and embracing its rhetoric linking rights and responsibilities, even to the point of titling a key section of his green paper "British Bill of Rights and Duties." Such a document, the paper said, "would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations" (Straw 2007).

What Brown means by obligations is not yet clear. In his conference speech he mentioned "jury service" as an example. But the green paper suggests that rather than being positive duties that individuals exercise, obligations refer to the general limits on rights already recognized in the ECHR based on public safety and security and the "needs of a democratic society." According to the green paper:

> The Government itself recognised, in its review last year of the implementation of the Human Rights Act, the importance which must attach to public safety and ensuring that Government Agencies accord appropriate priority to protection of the public when balancing rights. A Bill of Rights and Duties might provide a means of giving greater clarity and legislative force to this commitment (Straw 2007).

However, the green paper is careful to state that "a framework of civic responsibilities – were it to be given legislative force – would need to avoid encroaching upon personal freedoms and civil liberties which have been hard won over centuries of our history." Thus, although Brown is no less anxious than Blair was a decade ago to emphasize that a bill of rights would not be a license for radical or anti-social behavior, so far he has not adopted his predecessor's exclusive concern

for the rights of the law-abiding majority.

Just as Blair's government in 1998 emphasized that incorporating the European Convention would not be creating any new rights, Brown today wants to assure the public that a bill of rights would not introduce anything new or radical to Britain's political culture. On the contrary, there is already widespread agreement on what such a list of rights would look like, since it's what makes us British in the first place:

> At the heart of British citizenship is the idea of a society based on laws which are made in a way that reflects the rights of citizens regardless of ethnicity, gender, class or religion. Alongside this sits the right to participate, in some way, in their making; the idea that all citizens are equal before the law and are entitled to justice and the protection of the law; the right of all citizens to associate freely; the right to free expression of opinion; the right to live without fear of oppression and discrimination; the idea that there is an appropriate balance to be drawn between the individual's right to freedom and the collective good of all and that, in the final analysis, the Government is accountable for its actions to the will of the people expressed in Parliament and through elections (Straw 2007).

Although this list is probably meant to be suggestive rather than definitive, it does show clearly that when Brown speaks of codifying rights it is political and civil rights that he has in mind. Thus his proposal will disappoint those who would prefer a list that includes economic and social rights as well. According to the green paper, codifying such entitlements would "restrict the ability of the democratically elected Government to decide upon the way resources are to be deployed in the national interest" and would "involve a significant shift from Parliament to the judiciary in making decisions about public spending and, at least implicitly,

levels of taxation." By invoking the traditional Labour bugaboos of an emasculated Parliament and an unfettered judiciary (in a green paper devoted chiefly to redressing the power imbalance between the government and Parliament), Brown has tried to close off further discussion of an issue that would complicate what he obviously hopes will be a quick process of agreement on a relatively short statement of fairly general principles.

At the same time, by calling for public consultation on the matter ("a series of hearings, starting in the autumn, in all regions and nations of this country"), Brown is trying not to repeat Blair's failure to create any sense of public "ownership" of the Human Rights Act by confining discussion of its content to the parliamentary debate. (Cynics might say in retrospect that Blair never wanted the public to "own" the HRA.) But of course Brown, like Blair, is renowned for maintaining an iron grip on policy-making. Will an open, inclusive consultation process, including a possible referendum at the end, allow his government sufficient control over the outcome?

Already Brown's decision to place constitutional reform at the top of his early agenda has stimulated human rights groups to dust off the model bills of rights that many had drafted in the early 1990s. As they mobilize their memberships and begin planning their campaigns, aware that they have been handed an entirely unexpected opportunity to influence policy-making, some of the individuals and groups who became Blair's fiercest critics on the subject of civil liberties are expressing cautious approval of Brown's plans, while emphasizing that "the devil will be in the details." One of the organizations intending to have a prominent role in the upcoming discussions is JUSTICE, a human rights/legal reform group that for 50 years has played an influential role in helping shape legal policy in Britain. In early 2007, well before Brown's recent proposals, JUSTICE launched a campaign to stimulate public debate about a

written bill of rights. Although the organization has not yet endorsed any particular list of rights (it may do so in the fall), it is safe to assume that JUSTICE (like other human rights advocates) will be pushing the Brown government to adopt a more extensive and explicit list of legal protections than it might wish to, possibly even including some economic and social rights. Another influential player in the upcoming debate will be the Joint Parliamentary Committee on Human Rights, which is preparing an analysis of the need for a written bill of rights for publication in late 2007. Aside from the content of the bill of rights itself, JUSTICE has suggested that the most crucial issues that need to be considered are whether and how such a bill might be amended, whether and how it might be judicially enforced, and how it could most effectively be implemented (JUSTICE 2007).

One of the most serious challenges for advocacy groups, in addition to helping shape the content of a bill of rights proposal, will be maintaining the government's attention on the issue in the months ahead. In one sense, Brown's bill of rights proposal is serving the same purpose for him that EC incorporation once did for Blair: underscoring a commitment to break with the immediate past. Once that past is no longer so immediate, will Brown remain as interested in being seen as a new broom? Brown has also tied his proposals closely to the need to restore public trust in government. Constitutional reform may be seen as an inexpensive way to demonstrate a commitment to improving government performance, but before long the public will want to see more tangible results: better school results, shorter NHS queues, reductions in crime rates. Eventually Blair found that his constitutional agenda was not only a distraction from the "real issues," but actually stood in the way of demonstrating results in some of those areas. Human rights advocates with sensitive political antennae might find slightly worrying the recent comment of Ed Miliband, the Cabinet Office minister who is writing Labour's manifesto, that

"[w]e've got a big job to do to show that on the issues that really matter - housing, health and education - we can make the changes that people want to see" (Woodward 2007). No one would think of including a bill of rights as one of the issues that "really matter" to the British public, and there is no reason to think that as prime minister Brown will be less sensitive to public opinion than he was a chancellor. To keep their issue on Brown's front-burner, human rights advocates may find themselves in the paradoxical position of helping the prime minister make the case that a bill of rights is a way of *strengthening* the government by increasing the public's confidence that it will not overuse its authority.

3: David Cameron's Two-Step Plan

A Conservative victory in the next general election would set in motion greater changes in human rights policy than any other outcome. Exactly what those changes might be remains uncertain at this writing. In 2006 David Cameron became the fourth successive Tory opposition leader to call for repeal of the Human Rights Act. Unlike his predecessors, however, Cameron advocates replacing the HRA with a "home-grown, hard-nosed" bill of rights. A party commission was given the job of developing a more detailed proposal. That report has not yet been completed, but it probably will not add much detail to what Cameron has said so far. With such uncertainty about when the next election will be held, and therefore about the kind of record Brown will be running on, Cameron has little incentive to initiate potentially divisive intra-party issue debates. This is particularly true for human rights policy, where Brown's recent moves seem to have caught the Tories off-guard. Whereas a year ago Cameron clearly had Blair on the defensive over human rights, by grasping the issue of constitutional reform in his "big clunking fist," Brown may have succeeded -- for now -- in reclaiming the political high ground.

When the Conservatives begin putting their human rights policies down on paper, they will have to come to grips with the problem created by Cameron's determination to scrap the Human Rights Act without also withdrawing from Britain's treaty obligation to observe the European Convention on Human Rights. Repealing the act that incorporated the Convention into British law would merely reprise the pre-2000 situation in which Convention rights were available to British subjects only at the Court of Human Rights in Strasbourg. One of the arguments for incorporation was the embarrassing number of UK defeats in cases before the European Court of Human Rights, which at least partly reflected the absence of any sifting and screening of cases by domestic courts. Why would the UK be any more successful now than it was prior to 2000? Cameron has suggested that if Great Britain had a domestic bill of rights in place, Strasbourg judges would be much more sympathetic than before to its positions in Convention cases. There is no empirical support for such a view, however; nations with their own codified bills of rights do not necessarily fare better than others before the European Court. Unless Cameron's proposed bill of rights very closely tracked the European Convention (in which case there would have been no reason to repeal the HRA), any litigation that occurred under a domestic bill of rights before a case went to Strasbourg would have little or no effect on the outcome there. And a domestic bill of rights less extensive than the European Convention could itself be overruled by the European Court (Gibb and Charter 2006). Therefore, if the Conservative party decides to follow Cameron's lead on this matter, it will have to make the case -- not least to its own members -- that HRA repeal followed by a homegrown bill of rights will cause the government fewer problems in court than the HRA did, while still protecting essential rights as well or better than the HRA was able to.

To date neither Cameron nor his commission members have said much about what they might like to include in a bill of rights. No doubt Cameron would rather react to a Brown draft than have to table one of his own. If the government still has not settled on a specific proposal by the time of the election, Cameron needs to do no more than repeat his plan for HRA repeal and a British bill of rights that, like Brown's, will take into account the public's input. If at that point Brown has promised to hold a bill of rights referendum (by no means a certainty), Cameron would have little choice but to pledge to do the same.

Assuming that Brown sticks to his plan not to codify any social and economic rights, a Tory-sponsored bill of rights probably would not differ significantly from Brown's. Cameron's proposal, like Brown's, would be virtually certain to refer to "duties" as well as "rights." While the Conservatives' Big Tent includes some libertarians who might like to see government disappear entirely, the party as a whole would likely respond to rhetoric stressing the need to balance rights with responsibilities. We can get some idea of how that discussion might go from a paper prepared by a member of the party's bill of rights commission, Jonathan Fisher QC, which criticizes the European Convention for ignoring duties altogether, and suggests the African Charter for Human and Peoples Rights as a useful source of language about responsibilities that might find its way into a Tory bill of rights. But Fisher also thinks such a statute should "make reference to some specific British core values, such as an obligation to obey the Rule of Law, to treat people civilly, to respect other people’s human rights, to vote, to undertake jury service, to volunteer and assist charitable causes, to respect the environment" (Fisher 2007).

4: The Liberal Democrats: Finally In the Right Place?

The Liberal Democrats (along with their late predecessors, the Liberals and the Social Democrats) are the only major party in Great Britain that has consistently backed European Convention incorporation and a written bill of rights (and indeed, a fully written constitution). Support for these policies has been included in election manifestos since the 1970s (though oddly they were not mentioned in the party's slimmed-down 2005 version). Liberals and SDP members (both MPs and peers) were responsible for most of the EC incorporation bills introduced in Parliament from the 1970s to the 1990s; in both houses party support for these bills was virtually unanimous. For nearly 40 years the leading intellectual architect of these policies has been Anthony Lester QC (Lord Lester of Herne Hill), who followed his mentor Roy Jenkins out of Labour first to the Social Democrats, and later to the Liberal Democrats. It was Lester who ignited the modern bill of rights debate in 1968 by publishing the first explicit call for Britain to incorporate the European Convention into its domestic law (Lester 1968). In the House of Lords Lester sponsored several incorporation bills of his own and played a leading role in the 1998 parliamentary debate on the Blair government's Human Rights bill. He is his party's acknowledged master of the constitutional reform brief. It is reasonable to expect that if the next election produced a hung Parliament and a Lab-Lib coalition government with Gordon Brown as prime minister, the parties' power-sharing arrangements would include appointment of a Liberal Democrat as justice minister/lord chancellor. (The recent detachment of the justice department from the home office would make it relatively easy for Labour to agree to give away this particular prize.) If Lord Lester did not occupy this position himself, his influence would be strong on whoever did.

The Liberal Democrats' legislative demands would depend on whether or not Brown had already gotten parliamentary (and possibly public) approval for his own bill of rights, and

whether his support for such legislation were seen to have contributed to the loss of his parliamentary majority. If Brown by then had not yet succeeded in passing a bill of rights, the issue would no doubt be given a very high priority by his Liberal Democratic partners in government -- nearly as high a priority as electoral reform. A bill of rights campaign led by the Liberal Democrats would be less likely than Brown's to try to achieve a balance of rights and duties. Their own proposal would be the classic liberal model of individual autonomy protected from the power of the state, rather than the quasi-communitarian "contract" that Brown has espoused. As long-time advocates of a written constitution -- another item they would be using their leverage to enact -- the Liberal Democrats would not share the other parties' concerns about an excessively active judiciary; they would endorse American-style judicial review as a means of entrenching constitutional rights. The Liberal Democrats also would want fewer explicit limits on the codified rights than either Labour or the Conservatives. But like the larger parties, they would be unlikely to find a place on their list for social and economic rights.

Conclusion

With endorsements of a written bill of rights by the leaders of all three political parties, the stars seem to be in alignment for Britain to have one within the next few years. This is quite literally the first time in history that such a statement could reasonably be made. If a bill of rights does not materialize by 2011 at the very latest, it will either be because the issue has already been put out to public referendum and somehow failed to pass, or because unforeseeable events have radically transformed the nation's political landscape. But unless Prime Minister Brown moves ahead with uncharacteristic dispatch, we probably will not know until after the next election exactly what the bill of rights will look like. While there is no reason to expect that

it will break any new ground in defining the relationship between British citizens and their government, the simple commitment to codifying (and possibly constitutionally entrenching) human rights alone signifies a major change in Britain's political culture.

But the changes that loom ahead for human rights should not obscure the significance of what already occurred during the last decade. In fact, Tony Blair's demonstrated frustration and disillusionment with what his Human Rights Act wrought may be the best evidence of the seismic shift that took place on his watch. No government before Blair's had to worry much about having its hands slapped, much less tied, by the judiciary. No government after Blair's will be able to take for granted that merely by winning parliamentary approval it has achieved its legislative goals. The record of the last few years shows that even though the Human Rights Act explicitly denies judges the power to overturn laws, it still has given them the means of stopping the government in its tracks by issuing declarations of incompatibility. In theory the government may (with parliamentary approval) reject such a judgment. But because Blair's government never chose that course-- even when, as in the foreign detainee case, it must have been sorely tempted to do so -- it is highly unlikely that it will happen in the future. Thus, without ever being given formal powers of American-style judicial review, the British judiciary has become an institution to be reckoned with by the executive. The proof is that since 9/11 the British House of Lords has been at least as effective in challenging the Blair government as the American Supreme Court has been in confronting the Bush Administration.

The impending adoption of a British bill of rights can only reinforce this pattern. Even if the HRA itself does not survive, the judicial independence and authority it spawned will. No list of codified rights, no matter how "familiar" they may seem, can be self-explanatory. Judges will play a crucial role in determining their meaning. Rights claims invariably involve drawing

boundaries around government authority; the history of judicially interpreted bills of rights is that -- over time -- they do act as checks on the otherwise irresistible growth of official power. Probably without meaning to, Tony Blair set in motion a set of developments in the area of human rights that will continue to define the nature and scope of government in the United Kingdom for decades to come.

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