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David Erdos[1]

Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate

DESPITE A PLETHORA OF JURISPRUDENTIAL EXEGESIS, THERE REMAINS almost no work examining the politics of the Bill of Rights debate in Britain from a political science perspective. Such a lacuna is unfortunate not only because this issue has come to occupy an important place within British political debate but also because understanding Bill of Rights developments such as the 1998 Human Rights Act is important in explaining the contours of both 'judicialization'[2] and the 'rights revolution'[3] as they pertain to the British case. This article addresses the gap by providing a grounded theory analysis of elite political support for a Bill of Rights over time. Based on a close empirical study, it is argued that two principal factors – an ideological commitment to social liberalism and a non-executive power orientation – have proved important. These factors explain not only the very strong and long-standing support for such initiatives within the Liberal Party/Liberal Democrats, but also the more sporadic and wary attitude displayed by the two main parties – Labour and Conservative.

In particular, the 'aversive' development of a commitment to constitutional reform within the Labour Party during the 1990s was rooted in long and negative political experiences under Prime Minister Thatcher, which both galvanized social liberal forces and led to a non-executive-focused power orientation within the party during crucial periods of policy formation. Moreover, despite partially successful attempts to weaken Labour's Bill of Rights policy as it came

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[2] C. Tate and T. Vallinder, *The Global Expansion of Judicial Power*, New York and London, New York University Press, 1995.

[3] M. Ignatieff, *The Rights Revolution*, Toronto, House of Anansi Press, 2000.

closer to power in the late 1990s, the phenomenon of policy drag still ensured the passage of the path-breaking Human Rights Act (HRA) in 1998. More tentatively, it is also suggested that the Conservative Party's new and more positive policy on a Bill of Rights may similarly reflect its long period of non-incumbency, coupled with a newfound attempt to develop a more socially liberal policy approach.

INTRODUCTION

Bills of Rights are instruments that give formal legal status to a broad set of 'fundamental' human rights. Though they all share a common shape, Bills of Rights vary substantially in terms of designed strength and content. Thus, for example, the British debate on a Bill of Rights has encompassed both the idea of giving legal status to those rights set out in the European Convention on Human Rights (ECHR) – as provided for in the HRA – and the more ambitious project of framing a truly indigenous rights instrument for Britain. Meanwhile, the formal legal strength of Bills of Rights depends, most particularly, on the legal status of the rights it sets out (including, in particular, whether the rights are 'supreme' against other law) and the degree (if at all) to which the instrument and judicial decisions made under it are entrenched against repeal.

Traditionally, Bills of Rights have been viewed with distrust by the British constitutional tradition. Indeed, in granting a 'political' or 'policy-making' role to the judicial branch, they have been seen as interfering negatively with core 'Westminster' governance norms, such as responsible government and parliamentary democracy.[4] Nevertheless, support for such an instrument emerged within British public debate in the late 1960s with figures from a variety of political backgrounds endorsing it.[5] This policy proposal quickly found a party political home in the Liberal Party (later the Liberal Democrats). Achievement of a Bill of Rights became official party policy and, with the exception of the shortened manifesto for the second general election of 1974, every Liberal/Liberal Democrat general election

[4] A. Tant, *British Government: The Triumph of Elitism*, Aldershot, Dartmouth, 1993, p. 23.

[5] A. Lester, *Democracy and Individual Rights*, Fabian Tract 39, London, Fabian Society, 1968; J. Macdonald, *Bill of Rights*, London, Liberal Research Department, 1969; Lord Hailsham of St Marylebone (Q. Hogg MP), *New Charter: Some Proposals for Constitutional Reform*, London, Conservative Political Centre, 1969.

manifesto issued between 1970 and 1997 included a commitment to this.[6] Moreover, the party is still committed to a significantly stronger model than the statutory HRA, namely, 'a United Kingdom Bill of Rights, as part of a Written Constitution, to invalidate legislation that is contrary to fundamental rights'.[7] In contrast, as will be explored further below, the Labour and Conservative parties and individual politicians within these organizations have exhibited both a less positive and a more spasmodic approach to this issue. The purpose of this article is to analyse the elite contours of these disparate allegiances and, relatedly, how they have impacted on policy outcomes including, most notably, the HRA.

EXPLAINING OUTCOMES AND ALLEGIANCES

Bill of Rights Advocacy and the Ideology of (Social) Liberalism

Political ideology has crucially affected the nature of elite political debate on a Bill of Rights in the UK. In particular, the empirical record demonstrates a clear association between support for Bills of Rights and political actors who share an ideology of (social) liberalism that emphasizes civil liberty and social equality concerns.[8] Such politicians have naturally been concentrated in the Liberal Party/Liberal Democrats. However, it is also notable that many of the politicians in the other two main parties who have championed a Bill of Rights have also been associated with social liberalism. From the

[6] I. Dale (ed.), *British Political Party Manifestos, 1900–1997*, London, Routledge/Politico's Publishing, 2000.

[7] Liberal Democrats, *Protecting Civil Liberties*, Liberal Democrat Policy Briefing 11, available online at: http://www.libdems.org.uk/media/documents/policies/11CivilLiberties.pdf.

[8] This association has also been given emphasis in the wider comparative literature. See F. Morton and R. Knopff, *The Charter Revolution and the Court Party*, Peterborough, OT, Broadview Press, 2000; and R. Bork, *Coercing Virtue: The Worldwide Rule of Judges*, Toronto, Vintage Canada, 2002. A different strand of this literature, of which Ran Hirschl is the most prominent exponent, argues that economic neoliberals have been the key social interest behind Bill of Rights genesis. See R. Hirschl, *Towards Juristocracy*, Cambridge, MA, Harvard University Press, 2004. Empirical evidence of such involvement, however, is largely lacking not only in the UK but also elsewhere in the Westminster world (David Erdos, 'Aversive Constitutionalism in the Westminster World: The Genesis of the New Zealand Bill of Rights Act', *International Journal of Constitutional Law*, 5: 3 (2007), pp. 343–69).

Labour benches, such figures have included Roy Jenkins and Lord Gardiner in the 1970s and Harriet Harman and Bernie Grant in the 1980s and beyond.[9] Both Jenkins and Gardiner were famously associated with 'liberal' reforms during the 1960s such as easing theatre censorship, liberalizing divorce, decriminalizing homosexuality and abolishing capital punishment for murder.[10] Meanwhile, both Harman and Grant had a long history of involvement with social equality movements (women and ethnic minority respectively); Harman was also deeply involved in the work of the National Council for Civil Liberties, as its sometime legal officer.[11] Similarly, many in the Conservative Party who have been associated with support for a Bill of Rights can also be considered social liberals, including Lord Lambton, David Hunt and Dominic Grieve. Before his public disgrace and withdrawal from public life, Lord Lambton, the initiator of the first backbench attempt to legislate for a Bill of Rights,[12] was a strong proponent of liberalized laws regarding both obscenity and homosexuality.[13] Both David Hunt and Dominic Grieve, prominent Conservative Bill of Rights supporters during the 1990s, have been associated with the 'One Nation' wing of the party, which tends to be more supportive of social liberal concerns than other factions.[14]

It can be argued that this association reflects the particular resources of social liberals, including their alleged electoral unpopularity at the specific policy level and their access to a skilled legal cadre and sympathetic judges. Given such a resource set, advocacy for a Bill of Rights may make sense since it leads to greater involvement

[9] In 1987, Harman and Grant were among only 26 Labour MPs who were willing to back the call for a Bill of Rights made by the Constitutional Reform Centre (an important precursor organization to Charter 88). See File 1/24, Constitutional Reform Centre Archives, London School of Economics.

[10] *The Times*, 'Lord Gardiner – Obituary', 9 January 1990; *The Times*, 'Lord Jenkins of Hillhead – Obituary', 6 January 2003.

[11] P. Evans, 'Harman Case Changes Contempt Law', *The Times*, 14 June 1986; M. Phillips, 'Bernie Grant: Passionate Leftwing MP and Tireless Anti-Racism Campaigner', *Guardian*, 2 April 2000.

[12] See House of Commons, *Debates*, 23 April 1969, col. 474–84.

[13] J. Barnes, 'Lord Lambton – Obituary', *Daily Telegraph*, 2 January 2007.

[14] See R. Oakley, 'An Heir to the Prince of Wets – David Hunt', *The Times*, 15 March 1990, on David Hunt; and T. Barnes, 'TRG Finds Favour with Students', available online at http://toryreformgroup.wordpress.com/2007/01/30/trg-finds-favour-with-students/ on Grieve's involvement in the Tory Reform Group.

of the courts in the formulation of public policy.[15] If so, then constraint of executive power is the golden threat that unites the coalition supporting a Bill of Rights. Various political actors are attracted to this goal either out of an ideological fear of populist authoritarians undermining social liberal policy goals or (as will be sketched out below) from their and their party's own exclusion from this institution. Whatever the mechanism, it is certainly true that the various specific Bills of Rights proposals put forward since the late 1960s have been drafted so as to give further protection to social liberal ideological preferences. In other words, these instruments have placed great emphasis on civil liberty rights (e.g. the right to fair trial, freedom of expression, prohibition of torture and degrading treatment etc.) and also social equality rights, such as non-discrimination. In contrast, economic and social rights whether of a right-wing or left-wing hue have largely been ignored. Despite the presence of limited educational and property rights in the first protocol of the ECHR, such a preponderant focus is also clearly evident within the Convention and, *ipso facto,* in instruments such as the HRA aimed at 'incorporating' the ECHR rights into domestic law.

Of course, the important association between social liberalism and support for a Bill of Rights should not hide various complexities within this debate. In the first place, it is true that, at various points, political activists on the left and right have attempted to infuse not just social liberal commitments but also their socio-economic philosophies into Bills of Rights proposals. On the right this was particularly evident in the mid- to late 1970s when Keith Joseph and others argued that a Bill of Rights might be drafted that would, for example, limit the level of taxation and severely curtail the encroachment of planning law on private property rights.[16] Similarly, during the 1990s some draft Bills of Rights from groups on the left included a range of social rights such as rights to education, health and welfare; in fact, in 1993 the Labour Party even mooted that such rights might be included in the 'second stage' of its Bill of Rights process.[17] Second, it is also the case that the Convention has been criticized by those on both the left and right of politics for either entrenching what may be

[15] Morton and Knopff, *The Charter Revolution*, p. 29; Bork, *Coercing Virtue*, pp. 8–9.

[16] K. Joseph, *Freedom under the Law*, London, Conservative Political Centre, 1975, pp. 10–12.

[17] Labour Party, *A New Agenda for Democracy*, London, Labour Party, 1993, pp. 31–2.

considered a left-wing 'entitlement' rather than 'freedom' focused set of rights[18] or a right-wing (neo)liberal rather than socialist set.[19] Nevertheless, despite these critiques, and despite contrary arguments found elsewhere in the literature,[20] what is most notable about both the ECHR and the drafting of 'new constitutionalist' rights instruments generally is how they seek to protect fundamental civil liberties and social equality (seeing both as essential to an open and democratic society) whilst almost entirely excluding socio-economic rights of either the left or the right.

The emergence of support for a Bill of Rights in public debate since the late 1960s relates, in part, to societal changes notably linked to the growth of 'postmaterialist' preferences[21] and more diverse immigration.[22] These social changes have increased the proportion of the electorate concerned with social liberal issues and perspectives. The concomitant decline in the both the ideological salience of Marxism and the size and political salience of the working class has particularly led political forces on the modernizing wing of the left to reach out to these new constituencies. By 1990, though possibly with some hyperbole, Ronald Inglehart could even state that:

> [T]he issues that define Left and Right for Western public today are not class conflict ones so much as reflects of a polarization between the goals emphasized by Postmaterialists, and the traditional social and religious values emphasized by Materialists . . . The meaning of 'Left' and 'Right' has been transformed. The key Marxist issue – nationalization of industry – remains a central preoccupation only to Marxist fundamentalists such as the embattled hard-liners of the British Labour Party. They are out of touch with current reality – and with their electorate. Under their domination, Labour has lost three general elections.[23]

During the 1970s, the Bill of Rights issue had split the Labour movement with modernizers such as Shirley Williams and Anthony

[18] M. Howe, 'The Decline of Liberty', in O. Letwin, J. Marenbon and M. Howe, *Conservative Debates: Liberty under the Law*, London, Politeia, 2002, p. 27.

[19] K. Ewing, and C. Gearty, *Democracy or a Bill of Rights?*, London, Society of Labour Lawyers, 1991.

[20] See e.g. Hirschl, *Towards Juristocracy*.

[21] R. Inglehart, *Culture Shift in Advanced Industrial Societies*, Princeton, Princeton University Press, 1990.

[22] A. Peach, A. Rogers, J. Chance and P. Daley, 'Immigration and Ethnicity', in A. Halsey (with J. Webb) (ed.), *Twentieth Century British Social Trends*, 2nd edn, Basingstoke: Macmillan, 2000, pp. 128–75.

[23] Inglehart, *Culture Shift in Advanced Industrial Societies*, pp. 275 and 287.

Lester strongly championing a Bill of Rights based on the ECHR but facing fierce opposition from a powerful group of traditionalists.[24] Labour's embrace of a Bill of Rights in the 1990s was presented by modernizers as symbolizing both an appeal to rights-conscious post-materialist constituencies and a rejection of the strongly collectivist ideology of this latter group. Thus, Peter Mandelson and Roger Liddle stated in their seminal book *The Blair Revolution*: 'With a Bill of Rights enforced by a reformed independent judiciary, the modern age of citizenship will have begun, and no one will ever be able to accuse Labour of being prepared to sacrifice individual rights on the altar of collectivist ideology.'[25]

Finally, it may be noted that the increasing penetration of European governance mechanisms such as the ECHR system and the European Community into Britain has also encouraged a more legalized approach to constitutional and human rights issues especially in elite circles.[26] Such European factors had a particular effect on the judicial and legal elite pushing this group from being sceptical of the value of a Bill of Rights to being an important and weighty interest pushing for it. Thus, even by the end of the 1970s only a few senior judges such as Lords Salmon and Scarman had endorsed the need for a Bill of Rights. Moreover, the members of the Law Reform Committee of the Law Society actually spoke out against adopting a statutory Bill of Rights based on the ECHR while giving evidence before a House of Lords Select Committee looking into the subject.[27] In contrast, by the mid-1990s such a move had the support not only of both the Law Society[28] and Bar Council[29] but also of a majority of the

[24] L. Minkin, *The Contentious Alliance: Trade Unions and the Labour Party*, Edinburgh, Edinburgh University Press, 1992, pp. 214–16.

[25] P. Mandleson and R. Liddle, *The Blair Revolution*, London, Faber & Faber, 1996, p. 196. Nevertheless, some modernizers in relation to economic policy, notably Roy Hattersley (Labour deputy leader 1984–92), remained vocal and active opponents of legal innovations such as a Bill of Rights. See Minkin, *The Contentious Alliance*, p. 477.

[26] K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001.

[27] Great Britain, Parliament, House of Lords Select Committee on a Bill of Rights, *Minutes of Evidence Taken before Select Committee*, London, HMSO, 1977–8, p. 69.

[28] Michael Zander, *A Bill of Rights?*, London: Sweet & Maxwell, 1997, p. 39.

[29] Francesca Klug, 'Forward', in Anthony Lester, James Cornford and Ronald Dworkin, *A British Bill of Rights*, London, Institute of Public Policy Research, 1996, p. vi.

senior judiciary, including Lords Bingham,[30] Ackner, Browne-Wilkinson, Lloyd of Beswick, Simon of Glaisdale, Slynn of Hadley, Taylor of Gosforth and Woolfe of Barnes.[31]

Bill of Rights Support and 'Power Orientation'

Despite the clear importance of ideational and European factors in explaining the evolution of the Bill of Rights debate and outcomes in Britain, those factors fail to provide a comprehensive explanation of either of these phenomena. Empirically, the perspective cannot properly explain the sporadic nature of positive engagement in this debate by the Conservatives and Labour either institutionally or at the level of individual parliamentarians. Nor can the perspective explain the precise timing of Labour's enactment of a limited Bill of Rights in the form of the HRA in 1998. At a theoretical level, such an approach pays insufficient regard to the fact that Bills of Rights not only provide new protections for various social interests but, perhaps as importantly, transfer policy-making rights from those holding power within ordinary political branches (i.e. mainly the executive within Westminster-type systems) to the judicial branch. Indeed, such has been the extent of transfer that many have attacked Bill of Rights genesis on the basis that it amounts to nothing less than the foundation of a 'juristocracy'.[32] Assuming that, *ceteris paribus*, political actors generally wish to maximize their power and discretion, this suggests that, even if they are associated with relevant social interests, political actors holding executive power (or strongly oriented to the future prospect of holding such power) will be wary of actively promoting a Bill of Rights.[33] In contrast, support for reform is much more likely to

[30] T. H. Bingham, 'The European Convention on Human Rights: Time to Incorporate', *Law Quarterly Review*, 109, pp. 390–400.

[31] Anthony Lester, 'The Mouse that Roared: The Human Rights Bill 1995', *Public Law* (Summer 1995), pp. 198–202, p. 198.

[32] Hirschl, *Towards Juristocracy*; K. Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain', in K. Ewing, C. Gearty and B. Hepple, *Human Rights and Labour Law: Essays for Paul O'Higgins*, London, Mansell, 1994, pp. 147–87.

[33] More specific to Britain, such actors may be more influenced by a political tradition arguably characterized by a normative belief in strong leadership by the executive and hostility to the growth of alternative power centres. See D. Marsh and

be forthcoming from actors sharing a non-executive-focused power orientation.

This power-orientation logic parallels the 'insurance model' developed by Tom Ginsburg to explain variation in the adoption of Bills of Rights and other judicial review mechanisms during regime transition. This model argues that the preferences of elite politicians during such a transition reflect not ideological commitments but rather their anticipated future roles within the power structures being established. Those actors who expect to dominate these new structures will desire 'less vigorous and powerful courts so that they can govern without restraint'.[34] In contrast, politicians who face more uncertain prospects or who expect to be excluded from the executive will favour a strong Bill of Rights, since, through intervention by the courts, 'insurance' is thereby provided against the possible abuse of executive power in the future.[35]

Despite these strong commonalities, there are also important differences between the grounded theory perspective forwarded in this article and this insurance model. In the first place, this article argues that ideological factors, in particular, the degree of commitment to social liberalism, remain an influence on attitudes to Bill of Rights genesis, even at the elite political level. Second, it argues that, at least in relation to Bill of Rights genesis in stable democracies, a non-executive power orientation may be engendered not only by a strictly rational, prospective calculation of the prospects of holding executive power but also by the concrete experience of a long period in the political wilderness that may, through constructivist persuasion,[36] alter the outlook of key actors. Moreover, the phenomenon of policy drag ensures that such an experience can, given the right conditions, underpin a commitment to real institutional reform even when a party has returned to executive power with fundamentally altered future electoral prospects.

M. Hall, 'The British Political Tradition: Explaining the Fate of New Labour's Constitutional Reform Agenda', *British Politics*, 2 (2007), pp. 215–38.

[34] T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge, Cambridge University Press, 2003, p. 18.

[35] Ibid.

[36] A. Etzioni, 'Social Norms: Internalization, Persuasion, and History', *Law and Society Review*, 34: 1 (2000), pp. 157–78.

The General Nature of the Power-Orientation Logic in Britain

Turning to a systematic consideration of the British case, a focus on power orientation not only provides additional explanation for the strong emphasis that the Liberals/Liberal Democrats have placed on the enactment of a Bill of Rights, but can also explain the sporadic nature of much of the support for a Bill of Rights forthcoming from the Conservative and Labour parties. Thus, a 'swing' phenomenon is observable with regard to such attitudes. In other words, both the parties generally and key figures within them have usually demonstrated a much greater policy openness to a Bill of Rights when not holding executive power than when in government. This 'swing' phenomenon explains both Lord Hailsham's endorsement of the idea of a Bill of Rights when on the Conservative opposition front-bench in the late 1960s, followed only shortly afterwards by his rejection of the same idea when in government only a little later.[37] It also clarifies the Conservative Party's 1979 manifesto commitment to convene all-party talks on drafting a Bill of Rights,[38] followed by the party's reneging on this commitment.[39]

Finally, a 'swing' phenomenon is also observable in Labour's attitude to a Bill of Rights. In particular, despite legislating for the HRA shortly after returning to power in 1998, Labour's attitude towards the Bill of Rights agenda has become increasingly negative during its period in government, especially as the practical constraints that the HRA imposes in relation to the fight against crime,[40] the policing of

[37] Hailsham, *New Charter*; and House of Lords, *Debates*, 26 November 1970, col. 256.

[38] R. Blackburn, (ed.), *Towards a Constitutional Bill of Rights for the United Kingdom*, London, Pinter, 1999, p. 900.

[39] It is true that Hailsham himself continued to support a Bill of Rights throughout a good deal of the 1980s (see *The Times*, 'Hailsham Backs New Rights Bill', 4 February 1986). However, by 1992, even he had changed his mind again (Lord Hailsham, *On the Constitution*, London, HarperCollins, 1992, p. 105).

[40] See e.g. *R. v. Lambert* (2001) UKHL 37, (2002) 2AC 545 ('reading down' a provision reversing the burden of proof in relation to defence under the 1975 Misuse of Drugs Act so as to require only the defence to produce some evidence that aided its case (a so-called 'evidential burden') upon which the burden of proof would return to the prosecution); and *R. v. Offen* (2001) 1 WLR 253 ('reading down' mandatory life sentences in 1997 Crime (Sentences) Act so as to ensure that such sentences were only imposed when the offender was judged to constitute a significant risk to the public).

protest,[41] the treatment of asylum seekers[42] and the struggle against terrorism[43] has become clear. As early as February 2003, and after one particularly problematic asylum decision,[44] the then Home Secretary, David Blunkett, stated that he was 'personally fed up with having to deal with a situation where Parliament debates issues and judges then overturn them'.[45] By mid-2006 there were even indications that the government was preparing to weaken the HRA significantly through legislative amendment.[46] Seemingly prompted both by the Conservative Party's call for a British Bill of Rights (see below) and a felt need to renew trust in the government and establish a clear break from the Blair era, Labour's rhetoric has become less negative under Gordon Brown. Despite this, its suspicion of the power-diffusing potential of further Bill of Rights genesis remains intact.[47] Overall, these various outcomes mirror strongly the power-orientation logic expounded previously.

[41] See e.g. *Westminster City Council v. Haw* (2002) All ER (D) 59 (refusing to grant an injunction for obstruction of the highway against anti-war protestor Brian Haw on the basis of the HRA).

[42] See *R (Q, D, J, M, F and B) v. Secretary of State for the Home Department* (2003) EWHC 195 (Admin) (requiring state support be given to all genuinely destitute asylum seekers despite provision in the 2002 Nationality, Immigration and Asylum Act excluding provision of support for asylum seekers whose claims for asylum the home secretary has judged not to have been made as soon as reasonably practicable).

[43] See e.g. *A v. Secretary of State for the Home Department* (2004) UKHL 56 (voiding the UK's derogation from Article 5 (right to liberty) in the ECHR and holding that requiring suspected international terrorists either to leave the country or to be detained was both an absolute violation of right to liberty and impermissibly discriminatory in its effects).

[44] See n. 42 above.

[45] Quoted in R. Verkaik, 'Asylum System Flawed, Rules High Court', *Independent*, 20 February 2003.

[46] M. Hall, 'Stop This Nonsense, Blair Orders', *Express*, 15 May 2006.

[47] Thus, whilst the government's constitutional White Paper of 2007 mooted the possibility of a British Bill of Rights it stressed that 'if specifically British rights were to be added [to the Human Rights Act] . . . we would need to be certain that their addition would . . . not restrict the ability of the democratically elected Government to decide upon the way resources are to be deployed in the national interest' (Department for Constitutional Affairs, *The Governance of Britain*, London, HMSO, 2007, p. 61).

Labour, 'Aversive' Constitutionalism and the 1998 Human Rights Act

The passage of the 1998 Human Rights Act represents the only time in the modern era when an elected government has actively sponsored some form of domestic Bill of Rights instrument. It will be argued that this highly anomalous event developed in response to the experience of a long period of non-incumbency under a government (the Thatcher Administration, 1979–90) widely perceived as illiberal and authoritarian. As a result, a potent 'aversive' zeitgeist developed, in the Labour Party and the left more generally, favouring greater diffusion of power within the constitution. This zeitgeist emerged strongly after Labour's third general election loss in 1987 and was symbolized by the founding of Charter 88 by the left-of-centre journal, the *New Statesman*. The Charter's first demand was to '[e]nshrine, by means of a Bill of Rights, such liberties as the right to peaceful assembly, to freedom of association, to freedom from discrimination, to freedom from detention without trial, to trial by jury, to privacy and to freedom of expression'.[48] Although Labour's commitment to this power-diffusing agenda conspicuously declined as it sensed its proximity to power during the later 1990s, policy drag ensured the passage of a limited, statutory Bill of Rights in the form of the HRA.

This 'aversive' driver of change was strongly rooted in both the ideological and power-orientation factors considered above. To take one of the most potent but simple factors, the Labour Party experienced a long period out of power as a result of the Conservatives' winning an unprecedented four general elections. This experience gradually eroded the executive-minded power-hoarding mentality that had generally been central to Labour's thinking as a party of government.[49] In addition, fears of permanent Conservative hegemony and exclusion from power led to a new openness to cooperation between Labour elites and the Liberal Democrats.[50] This openness led to bodies close to the Labour Party, such as the Institute for Public Policy Research (IPPR), involving Liberal Democrats in

[48] Cited in M. Evans, *Constitution-Making and the Labour Party*, Basingstoke and New York, Palgrave Macmillan, 2003, p. 32.

[49] V. Bogdanor, 'Constitutional Reform', in A. Seldon (ed.), *The Blair Effect: The Blair Government 1997–2001*, London, Little, Brown, 2001, pp. 139–58, p. 155.

[50] Marsh and Hall, 'The British Political Tradition', p. 233. See also S. Fielding, *The Labour Party: Continuity and Change in the Making of 'New' Labour*, Basingstoke, Palgrave Macmillan, 2003, pp. 38–56.

the formulation of policy advice. Thus, in the late 1980s the IPPR appointed William Goodhart, Jeffrey Jowell and Anthony Lester – all prominent Liberals – to a committee charged with drawing up a draft Bill of Rights, and even invited the latter to act as its chair.[51] Informal linkages also proved relevant. For example, Lester argues that he played a critical role in converting Derry Irvine to the idea of a Bill of Rights, and he, in turn, later converted John Smith.[52]

As importantly, the Conservatives, particularly under Margaret Thatcher, acquired a reputation for authoritarianism and disregard of traditional checks and balances. With regard to checks and balances, the role of trade unions was fundamentally challenged with new laws outlawing secondary picketing and curtailing the right to strike. In addition, the Greater London Council and the other five metropolitan authorities – all Labour dominated – were simply abolished through the 1986 Local Government Act. More specifically, the Conservative government became associated with a range of legislative and other policies that were seen as hostile to civil liberties and social equality. Perhaps those that provoked most concern had to do with the perceived curtailment of freedom of expression. Legal actions were vociferously pursued in such cases as those involving Clive Ponting and the Falklands War and Peter Wright and the operations of the intelligence services.[53] Moreover, there were clashes with broadcasters over news-reporting, which even, on occasion, led to a coercive response. For example, in March 1988 the home secretary announced a broadcasting ban on interviews with terrorists in Northern Ireland and their supporters. This ban was implemented without notice; it included within its reach interviews with members of Sinn Fein, the political wing of the IRA, which boasted 56 councillors and one MP.[54] In the same year, restrictions on freedom of

[51] Lester et al., *A British Bill of Rights*.

[52] Lester, interview, 18 May 2005. According to Charter 88 documents, Irvine became converted to the idea of a Bill of Rights while working on the Labour Party's Policy Review in the late 1980s ('Charter 88 and Labour', Box 69, Charter 88 Archives, University of Essex). According to S. Weir, co-founder of Charter 88, Smith was also committed to a Bill of Rights prior to the 1990s (Weir, interview, 27 June 2005).

[53] K. Ewing and C. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain*, Oxford, Clarendon Press, 1990, pp. 143–69.

[54] Due to party policy the MP had not taken his seat. The ban explicitly excluded reporting dealing with Parliament and elections. See P. Thornton, *Decade of Decline: Civil Liberties in the Thatcher Years*, London, Liberty, 1989, p. 12.

expression were also imposed on local authorities with provisions to prevent their involvement in the 'promotion of homosexuality' or in promoting the 'teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'.[55]

Perhaps what was even more troubling to the left, and most particularly its more social liberal wing, was less these specific policies and more what was seen as the Conservatives' imperious attitude towards democratic checks and balances. Writing in 1989, Paul Hirst, an original signatory of Charter 88, stated:

> For Mrs Thatcher democracy means no more than a periodic plebiscite which selects *who* should rule; it has little or nothing to do with *how* they should rule. A 'mandate' from a general election should allow the governing party to do virtually whatever it likes; it should not be forced to submit to discussion, consultation, judicial scrutiny or constitutional check while in office. Why should she listen to those she has beaten, let alone accept that they might have the constitutional power to check her?[56]

It was in this context that many on the left began seriously to question their support for the executive-focused Westminster-style constitutional model. Hirst continued:

> In Mrs Thatcher Britain has found a politician to expose the nakedness of the constitutional checks and guarantees to public view. She has helped puncture our insular and incorrigibly ignorant view of ourselves as the premier democracy, and helped show the need for a break with our political history, with the institutions that we have celebrated to the point where we have ceased to think about them.[57]

During the years following the Charter's clarion call, a number of powerful groups on the left of British politics drew up radical Bill of Rights proposals. These drafts were usually framed as largely supreme against all other law and even entrenched, in some fashion. Moreover, although drawing heavily on the wording of the ECHR, a wider scope of rights protection was provided through inclusion of articles that drew their inspiration from other international instruments such as the International Covenant on Civil and Political Rights (ICCPR). As a result, in contrast to the ECHR itself, these draft instruments provided, for example, a right to non-discrimination and equal protection of the law which was both free-standing (rather than merely parasitic on the other enumerated rights) and which also explicitly

[55] 1988 Local Government Act § 28.

[56] P. Hirst, *After Thatcher*, London, Collins, 1989, p. 45.

[57] Ibid.

mentioned various criteria (e.g. sexual orientation, disability) not mentioned explicitly in the ECHR itself. Summaries of the two most prominent models – that of the Institute for Public Policy Research[58] and Liberty's draft[59] – can be found in Table 1.

As might be expected given its status as a party aspiring to government, the leadership of the Labour Party was initially sceptical towards the Charter's demands.[60] Nevertheless, in 1991, shortly after Margaret Thatcher departed 10 Downing Street, it finally committed itself to the enactment of a Bill of Rights, thus becoming the first major political party in Britain to do so.[61] The following year, Labour's general election manifesto included a commitment to enacting a 'democratically enforced bill of rights' that, according to Labour's chief spokesperson in the Lords, Lord Cledwyn, would be based on the ECHR.[62] Moreover, following Labour's fourth general election loss, Labour's proposals became more radical. In 1993, under the leadership of John Smith, the party endorsed 'A New Agenda for Democracy', which put forward a bold two-stage strategy in relation to this issue. First, a Human Rights Act would be passed directly incorporating ECHR rights into British law and providing that such rights would be supreme against all other law unless explicit indications were provided to the contrary on the face of primary legislation.[63] Second, since incorporation of these rights was 'a necessary first step, but . . . not a substitute for our own written Bill of Rights', an all-party commission would then be established charged with drafting an indigenous Bill of Rights, within a specified time period, which would then be entrenched.[64]

[58] Institute of Public Policy Research, *The Constitution of the United Kingdom*, London, Institute of Public Policy Research, 1991.

[59] F. Klug, *A Peoples's Charter: Liberty's Bill of Rights: A Consultation Document*, London, National Council for Civil Liberties, 1991.

[60] J. Straw, 'A Charter of Rights That Has Shown Itself Wrong', *The Times*, 23 October 1989; Labour Party, *Meet the Challenge, Make the Change: A New Agenda for Britain: Final Report of Labour's Policy Review for the 1990s*, London, Labour Party, 1989, p. 55.

[61] R. Oakley, 'Kinnock Promises to Put Britain in First Division', *The Times*, 2 October 1991.

[62] House of Lords, *Debates*, 11 March 1992, col. 1337.

[63] Labour Party, *A New Agenda for Democracy*, p. 29.

[64] Ibid., p. 31.

Table 1
IPPR and Liberty Bill of Rights Models of the 1990s

Model	*Scope of rights*	*Supreme law?*	*Entrenched?*
IPPR (1991)	Largely civil and political rights drawn mainly from ECHR and ICCPR. Also includes a set of non-justiciable social and economic rights (Clause 27).	Yes (Clause 1).	Yes. Amendment only possible if supported by two-thirds of members of each of the Houses of Parliament (Clause 69). Limited range of rights may be suspended by Order in Council if grave threat to national security, public order or a civil emergency has or is likely to arise but this is subject to judicial review (Clause 128).
Liberty (1991)	Largely civil and political rights drawn mainly from ECHR and ICCPR but also from other documents such as International Labour Organization (ILO) instruments and American Convention on Human Rights.	Yes (Article 24), but some rights subject to 'notwithstanding' provision where *either* (1) legislation declares that it will 'take effect in breach of the Bill of Rights' – such declaration to expire after five years and blockable for up to five years by second chamber *or* (2) Parliament passes legislation and two-thirds vote of a parliamentary Human Rights Scrutiny Committee (on which no single party dominates) confirms that it is in conformity with Bill of Rights (Articles 28–31).	Yes. Amendment only possible with support of two-thirds majority of both Houses of Parliament. Repeal similar but automatically delayed for five years (Article 33).

In the years following 'A New Agenda for Democracy', a steady decline in enthusiasm among the Labour leadership for these policy proposals became evident. In particular, Labour distanced itself from the comprehensive incorporation of ECHR rights and dropped all commitment to a second stage of Bill of Rights reform.[65] This reorientation mainly reflected the growing understanding within the party that its electoral fortunes (and thus its prospects of holding executive power in the future) had been fundamentally transformed.[66] Nevertheless, the phenomenon of policy drag ensured that a commitment to some form of Bill of Rights continued even when the party returned to power in a landslide election victory in 1997. As Table 2 elucidates, the resulting 1998 Human Rights Act is significantly weaker than the Bill of Rights model presented in 1993. In particular, this enactment is not entrenched, does not even fully 'incorporate' those rights found within the ECHR[67] and was adopted with none of the public involvement and consultation generally associated with the adoption of an overarching 'higher law'.[68] Despite this, especially as result of the inclusion of Section 4, which allows the judiciary to signal incompatibility between primary legislation and the rights set out, the enactment does grant an unprecedented role to the courts.

[65] In particular, the pre-election consultation document published by Shadow Home Secretary Jack Straw MP and Paul Boeteng MP reopened the whole question of to what extent ECHR rights should be fully incorporated into UK law and made only the briefest and most non-committal reference to the future drafting of an autochthonous instrument (Labour Party, *Bringing Rights Home*, London, Labour Party, 1996, p. 14). Labour's 1997 general election manifesto committed the party to 'incorporating' the ECHR but made no mention of any second-stage Bill of Rights process at all (Blackburn, *Towards a Constitutional Bill of Rights*, p. 960).

[66] In addition, a reduction in ideological support for the Bill of Rights within the leadership following the rise of 'New Labour' cannot be entirely discounted. In particular, it should be noted that many figures within New Labour were committed to an approach that appeared to place significantly more emphasis on individual 'responsibilities' rather than 'rights', arguably in a way that sat in tension with commitments to a Bill of Rights and social liberalism more generally. See, for example, the conspicuous addition of responsibility references in the Labour Party's 1996 consultation document on ECHR incorporation (Blackburn, *Towards a Constitutional Bill of Rights*, p. 960).

[67] In this regard, note should be made of the very candid remarks made by then Lord Chancellor Lord Irvine during the HRA's legislative passage (House of Lords, *Debates*, 29 January 1998, col. 418f).

[68] F. Klug, 'Enshrine These Rights: With No Consultation, the Public Didn't Buy into the Human Rights Act. We Can Correct That Now', *Guardian,* 27 June 2005.

Table 2
Labour Policy in 1993 vs 1998 Human Rights Act

	1993 policy	*1998 Human Rights Act*
Rights coverage	ECHR in first stage but later to be expanded on all-party basis to include a wider range of rights.	ECHR only.
Supreme law?	Yes but subject to Parliament expressly excluding legislation from remit through notwithstanding provision.	No. ECHR rights only legally affect interpretation of other law (Section 3). Non-legally binding Declaration of Incompatibility may be issued by higher courts in other cases (Section 4).
Entrenched?	No effective entrenchment in first stage but entrenchment envisaged when autochthonous Bill of Rights drafted.	No.
Consultation?	Limited consultation with regard to ECHR incorporation but extensive political, civil society and public process during second stage.	Very minimal.

As a result, it poses a significant (albeit somewhat implicit) challenge to the Westminster principle of parliamentary sovereignty and can genuinely be considered to be path-breaking. Its successful enactment indicates that, even when politicians have returned to power under fundamentally different electoral conditions, the development of an 'aversive' dynamic, rooted in social liberalism and a non-executive-power orientation during the policy-making process, can underpin real institutional reform.[69]

[69] For an argument that a similar 'aversive' dynamic underpinned Bill of Rights genesis in another Westminster-type case – that of New Zealand – see Erdos, 'Aversive Constitutionalism in the Westminster World'. Some parallels may also be noted with the Wilson government's acceptance of the right of individual petition to the European Court of Human Rights in 1966. This policy change was also pushed by social liberal cabinet ministers, notably Lord Chancellor Gardiner and, moreover, it seems far from coincidental that it was implemented by a political party with recent experience of a long period in the political wilderness. Nevertheless, as Lord Lester

The New Conservative Policy on a Bill of Rights – Preliminary Thoughts

During its passage in 1998, the Conservative Party expressed grave reservations about the HRA, even attempting to move an amendment during its legislative passage in the House of Commons that would have 'declin[ed] to give the Bill a second Reading'.[70] Moreover, in 2001, the then Conservative Party leader, Ian Duncan Smith, clearly stated his party's commitment to repeal the HRA.[71] More recently, however, the party's position has subtly, yet importantly, shifted. Thus, during the 2005 election, the commitment to repeal the HRA morphed into a pledge to 'reform or repeal' the Act when next in government.[72] Then, in June 2006 the new Conservative leader David Cameron delivered a speech to the Centre for Policy Studies outlining a new entirely new policy.[73] It is true that Cameron's speech was replete with mixed messages. On the one hand, the HRA was still criticized for undermining the fight against terrorism and crime[74] and for creating 'culture of rights without responsibilities'.[75] Nevertheless, alongside this, it was also argued that it had failed to protect effectively against the undermining the right to jury trial and free speech as a result of the government's legislation on religious hatred.[76] Moreover, the old Conservative policy of outright repeal was explicitly rejected as representing a 'step backward on rights and

notes, the momentous nature of this change was not well understood at the time and it was not even discussed either in cabinet as a whole or Parliament. See A. Lester, 'U.K. Acceptance of the Strasbourg Jurisdiction: What Really Went on in Whitehall in 1965', *Public Law*, (1998), pp. 237–353. In contrast to these two examples, the Attlee government's reluctant ratification of the European Convention in 1951, coupled with strong opposition to, and opt-out from, the proposed system of individual petition falls firmly within the rather different category of foreign policy expediency. See Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights', *International and Comparative Law Quarterly*, 42 (1993), pp. 796–826.

[70] House of Commons, *Debates*, 1998, vol. 306, col. 781.

[71] See D. Wooding, 'Let's Shut Our Door to Terror Says Smith', *The Sun*, 11 October 2001.

[72] K. Walker, 'Human Rights Act is Just Wrecking Britain', *Express*, 18 March 2005.

[73] D. Cameron, 'Balancing Freedom and Security – A Modern British Bill of Rights', in David Cameron, *Social Responsibility*, Northampton, Belmont Press, 2007, pp. 153–62.

[74] Ibid., p. 156.

[75] Ibid., p. 158.

[76] Ibid., p. 158.

liberties'.[77] Instead, Cameron argued that a British Bill of Rights setting out 'the core values which give us an identity as a free nation'[78] should be drafted and then entrenched against easy repeal.[79]

The details of this new policy have yet to be released and its overall impact remains to be seen. Nevertheless, at least from the perspective of 1998 or 2001, the direction of the shift in the Conservative Party's approach appears to be towards a more favourable attitude to Bill of Rights protections. This change in emphasis can be linked to the two factors of ideology and power orientation that have been given emphasis in this article. In the first place, the new policy fits alongside initiatives within the Conservative Party aimed at reaching out to new constituencies and developing a more socially liberal policy approach. Such initiatives include the founding in 2006 of the Conservative Liberty Forum, a ginger group specifically dedicated to civil liberty issues,[80] as well as efforts to encourage more diversity amongst Conservative MPs,[81] oppose the introduction of identity cards[82] and take a less punitive approach to crime.[83] In addition, the policy can be linked to the more jaundiced attitude to discretionary governmental power that became evident in the wake of the Conservatives' third consecutive general election loss in 2005, somewhat similarly to the changes in the Labour view in 1987. In this vein, the shadow attorney general Dominic Grieve argues that the new commitment to a British Bill of Rights emerged from:

> [t]he perception which has been growing in the Conservative Party that our civil liberties are under threat from authoritarian government. Nobody who's been around in the past two or three years can have failed to notice that the Government is willing to ride roughshod over established legal principles. In the name of security we have had a raft of criminal justice legislation – ASBOs, dispersal order, changing subtly the rules of evidences in court, attacks on jury trials. Quite apart from the anti-terror legislation, if you look

[77] Ibid., p. 159.

[78] Ibid., p. 160.

[79] Ibid., p. 161.

[80] G. Hinsliff, 'Blair Savages Critics Over Threat to Civil Liberties', *Observer*, 23 April 2006.

[81] G. Wilson, 'Quota Plan for More Women Tory MPs', *Daily Telegraph*, 21 August 2006.

[82] B. Russell, 'Tories Would Repeal "Illiberal" ID Cards Law, Says Davis', *Independent*, 30 June 2005.

[83] A. McSmith, 'All Young Offenders Need is Tough Love, Says Cameron', *Independent*, 3 November 2006.

at all that together then I think you can see pretty clearly that there is a trend towards a more highly regulated and I have to say rather authoritarian society.[84]

CONCLUSIONS

What factors drive elite political debate and outcomes in relation to the Bill of Rights issue? Based on a close empirical analysis of the British case, the grounded theory perspective forwarded in this article argues that three factors have proved crucial. In the first place, support for Bill of Rights genesis has been strongly associated with ideological support for social liberalism. Thus, it has been demonstrated that proposed Bills of Rights have been drafted with a view to aiding social liberal interests and have been disproportionately supported by parliamentarians attached to social liberal causes. Moreover, the emergence of advocacy for a Bill of Rights from the late 1960s has paralleled a partial 'postmaterialization' of voter preferences and the development of a more heterogeneous society which, it can be argued, has increased the salience of social liberal concerns and, indeed, popular support for moves to a Bill of Rights.

An emphasis on ideological factors alone, however, cannot explain the two main parties' sporadic support for Bill of Rights development. The second important variable – power orientation – plugs this gap. Given that Bills of Rights reduce executive discretion by transferring policy-making rights to the judiciary, those actors oriented to the defence of executive power will generally oppose the development of such instruments. Although that orientation will influence all traditional parties (in or out of power), a party actually holding executive power is most likely to be dominated by it. Conversely, a period of opposition may persuade such actors to take an interest in institutional mechanisms, such as Bills of Rights, designed to restrain and discipline the executive. This understanding strongly parallels the insurance model of judicial review developed by Tom Ginsburg in relation to the politics of constitutional design during regime transition.

Evidence from Britain also indicates that a change in attitude may be engendered as much by concrete experience of life in the political wilderness as by a strictly rational, prospective calculation of the

[84] D. Grieve, interview, London, 7 March 2007.

likelihood of holding executive power in the future. Finally, although such attitudes may largely dissipate once a party returns to government, the phenomenon of policy drag can still ensure real institutional reform. Thus, despite the Labour leadership's flagging interest, the sheer strength of the 'aversive' trigger that had built up during 17 years of Conservative rule ensured the passage of the watered-down but nevertheless path-breaking Human Rights Act shortly after Labour returned to power in 1997.