

British Politics and the Post-War Development of Human Rights



Benjamin Jones
Pembroke College

Doctor of Philosophy
Michaelmas Term 2013
99,759 Words

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Abstract

In this thesis I explore the attitudes, arguments, and actions of British political elites in connection with the development of human rights law in Europe and the UK. I do this by examining British input into five key episodes for the development of European supranational rights and their incorporation into domestic legal orders (namely the drafting of the European Convention on Human Rights 1950, the drafting of the European Social Charter 1961, the acceptance of individual petition in 1966, the failed 1970s Bill of Rights debate, the passing of the Human Rights Act 1998, and recent developments such as the UK 'opt-out' to the EU Charter of Fundamental Rights, and the emergence of a new 'British Bill of Rights' debate). Casting light on British involvement in less examined periods in European rights development, I challenge existing, isolated, explanations for the more focal episodes (such as Simpson's rational-choice post-colonial thesis for individual petition acceptance, and ideological accounts for New Labour's post-1997 constitutional reform). Responding to the most recent literature in the area, central to my analysis is the question of how rights progress relates to inter-party conflict. By considering continuities and discontinuities in elite political discussion of rights I argue that while conflict is a significant underlying feature of every major episode of rights progress during the last sixty years, and is less evident in less progressive periods, other factors have had a greater influence over the form, timing, and extent of rights progress. Most significant amongst these is the constitutional ideological development of the Labour party and the critical connection between Labour's elevation of the Convention within the UK constitutional space and revisionist shifts in party thinking.

Acknowledgements

In the production of this work I have accrued a great many debts. Firstly I should like to dedicate this thesis to my parents Nicholas and Shelagh Jones, and to my partner, Kiera Jamison. Their encouragement and belief inspired me to start this thesis and their constant support, moral and practical, were essential to its completion.

Academically I would like to express my sincere gratitude to my supervisor Dr David Erdos whose guidance has been absolutely critical to the success of this project. I would also like to thank my adjunct supervisors (Dr Fernanda Pirie, Dr Bettina Lange, and Prof Denis Galligan) who have kept a weather eye on my project's progress, intervening at critical moments with timely advice and criticism. Additionally I must acknowledge the assistance of all those who have helped examine my work (Dr Jeff King, Dr Liora Lazarus, Dr Alison Young and Prof Danny Nicol). Each has devoted incredible energy to reviewing parts of this work as they developed and their astute feedback has made it a far better piece of work. Notwithstanding the formidable oversight all of these parties have provided, all residual mistakes are, of course, entirely my own.

Practically I would like to acknowledge the assistance of the expert staff of Oxford's many libraries, the London School of Economics library, the National Archives, the Archives of the Council of Europe, the Archives of the Labour Party, and all of the others who have assisted me in uncovering the archive materials without which this work would be vastly impoverished.

Finally I must also acknowledge the valuable support of Freshfields Bruckhaus Derringer, the Centre for Socio-Legal Studies, and Pembroke College. Each of these bodies has provided generous funding that has made this project possible.

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List of Abbreviations

CoE	Council of Europe
CoEArch	Council of Europe Archives
ComMin	Committee of Ministers of the Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice / Court of Justice of the European Union
EM	European Movement
ESC	European Social Charter
EU	European Union
EUCFR	EU Charter of Fundamental Rights
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organisation
LabArch	Labour Party Archives
LibArch	Liberal Party Archives
NatArch	National Archives
NEC	National Executive Committee of the Labour Party
TP	The Travaux Préparatoires for the ECHR
TPESC	The Travaux Préparatoires for the ESC
UDHR	Universal Declaration of Human Rights 1948
UEM	United European Movement
UN	United Nations

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Chapter 1 Introduction

1. Six Decades of UK Involvement in European Rights Debates

Since the end of the Second World War the development of human rights law has been both a great triumph for European legal discourse and a great challenge to the UK's habitually political constitution. Despite this challenge, British political elites have played a central and, at some critical points, leading role in the development of this novel body of supranational constitutional law. From the marshalling of European federalists by Churchill in the immediate post-war period, through to reform of the Strasbourg Court's procedures during the 2012 United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe, the influence of UK domestic politics over the course of European rights debate has been significant. In the UK, over six decades, European human rights have come to occupy a privileged status within the domestic legal order, welcomed in gradually through a sequence of cumulative reforms. This progress has, however, been far from smooth, and British elites have been as active in resisting initiatives as they have in promulgating or developing them. In the midst of a public and political backlash, which is throwing the future of rights protection in the UK and Europe into question, it is now an important time to reflect upon past UK attitudes towards supranational rights and to develop a clearer picture of the processes that brought us to our current situation.

Whilst human rights, and European human rights in particular, borrow heavily from traditional civil liberties, their development as a new discursive frame in the post-war period is, like all constitutional reform, intimately bound

up in the circumstances of their inception. Within the supranational fora that came into being during the period (the United Nations, Council of Europe, Western European Union, NATO, and so on), a novel kind of international politics was emerging, with human rights law one of its more tangible outputs. Retrospective mythologising of the European rights project singles out the passing of the European Convention on Human Rights as the key turning point but the attractive narrative of a rights instrument forged, in solidarity, in response to the horrors of WW2 contains only a half-truth. Against this perspective one must acknowledge that popular rights discourse was a product of the 1970s and that prior to this the Convention's status was limited. Reflecting this, some authors have begun to read down the importance of the 1940s entirely, arguing instead that the true rights revolution in Europe only came in the 1970s, in response to the decay of other political idealisms.¹ Here too there is a half-truth but one must not underestimate the extent of the groundwork provided by the Convention. In stepping away from the maxim of public international law that state sovereignty in domestic matters is absolute and inviolable, a principle that had been reaffirmed only a few years earlier in the founding charter of the UN,² the Convention radically re-imagined the scope of public international law and brought international scrutiny to governmental actions at home for the first time.³

In attempting not only to codify the ethical common ground of a group of recently warring states but also to enforce that code, elevating adjudication of

¹ S Moyn, *The Last Utopia: human rights in history* (Harvard University Press 2010) 176

² Albeit surrounded by unprecedented references to the sanctity of human dignity. Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI

³ A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217

its terms into the supranational domain, the Convention was truly unprecedented.⁴ Such innovation is rarely tidy, however, and the post-war period saw a new form of 'legal diplomacy', as a new Bordieuean field of international law,⁵ begin to emerge out of the existing field of international politics.⁶ The drafting of the Convention, as well as subsequent instruments (most relevantly the European Social Charter), should be understood not as a typical form of legislative process but as an ad-hoc process of diplomatic negotiation in a new and rapidly developing space. These freeform drafting processes provided extensive latitude to participating elite actors, and the absence of strong procedural rules or conventions in concert with minimal public, civil society or press engagement⁷ empowered legal entrepreneurs to play out an intricate game fuelled by complex political motivations.⁸

2. Situating my Enquiry

The focal position of the UK in the European politics of the post-war period, the particular constitutional difficulties surrounding its interaction with the Convention regime, and the constitutional impact of the passing of the 1998 Human Rights Act have stimulated a rapid growth in academic interest in modern British rights history.

⁴ Previous inroads into state sovereignty, primarily through bilateral ceding of interest in relation to the rights of minorities, or under the pre-emptory *jus cogens* norms rejecting slavery, piracy and aggressive war, are minor by comparison.

⁵ In the sense of a new institutional arena in which for individuals to express dispositions and compete for a new kind of institutional capital.

⁶ Mikael Rask Madsen, 'Legal diplomacy - Law, Politics and the Genesis of Postwar European Human Rights' in Stefan-Ludwig Hoffman (ed.), *Human Rights in the Twentieth Century* (CUP 2011) 63

⁷ Tom Buchanan, 'Human Rights, the Memory of War and the Making of 'European' Identity 1945-75' in Martin Conway and Kiran Klaus Patel (eds.), *Europeanization in the Twentieth Century* (Palgrave Macmillan 2011) 158

⁸ Madsen (n 6) 63

The first piece to expose the division in elite British attitudes towards the Convention drafting came in 1984 from Anthony Lester.⁹ Drawing upon the recently opened Whitehall records, Lester cast light on Labour's flustered and slightly chaotic handling of the Convention drafting, against a better organised and more effective Conservative strategy. Geoffrey Marston's 1993 article built on this account, offering similar material and connecting it back with British contributions to the UN in the years prior to the Convention drafting.¹⁰ Both articles are richly descriptive but do not undertake to probe the motivations underlying Labour anxieties, nor those driving the Conservatives. Lester continued his examination in 1998 with an insider's account of the discussions leading to British acceptance of individual petition in 1966. However, in the absence of official records, Lester's second article focuses heavily on the relevance of two obstacles to acceptance (the East African Asians and Burma oil¹¹ cases). Again, this provides a valuable first-hand account of the process of the optional articles' acceptance but little insight into why they occurred.

Developing a more analytical approach, Elizabeth Wicks revisited both the Convention and the 1966 acceptance.¹² Wicks argues that fear of communism was the principal motivator of the UK's human rights agenda and concludes that it was a single-minded pursuit of protection against this threat that drove UK interactions with, and the adoption of, the Convention (as well as

⁹ Anthony Lester, 'Fundamental Rights: the United Kingdom isolated?' [1984] PL 46

¹⁰ Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42(4) ICLQ 796

¹¹ Specifically the apocryphal belief amongst Whitehall civil servants at the time that if they delayed acceptance of individual petition then this would time bar a potentially costly petition regarding war damages for the Burma Oil Company.

¹² Elizabeth Wicks, 'The United Kingdom Government's perceptions of the European Convention on Human Rights at the time of entry' [2000] PL 438

supposedly blinding the Government to the Convention's broader implications).¹³ On the question of the Labour u-turn on the optional articles, Wicks offers simply that the passing of time reduced the perception of the Convention as a threat. While providing a subtler account than many, Wicks's article only details a few isolated topics of substantive concern noted in governmental documentation (namely resisting communism, avoiding colonial instability, and the threat to sovereignty of individual petition) and does not attempt to further unpack these disparate issues.

More problematically, in advancing a broader account of underlying motivations, Wicks does not fully integrate this analysis with her examination of the Convention and, as such, neither of her explanations marries with the broader picture revealed through a more extensive study of the available archive materials. Despite casting valuable new light on the positive motivations underlying the drafting Wicks does not develop a comparable level of detail in her account of elite objections. The same issue accounts for the problems in her second conclusion as significant concerns did remain amongst some in Government and across Whitehall in 1966. No attention is given to the relevance of Labour's return to power and the UK's acceptance of individual petition, and the suggestion that the Convention system had been shown to pose no threat ignores the cases highlighted in Lester and the derogations of the interceding years. Overall, Wicks demonstrates a mild version of a general tendency in public discussion of British political input into the Convention: to reduce the complex influence of numerous British actors to a questionably

¹³ *ibid* 454

singular 'UK influence'. The suggestion that the UK Government substantially drafted or, at least, dominated the drafting of the Convention is widely – and erroneously – employed. Despite the work of Lester and Marston clearly demonstrating to the contrary, a misleading presentation of unity and purpose in the UK's relationship with the drafting has proliferated.

Examples of this trend are commonplace. In an Institute of Public Policy Research report on UK domestic protection of human rights, Klug describes the European Convention as 'a document largely drafted by UK Government lawyers'.¹⁴ Foley and Starmer assert that 'the UK played a leading part in the drafting and establishment of the UDHR and the ECHR' and that 'there was broad agreement between the major political parties about the need for them'.¹⁵ Outside of academia this view has also gained currency with Lord Hoffman asserting that 'we joined, indeed, took the lead in the negotiation of the European Convention'¹⁶ and Conservative Lawyers Faulks and Warnock describing the Convention as 'significantly a product of British thinking and draughtsmanship'.¹⁷

Only partly avoiding this error, Mole suggests that '[t]he substantive text was largely a British baby, but the institutional structure was heavily influenced by jurists associated with the European federal movement'.¹⁸ This claim (which was somewhat surprisingly extended to the Universal Declaration as well) takes

¹⁴ Justice Constitution Committee, *A British Bill of Rights* (Justice 1996)

¹⁵ C Foley and R Starmer, *Signing up for human rights: the United Kingdom and international standards* (Amnesty International 1998) 466

¹⁶ R Hoffman, 'Human Rights and the House of Lords' (1999) 62 MLR 159

¹⁷ E Faulks and A Warnock, *The Impact of the Human Rights Act on the Work of the Courts* (Society of Conservative Lawyers 2007) 1

¹⁸ N Mole, 'International Law, the Individual and A.W. Brian Simpson's Contribution to the Defence of Human Rights' ch.1 in K O'Donovan and G Rubin (eds.), *Human Rights and Legal History* (OUP 2000) 17

a large step in the right direction but suffers from failing to follow Lester and Marston in distinguishing the range of contributions, many conflicting, from amongst the ranks of involved British actors. Specific, but incorrect, Professors Ewing and Gearty claim that 'Atlee's cabinet of the post-war years was instrumental in promoting and drafting the European Convention'.¹⁹

Detail returned with a vengeance in 2001 when Brian Simpson's *Human Rights and the End of Empire* cast the prior, slim, literature in the shade.²⁰ This epic and primary-resource-intensive tome explores Britain's attitude to human rights from before the war, through the drafting of the Convention, across Britain's imperial troubles in the post-war years, and up to acceptance of the Convention's optional articles. The first six hundred pages of the book provide a robust foundation on the years up to 1948, fleshing out and massively enhancing Marston's account. The next two hundred provide a blow-by-blow account of the drafting itself, offering a substantially elaborated version of the descriptive account contained in Lester, Marston, and Wicks. The final sections flesh out Simpson's overarching argument that the major obstacle to British uptake of the Convention in 1950 was empire and that the crucial factor in full acceptance of its terms in 1966 was the incoming tide of independence. While Simpson's coverage of the material is exhaustive, this attention to detail is not matched in the associated analysis. While parties are clearly demarcated, his sweeping empire argument lacks the explanatory power that the wealth of

¹⁹ K Ewing and C Gearty, *The struggle for civil liberties: political freedom and the rule of law in Britain, 1914-1945* (OUP 1990) 2

²⁰ AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2004)

material promises (again neglecting to comment upon the relationship between acceptance of individual petition to the ECtHR and Labour's return to power).

Simpson's text has been employed as the foundation for work by a number of authors, including Nicol²¹ in his work contrasting British opinions towards the Convention with those of other contributing states. While much briefer than Simpson's work, Nicol offers a broader context to analyse the Convention drafting process and provides substantially more analytical heft. Nicol's thematic approach opens the door to a better appreciation of UK involvement within the dynamics of the Council (an understanding without which any account of the UK's contribution falls flat).

The most significant contribution of Nicol's paper is to draw attention to the tension between the Consultative Assembly of the Council (a forum of individuals from all parties and none) and the Committee of Ministers (an executive formed of direct representatives of the ruling parties in each state – principally Government ministers or ambassadors). This is an essential dynamic to appreciate if one is to understand the influence exercised by different British actors and, in particular, the purely advisory role of the Assembly (which none-the-less contributed the most to the drafting of the Convention). Nicol summarises the difference in approach between the Assembly and the Committee as that between 'enthusiasm' and 'caution'.²² In chapter 2 I elaborate on this tension between the dominant progressive elements in the Assembly and the conflicted Ministers.

²¹ D Nicol, 'Original Intent and the European Convention on Human Rights' [2005] PL 152

²² *ibid* 154

Another author dovetailing his account in with that of Simpson is Ed Bates²³ who goes slightly further into the European unity movement background underlying the Convention's birth and details some of the tensions in the Council during the drafting. This work paints in a little more detail but does not explore British Conservative input into the European unity movement, nor does it provide close attention to the UK's role in generating or exacerbating tensions in the Council, both important matters to consider given the absolutely central importance of British actors in the lead up to, and during, the ECHR drafting.

A more theoretical account of the Convention's birth, also taking into account other state actors but with significant importance to the study of British input, can be found in the socio-historical work of Mikael Rask Madsen. His two-stage 'boomerang effect'²⁴ of normative export in the Convention's creation (most clearly identified in the part played by the UK and France), followed by a subsequent re-import of remediated versions of those norms, inspires the broad structure for this thesis's two parts (with the early chapters considering export and the latter examining re-importation). This idea of UK and French interest in human rights being initially outward-looking also marries with the political scientific work of Andrew Moravcsik who identifies elite political interest in binding rights enforcement as being the preserve of weakly established

²³ Ed Bates, *The Evolution of the European Convention on Human Rights: From its inception to the creation of a permanent court of Human Rights* (OUP 2010) and Ed Bates, 'The Birth of the European Convention on Human Rights—and the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds.), *Human Rights between Law and Politics* (OUP 2011)

²⁴ Mikael Rask Madsen, 'France, the UK, and the 'Boomerang' of the Internationalisation of Human Rights (1945–2000)' in Simon Halliday and Patrick Schmidt (eds.), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart 2004) 72

democracies (where there is a greater fear of future political uncertainty at home).²⁵

Madsen has also contributed to the flurry of renewed critical interest that has occurred during the course of this project. This new body of work has seen efforts to further complicate the narratives of consensus that had predominated in earlier accounts of the European Convention's drafting.²⁶ Building on the above literature new bodies of sociological,²⁷ political and historical criticism have begun to emerge. In the area of this project, in particular, new scholarship from Tom Buchanan,²⁸ Samuel Moyn²⁹, Mikael Madsen³⁰ and Marco Duranti³¹ have all contributed to a nascent 'history of human rights as the history of conflict', examining Europe's human rights project in light of emergent Cold War, inter-state and inter-party tensions. While this thesis builds upon and responds to all of the work above, it is within this later, rapidly developing, body of work that this thesis sits and to which I hope to offer an important new contribution.

²⁵ Andrew Moravcsik, 'Explaining the Emergence of Human Rights Regimes: Liberal Democracy and Political Uncertainty in Postwar Europe' in (1998) 98-17 Weatherhead Center for International Affairs Harvard University Working Paper Series

²⁶ An end appealed for by Stefan-Ludwig Hoffmann.

²⁷ See, for instance, the October 2012 special edition of *Sociology* on the Sociology of Human Rights: (2012) *Sociology* 46(5)

²⁸ Tom Buchanan, 'Human Rights Campaigns in Modern Britain' in Nick Crowson, Matthew Hilton and James McKay (eds), *NGOs in Contemporary Britain: Non-State Actors in Society and Politics* (Macmillan 2009)

²⁹ S Moyn, *The Last Utopia: human rights in history* (Harvard University Press 2010)

³⁰ MR Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) 32(1) *Law & Social Inquiry* 137; MR Madsen, 'Legal diplomacy' - Law, Politics and the Genesis of Postwar European Human Rights in Stefan-Ludwig Hoffman (ed.), *Human Rights in the Twentieth Century* (CUP 2011)

³¹ M Duranti 'Curbing Labour's Totalitarian Temptation: European Human Rights Law and British Postwar Politics' (2012) 3 *Humanity* 361

This literature brings welcome attention and new scepticism to bear on the European project and on Conservative intentions towards it. Labelling the political scientific, philosophical and legal literature on the topic as ‘triumphalist’ and ‘presentist’, Stefan-Ludwig Hoffman introduces a recent edited collection³² by emphasising the gap in the literature for more critical and historical work. He also poses a question that captures the spirit of this project: ‘[c]an we conceive a genealogy of human rights that narrates their history not teleologically as the rise of moral sensibilities, but rather as the unpredictable results of political contestations?’³³

Madsen elaborates this argument in his contribution to the collection³⁴ arguing ‘that the historical genesis of the European human rights regime was much less straightforward and politically self-evident than most commentators assume today’.³⁵ Noting absence of consensus over the years, he emphasises the importance of individual agency in the creation of the Convention,³⁶ ongoing political meddling in the idea of European human rights during its early years,³⁷ and argues that ‘inter-institutional’ jockeying for power between the European Commission of Human Rights and the European Court of Human Rights served to starve the latter of cases through until the 1970s.³⁸

Regarding British input, he makes sensible reference to the importance of Conservative David Maxwell-Fyfe during the Convention’s drafting. Madsen

³² Stefan-Ludwig Hoffman, ‘Genealogies of Human Rights’ in Stefan-Ludwig Hoffman (ed.), *Human Rights in the Twentieth Century* (CUP 2011)

³³ *ibid* 4

³⁴ Madsen (2011) (n 30)

³⁵ *ibid* 63

³⁶ *ibid* 67

³⁷ *ibid* 71

³⁸ *ibid* 74

is, however, keen to narrowly explain acceptance of the optional articles in the mid-60s as a result of governmental confidence in the Commission's restrictive interpretation of the Convention. (In Chapter 4 I show that many in Whitehall were of quite the opposite opinion.)³⁹ His closing claim that European human rights have shifted from a conflict between domestic politics and European law to a conflict between domestic law and European law is, in light of recent domestic developments, also flagged as somewhat suspect.⁴⁰

For the UK, the tensions between domestic politics and European law remain clear for all to see in issues such as prisoner voting and the protracted battle to extradite Abu Qatada. Certainly these are different kinds of conflict between domestic politics and European law than those envisioned by some in the 1940s, but they are not simply legal conflicts. The interesting question is how these conflicts have shifted over time from the anti-communist concerns of the Cold War to the present day. British participation may not make sense to some elite political actors now but, misrepresentations of the Convention's 'original purpose' aside, we must consider first why it made sense to elite political actors then. As Hoffman notes, just accepting that the Convention was principally about anti-communism does relatively little to explain why the UK got so involved in the ECHR's preparation.⁴¹

This motivation question has begun to be answered elsewhere, with Harris identifying in Churchill (amongst other intellectual elite actors) a perceived threat to European civilisation and an 'intangible commitment to a certain kind of social, political, religious and philosophical "culture" embodied

³⁹ *ibid* 78

⁴⁰ *ibid* 81

⁴¹ Hoffman (n 32) 16

in the cumulative experience of two thousand years of European history' amongst intellectual elites.⁴² However, he still argues that 'it was only the threat of Russia sweeping in' that shifted minds 'to the future of "Europe" as anything more than a collection of defeated or "failed" nation states.'⁴³ He adds that for '[m]ost Conservatives and many Labour "moderates"', progressive internationalism was more about 'promoting various models of "revitalized" British empire or commonwealth, ... than the regeneration of post-fascist Europe'.⁴⁴

Buchanan follows similar lines in his contribution to the same volume,⁴⁵ identifying rights as the 'cornerstone of European identity' and their spread as 'a conscious attempt to invest Europe with distinctive meaning' but claiming that Churchill's 1948 call to 'set the people free' was 'a protest against the British Labour Government's restrictions on economic, rather than political, freedoms.' Buchanan argues that human rights fortunes turned on the development of a transnational rights movement in the 1950s, but touches only briefly upon Labour's growing interest in rights in the late 60s.⁴⁶

While the products of this growth spurt in the literature, and a growing appreciation of the complex origins of European human rights, are incredibly welcome, there are still notable limitations in this work, which I seek to address. Amongst these are the lack of study of Labour party attitudes, ongoing

⁴² J Harris, 'A Struggle for European Civilization': T.S. Elliot and British Conceptions of Europe during and after the Second World War' in Martin Conway and Kiran Klaus Patel (eds.), *Europeanization in the twentieth century* (Palgrave Macmillan 2011) 44

⁴³ *ibid* 45

⁴⁴ *ibid*

⁴⁵ T Buchanan, 'Human Rights, the Memory of War and the Making of 'European' Identity 1945-75' in Martin Conway and Kiran Klaus Patel (eds.), *Europeanization in the twentieth century* (CUP 2011)

⁴⁶ *ibid* 169

preoccupation with Simpson's post-colonial analysis, a lack of consideration of socio-economic rights, little attempt to connect political positions with contemporaneous social and political realities, and still insufficient focus on the quiet years for human rights between the enthusiasm of the post-war period and the resurgence of rights discourse in the 1970s.⁴⁷

In this area, only very recent work by Marco Duranti⁴⁸ has begun to unlock some of the importance of British domestic political rivalries in the creation of the European Convention regime. His finding that tensions between the Conservatives and Labour were a fundamental motivator for the Convention mirrors my own, as detailed in my second chapter. However, in his explanation for Churchill's actions our accounts diverge. His thesis runs that despite a degree of domestic consensus on socio-economic reform in the wake of the war, both in Europe and at home (as suggested by the Conservatives' own 'Industrial Charter') the Conservatives were deeply concerned about these ideas being elevated into the supranational domain, lest they become embedded at the heart of the new Europe, entrenching a policy favourable to Labour. He argues that, consequently, the Conservatives were motivated to exclude socio-economic rights from the Convention and to try to create a European Court that could challenge Labour's continued use of wartime emergency legislation,⁴⁹ as well as future measures along the same lines.⁵⁰

Duranti correctly notes that the Conservatives acted in a way that

⁴⁷ Moyn's *Last Utopia* (n 29) seeks to explain the rise of rights in the 1970s in broad socio-theoretical terms as a response to the decay of prior forms of political idealism but does not provide much in the way of evidence.

⁴⁸ Duranti (n 31)

⁴⁹ Notably the Emergency Powers (Defence) Acts 1939 and 1940 and the Defence Regulations passed under them.

⁵⁰ Duranti (n 31) 398

privileged civil and political rights over socio-economic ones throughout the lead up to the Convention, essentially ensuring that the Convention was restricted to the former. However, Labour too were adamantly against including socio-economic rights (as is demonstrated by the subsequent drafting of the European Social Charter, where Labour fought against a dedicated socio-economic instrument). The conflict between the two certainly saw the Attlee Government attempt to minimise the civil and political content, but even there it is far from obvious that any of its terms would have affected Labour's programme of nationalising and centralising reforms. The evidence Duranti adduces demonstrates a general privileging of civil and political content and that the Conservatives were keen to adopt an active role in Europe, in conflict with Labour, but he does not convincingly bind the two together.

The motivation pushing Churchill and elite Conservative allies to become so involved with the Convention is just as easily explained by a simple desire on the part of Churchill to maintain his profile as a leader and elder statesman after his surprise ousting from office in 1945. While Duranti demonstrates that the key Conservative involved in the drafting, Nuremburg prosecutor and future Lord Chancellor David Maxwell-Fyfe, was deeply concerned about Labour's actions, I argue that his motivations were also more idealistic (as demonstrated by his frustrated desire to implement the Convention's optional articles on individual petition even once the Conservatives returned to power).

We are unlikely to ever know exactly what possessed Churchill to champion the Convention, but neither fear of a Labour sponsored socio-economic instrument nor a focused desire to constrain Labour's domestic policy agenda is a good fit. Even an extensive political rights instrument held little

potential for constraining Labour's reforms at home. Consequently, a simpler motivation of attempting to outfox and embarrass Labour through dominance of the European space, while pushing for the Convention as a politically symbolic gesture (for Churchill), with genuine desire for a system of binding political rights being limited to Maxwell-Fyfe, appears a stronger explanation.

This point aside, the important evolution in the literature, beginning to unpick the influence of British domestic politics on European rights, is to be warmly welcomed. This avenue of enquiry still has much farther to develop and it is this motivation that drives the first part of my thesis. My study of the 'export' stage of British input into the Convention and Charter creation, through Chapters 2 and 3, both enriches this literature and, also, serves as a counterpoint for the second part of my thesis, with its examination of the later re-importation of mediated European rights norms.

Out of these small pieces a larger, subtler and more complex picture has begun to be assembled. Consensus is forming around an appreciation of the Convention as the product of contestation rather than consensus. Idealistic accounts and those rooted in the horrors of the Second World War have been challenged by those that emphasise contemporaneous concerns with countering the threat of communism. Appreciation of the differential attitudes and approaches of, and within, the larger European powers, has begun to come to the fore.

As regards the UK's contribution to this process, various works have now provided factual accounts of individual Conservative input and/or Whitehall records, but there is still significant variation in the literature regarding motivation, and different authors have adopted strong rational choice or

ideational understandings of governmental and opposition attitudes without attempting to address this divergence. Broadly, authors leaning towards rational choice explanations characterise the UK, or some component of its Government, as pushing for a Convention that was no more than a set of British political norms in order to press smaller (or weaker) governments into adopting a normative framework amenable to British international interests. More idealistic authors⁵¹ emphasise the enduring impact of the horrors of the war and see governmental action as an altruistic response. While both are compatible with processes of normative export from developed democracies, the latter framing understands this process as motivated by a belief in the benefits of those norms for the recipients (and for international stability), while the former is interested less in the common good than domestic concerns.

Outside Duranti there has been very little attention to the interplay between the Labour and Conservative parties during the Convention's drafting. Moving on, there has been scant attention to the period between the ECHR's passage and the processes leading to acceptance of individual petition and the European Court in January 1966. Literature on acceptance has seen only very limited explanations being offered. Of particular concern is a complete lack of attention to the interplay between the parties, an omission even less explicable than the lack of attention to the same issue during the Convention's drafting. Some authors (most notably Lester) have detailed how the acceptance occurred without making any attempt to examine why. Others have attempted to explain why (principally Simpson, endorsed by Nicol, with his declining empire account,

⁵¹ Perhaps most visibly Klug: see F Klug, *Values for a godless age: the history of the Human Rights Act and its political and legal consequences* (Penguin 2000)

Wicks with her passage of time explanation; and Madsen, with his suggestion that the Government had come to be reassured by the Commission's approach) but offer slim evidence to support their claims.

Even if we accept these explanations, they only account for the amelioration of certain perceived obstacles, obstacles which themselves have not been properly accounted for, and they identify no convincing positive impetus for the Labour Government to have acted. They also treat the fact that the decision to accept was taken by a new Labour administration, after 14 years of Conservative rule, as entirely incidental and make no attempt to examine the interplay between that change of domestic political direction and the change of direction in Britain's human rights policy.

Moving past the 1966 acceptance, the literature on UK engagement with human rights becomes extremely patchy. While Moyn and Buchanan point to the 60s and 70s as the true site of rights revolution, there has been little historical attention to the latter part of this period where a first domestic Bill of Rights debate had raged, with attention drawn forward to the 1990s and the run up to the HRA.⁵² Over the last five years the British National Archives have opened up records for this period and, while nothing ultimately came of the 70s debate, any detailed appreciation of the birth of the HRA and the subsequent debate over a British Bill of Rights must contain more than a footnote to this important episode, which saw incorporation of the Convention into domestic law seriously contemplated for the first time.

⁵² There has been political scientific work that has looked at this period but no specific or extended historiographical examination (see D Erdos, 'Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate' (2009) 44(1) Government and Opposition 20)

Overall, there is still a lack of a rigorous, longitudinal, meta-analysis of British elite political attitudes. International relations and historical literatures have clumped around the Convention's drafting while political, legal and other work has focussed on the HRA and later. The gap between these two phases has begun to draw new scrutiny, but there has been no attempt to track the developing attitudes of the British political parties or to relate these attitudes to the varied responses that have been seen during successive rights debates during the 50s, 60s and 70s, as rights became increasingly established.

In this thesis I fill out some of this gap by subjecting the key episodes from across the period to deeper scrutiny, identifying continuities and discontinuities in party policy and patterns of objection over time. Contrasting varying international political, domestic political and socio-economic concerns, in this thesis I identify additional contextual factors that help explain the various political u-turns undertaken by the major parties and consider the relevance of minor party interests and lobbying. In the first half of my thesis I demonstrate that British political affairs were one of the most important forces in the mapping out of Europe's rights landscape. In the second half, I consider how developments in British political affairs contributed to the gradual opening up and subsequent closing of British tolerance towards the importation of European remediated versions of its previously exported norms.

3. Structure of the Thesis

In this thesis I examine the interrelationships between post-war British politics and the development of human rights law, both in Europe and the United Kingdom, through the lens of several major debates. These debates have

exposed the attitudes of British elite political actors over the course of the post-war period and have served to shape European and domestic rights ideas, institutions and instruments. Spanning five changes of government and ten Prime Ministers, examining these debates permits broader observations to be made and comparisons of party attitudes to be drawn across various conditions and dimensions. Pursuing a discursively aware form of Simpsonite socio-historical analysis, attempting to tie constitutional legal change to detailed political history,⁵³ I draw upon evidence from a broad range of primary sources (including the National, Council of Europe, Conservative, Liberal and Labour Party Archives, Hansard, contemporaneous published commentary, speeches and press coverage). From these sources I track changing ideas and tactics within and between the parties, across time, in and out of government and in the contexts of different kinds of rights proposal. By doing so, I provide a detailed history of each of the parties' attitudes towards rights as well as a broader picture of the UK's influence on European rights developments. In the United Kingdom's remarkable, spasmodic but constant progression towards greater engagement with human rights law, and erosion of parliamentary supremacy, these episodes act as key landmarks of enthusiasm and reticence and help build a fuller picture of British engagement with rights ideas.

The thesis falls into two broad but closely related halves, demarcated along Madsen's lines of export and import. In the first half I examine the spectrum of elite political attitudes towards the European rights project in its early years. During this period, the UK held significant sway over the course of

⁵³ Joshua Getzler, 'Brian Simpson's Empiricism' (2012) 3(2) Transnational Legal Theory 127-139

European integration, and British actors held the power to significantly shape both the early political agenda and also the form, style and content of the instruments that would populate the European rights space. In the second half I examine the gradual domestic adoption of these developing European rights instruments and identify some novel political, social and economic processes that stand out as potential contributors to changing attitudes over time.

To begin, in Chapter 2, I revisit the Convention drafting process and consider in detail British influence over the form, structure and content of the European Convention on Human Rights. I start by examining the crucial Conservative stewardship of European federalist movements that culminated in the creation of the Council of Europe and the tentative Labour Government reaction to the newly emerging European space. Conclusively rejecting the understanding of the ECHR as a singular product of British drafting, I develop beyond Duranti's examination of domestic conflict and explore the Convention's emergence as an awkward compromise between two distinct British drafts, each backed by one of the main Westminster parties, and each manifesting different, and heavily conflicting, approaches towards the proper form of a human rights instrument.

Considering the institutional entrepreneurship of Churchill and the manner in which he, and a few other close elite Conservatives, worked to frustrate, obfuscate and outflank the Labour administration, I elaborate an account of the confused and ambivalent reaction of the Government towards the Council of Europe and the Convention. Considering each of the parties and their contributions, I identify four key categories or factors of concern that underlay British political resistance to human rights instruments. Using these factors –

codification of rights principles in general, the transfer of sovereignty to supranational organisations, the transfer of sovereignty to a judiciary, and substantive concerns over specific drafting formulations – I propose an analytical framework for categorising party thinking. By employing this framework across the following chapters I provide a more rigorous appraisal of party attitudes than is found elsewhere in the literature and progress understanding beyond superficial emphases on ‘traditional’ British constitutional principles such as parliamentary sovereignty – which have often dominated the public face of the debate without revealing anything of its underlying substance.

In chapter 3 I examine the second episode in the European rights project and consider British influence over the drafting of the 1961 European Social Charter. This, largely ignored, social rights instrument (redrafted, to little effect, in 1996⁵⁴) was to provide a statement of social and economic rights to partner the largely civil and political rights in the Convention. However a prolonged, disorganised and divisive eight-year drafting process left the Charter a pale shadow of the Convention. Nevertheless, while the Charter has almost been relegated to a footnote in the European rights story, it has a significant contribution to make in this account of elite British political engagement with European rights. Covering the period from 1953 to 1961, the Charter drafting provides a valuable insight into party political attitudes post-Convention but before the development of any significant rights constituency either at home or in international civil society.

⁵⁴ European Social Charter (revised) (1996) ETS. 163

The structure of the Council, with its Consultative Assembly, made up of representatives from across the British political spectrum, also provides a broad cross-sectional snapshot and shows the impact of British politicians, again under the European spotlight, but now with the Conservatives, comfortable in their domestic power, no longer adopting the role of European entrepreneurs. The drafting thus provides several useful contrasts to the Convention drafting: it sees a reversal in government at home, it steps beyond the immediate post-war bubble of co-operative Euro-enthusiasm, it sees Labour more settled in its understanding of the European space and, of course, it exposes attitudes towards a different, more demanding, form of rights protection. Under these altered circumstances the intrigue, bluff, and conflict that characterised the relationship between the parties during the Convention drafting was supplanted by an unprecedented co-operation, bordering on collaboration, to undermine the Charter and ensure that it did not begin to approach the terms of the Convention. As well as providing the first account of British involvement in the Charter drafting process, I also provide comparisons between the Charter and Convention drafting processes regarding the tactics employed, outcomes achieved and, most crucially, profile of concerns harboured (with the final application of my framework from the previous chapter revealing a shift towards concerns with codification). I finish the chapter by identifying the connection between this heightened concern and the contemporaneous context of complex and fragile British labour relations.

In chapter 4 I move to examine the Labour turn towards adoption of Europe-mediated human rights. The key quality that marked out the ECHR as a

new breed of instrument was its novel enforcement.⁵⁵ While these articles were made optional, over the course of thirty years all of the member states (or 'high contracting parties') subjugated themselves to their terms. Without this ostensibly magnanimous surrender of sovereignty, the first acceptance by the states involved of a legitimate external interest in their internal affairs,⁵⁶ through the Convention regime, would never have got off the ground. While Britain's 1966 acceptance trailed that of many member states,⁵⁷ it was certainly not the last⁵⁸. The decision to accept either of the optional articles is surprising and demands attention for a number of reasons. The United Kingdom had already found itself on the sharp end of the Convention through its referral to the European Commission by Greece over British emergency rule in Cyprus (the first petition to be accepted as admissible by the Commission).⁵⁹ The European Court also remained an entirely unknown quantity, having yet to pass a single judgment. Cases against other states were beginning to trickle in, and the recently agreed Protocol no.4⁶⁰ to the Convention demonstrated Council of Europe interest in developing the Convention in a direction that was unacceptable to the UK. (The UK has still not ratified this protocol.) There was also relatively little public, press or parliamentary interest in acceptance.

⁵⁵ Madsen (n 6) 65

⁵⁶ Simpson (n 20) Ch.1

⁵⁷ Preceded by Sweden, who were first to opt-in in 1952; Ireland in 1953; Iceland, Belgium, Germany and Norway in 1955; Luxembourg and Austria in 1958; and the Netherlands in 1960.

⁵⁸ France did not ratify the Convention until 1974.

⁵⁹ *Greece v United Kingdom* App no 176/56 (EComHR, 26 September 1958) 2 YB 172, followed a year later by App no 299/57, 2 YB 178 and 186

⁶⁰ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto 1963 ETS 46

As noted above, the general approach to explaining acceptance in the literature is negative: identifying waning obstacles rather than suggesting positive motivations, and drawing no connection between the acceptance and its timing, in the early stages of the first term of Labour power since 1950. These oversights are even more remarkable given the ferocity of Labour rejection of the optional articles in 1950. (The opening section of the chapter details Atlee's near boycott of the Convention over the inclusion of the articles.) In this chapter I take a more rigorous approach to the negative side of the equation, examining Simpson's end of empire hypothesis, and applying my framework to explore how the shape of Labour and Conservative resistance shifted from 1950 to 1965. In place of passive accounts I highlight the positive connection between Labour's return to power and the acceptance of the optional articles, with particular emphasis on the significant reorientation in the party's politics during the 50s and early 60s.

In Chapter 5 I follow the story of domestic engagement on from 1965 and consider the rise of debate regarding the potential for a Bill of Rights in the United Kingdom. As in Chapter 3, this Chapter profiles a process that had relatively little practical impact at the time but which set the tone for future engagement. While the idea for a Bill of Rights emerged organically out of domestic political processes, pressures and controversies, and not human rights in the European mould, it rapidly developed into a series of concrete proposals to incorporate the Convention into domestic law by statute. Though this would not actually occur until 1998, the key shift in thinking, merging European human rights ideas with a longer heritage of British civil liberties advocacy, must not be ignored. Not only did the eventual Human Rights Act take a form

closely reflecting the latter bills put forward during this first Bill of Rights debate, but the consultations arising from the proposals reached many of the same conclusions as obtained by the recent Commission on a Bill of Rights. In exploring the significance of this period, I propose answers to several related questions. The first is why the Bill of Rights debate emerged at the time it did and how far this grew out of endogenous domestic factors and how far out of exogenous European pressures. The second asks how the European Convention came to form the heart of the Bill of Rights proposals, displacing earlier suggestions for a home-grown Bill of Rights or one based on the common law precedent provided by Canada. The third, applying again my analytical framework, considers how far the failure of the 1970s debate is attributable to similar concerns to those identified in previous chapters. In answering these questions I emphasise the Convention's unique status as an instrument around which a degree of cross-party consensus already existed at a time when no other form of consensus was liable to be reached. Softening Labour attitudes towards judicialisation and lessening Conservative objections to the substantive content of the Convention helped draw the Convention into a longer standing Liberal discourse regarding bills of rights and constraint of the executive in the face of a weakening Parliament. The chapter concludes by considering how the Convention represented the right instrument but at the wrong time. While there was a core of cross-party interest, a congested agenda of potential constitutional reforms (including, most pressingly, action on devolution) and wafer-thin majorities rendered the task of passing a constitutional rights instrument unworkable.

In Chapter 6, I consider the last twenty years from the process leading up to Labour's partial incorporation of the Convention through the HRA, alongside its decision not to draft a supplementary, home-grown, Bill of Rights (as was originally the plan), through to the new Bill of Rights debate that has been fuelled by a powerful media backlash against the Convention and the HRA. Considering these two processes alongside British input into the European Union's Charter of Fundamental Rights (and the UK's special opt-out clause), I identify various connections to the episodes covered in previous chapters. Applying my analytical framework to the available evidence, I identify further explanatory shifts in Labour attitudes to judicialisation and Conservative attitudes to the supranational. I conclude my thesis by drawing together the lessons of the various episodes, considering the divergent approaches of the different parties and emphasising key recurring factors that have aided and frustrated the growth of rights across the period of study.

Chapter 2 Negotiating a European Human Rights Framework

'While it is desirable to encourage the maximum co-operation between the nations of Europe, it should be clear that an organisation led by Mr. Churchill is not likely to stimulate such co-operation.'

Labour Party National Executive Committee Minute, 1948¹

1. Introduction

I begin my analysis of the UK's relationship to the development of constitutional human rights by re-examining the first and, over sixty years on, still principal post-war rights instrument, the European Convention on Human Rights². The Convention drafting constitutes the first outward throw of Madsen's boomerang, and in this chapter – considering the influence of British politicians and British politics over the inception, drafting and adoption of the Convention – I argue that the process developed substantially out of a post-war struggle, between Conservative and Labour parties, for authority in the new post-war European political space.

Through this chapter, I assess Conservative institutional entrepreneurialism, the ideological conflict account proposed by Duranti and the various grounds for concern underlying Labour's contributions to the Convention's drafting. Out of these sections I elaborate a theoretical framework for assessing elite political resistance to human rights reforms. This framework highlights four loci of concern manifested in response to proposed

¹ Labour Party National Executive Committee meeting minute, 'Party Attitude to Churchill's "United Europe" Movement in Great Britain' (International Department Boxfile, initialed M.P., 1948)

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) 1950 ETS 5

developments in human rights protection. These pertain to supranationalisation of supervision; judicialisation and the development of new forms of formal review; codification of novel rights; and the drafting style in which new rights are couched. This framework provides a general structure for scrutinising the nature and substance of objections to novel rights proposals and is employed throughout the rest of the thesis as a tool to assess continuities and discontinuities in party attitudes towards developing human rights protections.

Mainstream public and political discourse paints British influence over the Convention as direct, deliberate and decisive. While recent years have seen a growing appreciation of Conservative input into the Convention and Labour resistance, (particularly by Conservatives keen to claim an affinity with rights protection),³ there has still been inadequate attention paid to the heterogeneity of elite political attitudes, their bases, and the dynamics between elite actors. In this chapter I add to the growing academic critique of these accounts, dismissing the idea of total British, or Conservative, dominance over the Convention's drafting. Responding to Duranti's valuable account of Conservative input as a response to post-war Labour, socialism I strongly endorse the view that the Convention grew out of British domestic conflict but argue that Churchill's institutional entrepreneurship in the European space and the impetus behind early, elite, Conservative support for the Convention embraced a selection of viewpoints. While the key Conservative contributor to the drafting appears to have been interested in binding human rights law, Churchill and

³ See, for instance, Jesse Norman MP and Peter Osborne, *Churchill's Legacy: The Conservative Case for the Human Rights Act* (Liberty 2009), or Dominic Grieve, 'European Convention on Human Rights: current challenges' (Speech given at Lincoln's Inn, 24 October 2011)

other senior Conservatives appear to have been more concerned with raising the status of the Council of Europe (a political forum in which Churchill held a commanding position) than with any concrete effect its work might have had in forcibly constraining Labour policies at home.

After providing a general orientation to the drafting of the Convention, in the second section of the chapter I re-examine the attitudes of the Conservative and Labour parties towards the drafting. Drawing upon the Council of Europe's collected texts and materials documenting the drafting of the Convention,⁴ publicly accessible party records, Government files in the National Archives and unpublished historical research on the workings of European federalist organisations I re-examine Conservative efforts in support of European federalisation and Labour wariness towards those actions. The composite picture shows the Council of Europe, its initiatives, and in particular the Convention, sitting at the heart of a Europe initiative rooted in domestic inter-party tensions. Through the rest of the chapter I provide a thematic analysis of the complaints proffered by British actors during the drafting process, detailing in each section one of the four areas of tension that supported Labour (and to a lesser degree Conservative) objections to a fully enforceable supranational rights instrument. Concluding this chapter, I consider the degree to which these concerns can be predominantly associated with a single underlying motive.

⁴ As reproduced in the eight volume Council of *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* (Martinus Nijhoff 1985) herein footnoted as 'TP'

i. The Convention Drafting in Overview

The overall story of the drafting has already been told, and I do not repeat the detailed chronologies that have been provided elsewhere.⁵ However, before proceeding to a detailed examination of the intentions and concerns of British elites, it is helpful to rehearse some of the key stages, bodies and processes involved in the Convention's drafting.

The Convention, signed 4th November 1950, was the first, and arguably last, significant instrument passed by the Council of Europe, which had been founded eighteen months earlier on 5th May 1949. The Convention, like the Council itself, grew from the initiative of European federalist forces marshalled under the 'European Movement' umbrella organisation. This European Movement (herein 'EM') brought together pro-federalist groups from across Europe, including the ruling parties from France and Belgium. This coalition of European advocates crossed conventional political boundaries, bringing together British Conservatives, Belgian Socialists and French Christian Democrats in collaboration. The EM, as detailed in the next section, was, in very large part, orchestrated, funded and dominated by the British opposition.

The Council of Europe was, and is, structurally arranged around two key institutional elements. The first is the Committee of Ministers, made up of representatives (often Foreign Ministers) of the governments of the member states, and the ultimate decision making body. The second is the Consultative Assembly (now 'Parliamentary Assembly'), a body made up of representatives

⁵ See literature review in Chapter 1 and, in particular, A Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2004) for the Council processes, and M Duranti 'Curbing Labour's Totalitarian Temptation: European Human Rights Law and British Postwar Politics' (2012) 3 *Humanity* 361 for the preceding Euro federalist meetings.

of all parties from across the member states, with a purely advisory jurisdiction. The organisation, created by the Treaty of London, followed the specification outlined by the EM organised 'Congress of Europe'⁶ in May 1948.

This gathering in The Hague brought together 750 prominent intellectuals, jurists, politicians and other elite actors from across Europe with the purpose of discussing the future of European co-operation. As demonstrated below, the gathering was only superficially an occasion for debating issues and, in substance, was an audacious exercise in generating apparent legitimacy for the EM's own vision and plans. These plans included the creation of a permanent European organisation resembling a slimmed down version of the Congress itself (ideally with legislative powers), unification of policy in numerous key areas, and the start of a new body of European legislation, commencing with a constitutional, European, Bill of Rights, backed by a competent European Court with material powers of enforcement.

The Movement did not entirely get its way; the Consultative Assembly lacked any powers beyond petitioning the Committee of Ministers, and certain areas of discussion were held to be beyond its remit. Discussion of a human rights instrument was also, initially, absent from the order of business for the Assembly's first session. This omission did not last long with Churchill personally intervening at the Assembly's Standing Committee. Criticising the governmental Committee of Ministers for resisting such a discussion he opined: '[a] European Assembly forbidden to discuss human rights would indeed have been a ludicrous proposition to put to the world.'⁷ Churchill commended a

⁶ Sometimes referred to as 'Congress of Nations'.

⁷ *ibid*

Convention based on a shortened form of the UN's Universal Declaration on Human Rights⁸ and it was such a document, edited down largely by Conservative (former Nuremburg prosecutor and future Lord Chancellor) Sir David Maxwell-Fyfe and Christian Democrat (purger of the Vichy regime, founding father of the European Community and future leader of the French Popular Republican Movement) Professor Pierre Henri Teitgen, that was submitted by the EM for consideration at the first Assembly. This text was further developed by the Assembly's Committee on Legal and Administrative Questions (with Teitgen as rapporteur) and delivered to the Committee of Ministers. Here the Assembly's UDHR-derived, EM mediated and Conservative backed document was met with its first real resistance. This resistance came in the form of a second, competing draft produced by the Foreign Office. Based on Britain's submission to the Universal Declaration drafting committee, this Labour Government-backed draft was far leaner, reflected the approach of the UK's distinct legal heritage and took a substantially different philosophical approach to the idea of supranational rights (discussed in detail section 4 below). This left the Committee of Ministers in a difficult position, forced to choose between the product, albeit somewhat unwelcome, of its own non-governmental Assembly and that of the Government of one of the most powerful partners in the Council.

The approach adopted was to attempt to reconcile the irreconcilable with the Committee of Ministers appointing its own 'Committee of Legal Experts' to produce a composite draft. When this panel of national lawyers

⁸ Universal Declaration of Human Rights, UNGA Res 217 A (10 December 1948)

failed to find a tidy solution the Ministers appointed a 'Conference of Senior Officials', consisting of diplomats and civil servants, who, somewhat more pragmatically, grafted the two instruments together, sparing little concern for technical implications. It was this compromise, or perhaps compromised, draft that was signed as the final Convention in Rome on 9th December 1948. The Consultative Assembly was scandalised by its marginalisation and the removal of several crucial rights (particularly property and education, which were included in the first protocol to the Convention.) The Convention was so little esteemed that no British politician was dispatched for the signing and ceremonial duties were left to the local ambassador.

This brief sketch introduces many of the key issues engaged with in this chapter. The importance of understanding the motivations of both Conservative and Labour elite actors as a pre-requisite for any satisfactory understanding of the Convention's birth is clear. Movement in the literature towards a new historical appreciation of the Convention, seeing it partly as the product of conflict rather than purely as the fruit of consensus, is clearly warranted. The case for detailed reflection on the part played by elite, British, domestic tensions is particularly strong and thus Duranti's contribution is particularly welcome. In the next section, however, I criticise the two points of Duranti's argument and propose an alternative driver for Conservative action. Through the rest of the chapter I analyse the Labour Government's position, categorising each of the heads of concern that underlay its resistance.

2. Re-Assessing the Labour-Conservative Conflict

For the purposes of my enquiry the key first event was the 1945 General Election. Churchill's debilitating election loss to Attlee was a setback for the Conservatives and a major blow to Churchill, the recently triumphant war leader. More surprising than this loss, however, was Churchill's response. Thrust into opposition, members of the Conservative party elite (partnering with pro-federalist European continental parties) developed and prosecuted a pro-European agenda. While, at home, Churchill had lost an election, abroad he remained the charismatic and victorious leader, moving quickly to exploit the opportunities of the new European space that was opening up. Combining this status with the support of deep-pocketed commercial connections at home, Churchill was able to orchestrate a strenuous and well-funded campaign leading to the creation of the Council, the Convention and, arguably, setting the ball rolling for all of the other major European projects of the last sixty years. The key questions for the historian of European human rights are why Churchill took this path and what he hoped to achieve.

Duranti responds to these questions with two claims regarding elite Conservative motivations for involvement in the drafting of the European Convention.⁹ The first is that the Conservatives sought to create a supranational legal instrument out of a 'genuine fear' of 'totalitarianism' under Labour Government. Duranti argues that the marriage of socialist policies and enduring emergency powers (passed under war-time legislation that had yet to be repealed) created such a sense of threat amongst Conservative actors that they

⁹ Duranti (n 5)

felt compelled to push for supranational rights law as a means to curb them. Building for this first point, he makes a second that the absence of social and economic rights from the Convention was also a reflection of Conservative hostility to Labour's social and economic policies. Claiming that there is a discord between the post-war period as a time of relative consensus on the need for greater social protection on the one hand and the absence of such protections in the Convention on the other, Duranti argues that Conservatives forced an emphasis on civil and political rights not because of their own resistance to socio-economic rights but out of concern that these would buttress Labour action in the social field.

These arguments are thought-provoking but incomplete. In respect of his first argument, the evidence adduced by Duranti in relation to the Conservative anxiety about opposition certainly marries with my own findings, elaborated below. However, the fuller contention that the Conservative involvement in the Convention was intended to forcefully constrain Labour does not appear to me to be adequately borne out by the evidence. Instead I argue that within the Conservative elite there were various motivations. While Maxwell-Fyfe's input into the drafting, coupled with support for the right of individual petition after the Convention's passage, suggests a genuine ideological belief in an enforceable Convention aimed at constraining government, Churchill's support for the Convention tailed off short of the document's passage and never rekindled. Conservative elites may well have been deeply troubled by Labour's radical programme of reform, but a simpler explanation for Churchill's European actions is that he was making use of his political capital on the continent to outmanoeuvre Labour in the new and important European domain. A more

speculative extension of this explanation is that such involvement enabled him to maintain his status as a leader and statesman against the domestic rebuke delivered by the British public in his 1945 election loss (explaining the total departure of enthusiasm post-1950). We know that Churchill recognised and vociferously supported the idea of European integration, but the question of what practical part he saw the United Kingdom playing in such initiatives is much more ambiguous.¹⁰ Duranti's argument does not run counter to the understanding that Churchill was concerned to encourage Europe to federate with the UK existing outside this union (as head of the Commonwealth) but still close at its side. However, as demonstrated below, it was relatively clear by 1950 that Churchill was opposed to any significant steps towards federation. Indeed, the latter stages of the drafting saw a period of Conservative movement away from its federalist partners.¹¹ As such, the idea that Churchill was intent on ceding a significant measure of sovereignty to a novel supranational entity purely so as to impact upon domestic socialist reform is not a perfect fit with the evidence.

As regards the second of Duranti's arguments, I certainly agree that the Conservatives played an extremely significant part in determining the emphasis of the Convention and in steering it towards a limited statement of civil and political rights. However, attributing this course of action to conflict with the Labour party is problematic to demonstrate. The Convention was intended as a bulwark against communism and the formulation of an instrument that served

¹⁰ Simpson (n 5)

¹¹ This point is also expanded upon in ch 4, where I examine the Conservatives' drawing back from the European federalist community – and from support for the Convention itself around their return to power in 1951.

these ends may perhaps have caused it to resemble an anti-socialist instrument more generally. However, to suggest that the omission of the social rights contained in the Universal Declaration was a measure aimed at the socialist Labour Government and not at the communist governments on Europe's eastern front requested a big leap. The Labour Government had no appetite for any binding international instrument in the late 40s whether its content be civil and political or social and economic. Labour's ideal draft for the Convention was more limited than the Conservative one, not more expansive, and contained no social or economic content. In fact, as demonstrated in my next chapter, both parties were strongly opposed to enforceable social and economic rights in domestic or international law, and the Labour Government was, at the time of the Convention's drafting, fiercely resisting moves in the UN to render any of its measures enforceable.

Overall in this first section I suggest that for Churchill, and for many of his elite Conservative colleagues, the Convention was more a political and symbolic tool than a legal one and both its passage and its form reflect this. By partnering with the leading parties of Europe, many of them socialist, Churchill's dominance of post-war politics on the continent was not a means to forcibly constrain Labour but instead to outflank the Attlee Government and develop a dominant position in the new European political space. While support for the Convention was genuine, I argue that any principled and committed attempt to constrain Labour was David Maxwell-Fyfe's alone and was not characteristic of any Conservative strategy more generally. Similarly, I argue that Conservative moves to restrict the scope of the Convention were the result of a functional approach to finding a document that captured a robust core of

common ground between the states and not as a result of a move to try and prevent the Convention from offering protection to Labour reforms.

i. Understanding Churchill's Euro-Federalist Patronage

Having outlined these concerns with Duranti's account, I move on to my own, referencing back to these issues as I build up a picture of elite Conservative actions. The first element of this picture is to understand how Churchill, and a few of his close allies, went out on a limb to engage with Euro-federalists. This leads into my argument that Churchill lacked the commitment to transfer of sovereignty required to consider the Convention a serious tool for constraining Labour.

Few in the immediate post-war period would have denied that some form of closer interaction between European powers was necessary. Expressions of pro-European sentiment from Labour elites, however, were less frequent and their actions focused on more traditional policy areas, while it was the Conservatives who committed serious resources, political and financial, to supporting the inception of a new European polity. While Foreign Secretary, Ernest Bevin, enthusiastically supported European co-operation,¹² playing a major part in the negotiation of the Brussels Treaty¹³ on social, cultural and military co-operation and was involved in the creation of the Organisation for European Economic Co-operation this interest did not stretch into structural or functional unification. Instead Labour made a slow and tentative start in the

¹² During the lead up to the Brussels Treaty, Labour Foreign Secretary Ernest Bevin expressed his conviction that Western Europe must unite.

¹³ The Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, signed in Brussels on 17th March 1948 by Belgium, France, Luxembourg, the Netherlands and the United Kingdom. Entered into force 25th August 1948.

post-war internationalist space, focusing on gatherings of European socialists and UN responsibilities, while at home the socialist administration concerned itself with the rebuilding and remoulding of post-war Britain. This slow start facilitated Churchill, giving him time and space to dominate the political agenda on more European co-operation.¹⁴

Churchill's tone in a sequence of high profile overseas speeches was strident.¹⁵ Through these engagements he advocated European union and, notoriously, in several instances, specifically invoked a, presumably federalist, ideal of forming a United States of Europe. Behind the scenes his support for pro-federalist actors was vigorous, firstly through the creation of his own 'United European Movement', then through patronage of the organising 'United European Committee', which he also helped launch in 1947¹⁶ and, most significantly, as figurehead of the 'European Liaison Committee'. This committee, later renamed the European Movement, was convened by Churchill's son-in-law, Duncan Sandys MP as a vehicle for the consolidation, coordination and development of the activities of the disparate and fractious pro-European activist groups (including Churchill's own, United European Movement). These groups were divided both physically and ideologically and lacked any common plan or methodology. As such, the EM was, at first, little more than a conference of groups sharing a vague pro-European sentiment (which itself ranged from the radical and totally federalist – pushing for the

¹⁴ Simpson (n 5) 562

¹⁵ To the Belgian Parliament in November 1945; in the presence of President Truman at Fulton, Missouri in March 1946; at the University of Zurich in September 1946; to the States General of the Netherlands at the Hague in early May 1946 and in the Albert Hall in London on 14 May 1947.

¹⁶ At the Albert Hall speech (n 15)

immediate creation of a European super state under a far-reaching supra-national constitutional settlement – to far more conservative advocates for co-operation on discrete policy issues with little or no transfer of sovereignty). Between these existed a spectrum of various forms of federalists, most defining themselves either as ‘unionists’ or ‘functionalists’, though these terms were ill-defined and flexibly applied.¹⁷

The diversity of the philosophical convictions possessed by the constituent members heavily militated against the EM’s prospects for success, and a light touch was required from Sandys and Churchill in ushering the disparate organisations in a single direction. Revealing any firm convictions would have been fatal to Sandy’s impartial stewardship and so, somewhat fittingly, instead of attempting to foster an ideological consensus, his efforts began with loose and non-binding attempts to bring the groups round by coordinating their functions and activities. Through the creation of a steering group-cum-governing committee (the ‘Joint International Committee of the European Movement’) Sandys worked to consolidate his position and, despite resistance from a number of member organisations, he was appointed as President of the umbrella organisation. Lacking a singular attitude, message or plan, the organisation was drawn together instead by the profile of its patrons. Alongside other prominent European political personalities (most notably the Belgian Prime Minister, Paul-Henri Spaak and President of the French Provisional Government, Léon Blum) Churchill took an honorary leadership role.

¹⁷ These terms and the flexibility/obfuscation surrounding their use is discussed further in Chapter 3.

In addition to this operational control by Sandys, and reliance on Churchill for his profile, the Movement was also financially dependant on the Conservatives. In principle the organisation was to be financed by contributions from all of its affiliated organisations but, up to 1950, Churchill's United European Movement provided more than 80% of the Movement's funding.¹⁸ The majority of this money was sourced from the Conservatives' industrialist backers and, in addition to the basic contributions due and additional payments given, substantial further amounts were advanced in the form of loans, ensuring that the Conservatives would have enduring influence over the Movement.¹⁹ These funds were transferred through Churchill's UEM and made up the bulk of that organisation's budget. This is significant, as the UEM had begun its life with the aim of communicating the benefits of European unity to the British public. However, after several, large public meetings, public reaction to the vague pro-European message was seen to be limited (public subscription receipts were modest and circulations of printed materials were insubstantial). As such the UEM's domestic activities were rolled back to permit a new focus on international lobbying. Having failed to capture the agenda at home, from 1947 onwards, the Conservatives' employed arguments regarding European unity only occasionally, and in broad terms, as a propaganda tool to attack the Labour party for their failure to engage with Europe. No significant further effort was

¹⁸ François Xavier Rebattet, 'The European movement, 1945-1953: a study in national and international non-governmental organisations working for European unity' (DPhil thesis, University of Oxford 1961) 24

¹⁹ *ibid* 199

invested into mustering support from the British public or into further stimulating domestic political debate.²⁰

Labour was not oblivious to the ground that was being lost and whilst unaware of the true nature or extent of Churchill's plans, substantial concern was emerging at the top of the Labour party. On the inception of the UEM the Labour party's National Executive Committee issued a warning to party MPs cautioning against association with the body. The NEC made clear 'while it is desirable to encourage the maximum co-operation between the nations of Europe, it should be clear that an organisation led by Mr. Churchill is not likely to stimulate such co-operation at the present time.'²¹ Instead the NEC advised MPs: 'to concentrate such of their energy as is not absorbed in direct work for the Party on organisations such as the United Nations Association, whose aims and inspiration are above suspicion.'²²

The tension between scepticism over Churchill's presumed plans for Europe and the need to show willingness towards developing international co-operation was apparent at the Labour party conference in May 1947.²³ In January 1948 Ernest Bevin told the House of Commons that '[i]t is easy to draw up a blue-print for a united Western Europe and to construct neat-looking plans on paper' but that it must be 'a much slower, harder job to carry out a practical programme which takes into account realities which face it.'²⁴ In facing this task,

²⁰ *ibid* 279

²¹ Labour Party, 'Party Attitude to Churchill's "United Europe" Movement in Great Britain' (LabArch, International Department Boxfile, London c. late 1947/early 1948)

²² *ibid*

²³ See the speech by Hugh Dalton, Chairman of the International Sub-Committee of the Labour National Executive Committee to the 1947 Labour Party Conference (LabArch, International Department Boxfile, Margate May 1947)

²⁴ HC Deb 22 January 1948, vol 446, col 394

as well as pushing its MPs towards the UN, the party invested its international energies in organising a conference of Socialist Parties of Western Europe, which encompassed all of the countries involved in the Marshall Plan and sought to put a socialist spin on post-war reconstruction.²⁵

However, as the Conservatives had offered little substantive policy for Labour to respond to or take issue with there was no basis for public criticism. The Conservatives were stealing a march and united, albeit uneasily, the EM began developing not just political momentum but also a rich array of policy proposals. These ideas stretched beyond the formation of the Council of Europe, through an early agenda of harmonisation in fields of political rights and social policy, and reaching out to map out most of the ideas that have occupied the European agenda to the present day (from European parliamentary assemblies, through free trade, free movement and open borders to the EU as a political union, the single currency, and eventual fiscal union).

The springboard for the first of these developments was the Hague Congress. Rather than seeking to exclude Labour from this key gathering, however, significant efforts were made to get Labour MPs to attend. The lack of governmental representation was determined by the NEC who believed that it should continue to ignore the gathering in an attempt to restrict the legitimacy of the obviously Conservative driven European project. A note was circulated to Labour MPs warning:

[t]he Hague Congress is in its function and organisation exactly like one of the international Communist Front organisations, e.g. the World Federation of Democratic Youth, by which sincere idealism is exploited purely in the interests

²⁵ Held on 22 March 1948 (n 21)

of the Communist Party without the Communist Party seeming to play more than a minority part in the organisations itself. In this case however the power in the background is the British Conservative Party.²⁶

Reticence was further exacerbated by the slight of hand engaged in by the EM to raise the profile of the event.

The Congress has been organised in a most dishonest way. For example, a hundred invitations were sent out, each one stating that the other ninety-nine people invited had already accepted – e.g. Blum was told that Cripps and Dalton were going, we were told that Blum was going.²⁷

The purpose of the conference was judged, accurately, as being ‘to provide an audience as representative as possible for one of Churchill's major pronouncements about world affairs’.²⁸ Rather than offering an opportunity to thrash out the details for Europe’s future, the conference’s structure would ensure that ‘Churchill's speech will be the main focus of world attention, whatever decisions are taken in committees and so on’.²⁹ As such the NEC determined ‘that the Hague Congress should be robbed of authority and exposed as a political racket on behalf of a discredited minority party in Britain.’³⁰ However, despite these emphatically expressed concerns, a number of Labour MPs still registered to attend. Those MPs received a further letter from the party warning:

the National Executive Committee strongly disapproves of members taking part in the Hague Congress, whether as individuals or as representatives of organisations. The National Executive Committee is unconditionally opposed to any action which might appear to associate the prestige of

²⁶ Labour Party, ‘Note on United Europe Congress’ (LabArch, International Department Boxfile, The Hague May 1948)

²⁷ *ibid*

²⁸ *ibid*

²⁹ *ibid*

³⁰ *ibid*

the governing majority party in Great Britain, however indirectly, with an organisation calculated to serve the interests of the British Conservative Party.³¹

Of the two parties, we can see that at least in microcosm, Labour showed the more pervasive anxiety about the actions of the other. In the NEC's final reminder to errant MPs that '[w]e are not a coalition Party',³² we can see Labour had been put firmly on the back foot by Churchill's tactics. The NEC's fears proved well founded – the Congress's sessions were heavily orchestrated and opportunities for input largely superficial.³³ Those Labour members that did attend, in an individual capacity, notably sided with the Conservatives in Committee debates, supporting proposals for a human rights instrument of clear but limited scope.³⁴ This brings us to the two crucial points of divergence between Duranti's account and my own. The first is to resist the suggestion that this narrowly proposed instrument, supported by all of the British actors present – against pressure from continental socialist governments interested in a more comprehensive instrument – represented a concerted Conservative attack against Labour (by which I mean one that was shared by the majority of the Conservative elite). The second is to suggest that the pressure to exclude socio-economic rights had little to do with Conservative attitudes towards the Labour party and rather more to do with a more general difference in attitude between British and continental actors in connection with rights.

³¹ Letter from Secretary of the Labour Party (M. Phillips) sent to 41 Labour MPs who had published their intention to attend Hague conference (LabArch, International Department Boxfile, London 21 April 1948)

³² *ibid*

³³ Rebattet (n 18) 323

³⁴ Duranti notes examples of this at (n 5) 371

ii. Style Over Substance

The Conservative game of presenting itself as a partner in unification, when their aspirations stretched only to mediating the unification of others, was a dangerous one. While playing figurehead and driving forward an agenda of European unity, Churchill and his compatriots also had to carefully direct and constrain the proposals of all but the least radical of their EM partners. Whilst sticking to equivocal statements had been relatively easy prior to the Hague Congress, with the negotiation of firm reports and policy proposals the Conservatives trod an increasingly fine line.

To deal with this the 776 Congress attendees were split into separate groups relating to political; economic and social; and cultural matters, minimising plenary sessions and thus reducing opportunities for conflict to surface. The conference was kept to three days, allowing the agenda to be tightly managed, and removing opportunities for general or theoretical digression from the agreed order of proceedings. Most importantly, the material for consideration consisted of carefully pre-prepared reports, drafted using an ambiguous synthesis of more federalist and more unionist components without expressing any particular preference towards one or the other.

If the Conservatives had truly intended for measures to be taken to forcibly constrain Labour we would expect to find something more concrete or committed but the Conservatives were dealing more in impressions than substance. The key report of relevance to this enquiry is the political report, which was produced by Duncan Sandys and which laid out a proposal for a new European polity with human rights at its centre. The report stipulated the creation of an 'Emergency Council of Europe' (formed of governmental

representatives), with membership dependent on acceptance of 'a Declaration of Human Rights', which would be adjudicated over by a 'European Court', and whose judgements would be enforced by a 'European armed force'.³⁵ The substance of this proposal, a major new supranational system of rights enforcement, may not sound very restrained, but Sandys was quick to assert that he intended no federalist innovation and no surrender of sovereignty.

Overall, the model reflects an outward-looking approach to rights infringements of a kind that would never trammel British shores. Further trimming back the implications of this proposal, and demonstrating a lack of broader Conservative interest in European supranationalisation, Tory delegates to the Congress vigorously resisted proposals for a general, autonomous, European legislative assembly. This was rejected in favour of a non-legislative and effectively powerless 'European Deliberative Assembly', 'through which views could be exchanged and a common European opinion expressed on the problems of the day'.³⁶ In only one area did the Conservatives propose 'a parallel policy of closer political union' and this was in connection with the Marshall Plan.

Churchill chose to dance around these issues, acknowledging that European solidarity 'involves some sacrifice or merger of national sovereignty', but then qualifying this as actually being 'the gradual assumption by all the nations concerned of [a] larger sovereignty'.³⁷ An opaque speech by Harold MacMillan on the same point could readily have been interpreted either as a

³⁵ Congress of Europe, 'Verbatim Report I Plenary Sessions, Postbox 279' (The Hague, May 1949) 9 cited by Rebattet (n 18) 330

³⁶ *ibid*

³⁷ *ibid*

proposal for swift reforms, (to make the most of the unique political moment created by the War), or espousing caution (in light of the likelihood that this moment was only a temporary aberration and that such public support as they enjoyed, would soon evaporate).

It is the terrible conditions of Europe as a result of the second war which have brought many of us to the conclusion that new and novel means must now be taken which we would not have supported under any other conditions. ... let us remember that, as it were, we are enjoying this progress because of the deterioration of Europe and, if economic conditions should improve, political tension will relax and we may have a more difficult task in persuading our fellow countrymen to take these novel steps.³⁸

While the Conservative's pronouncements answered few questions, their actions spoke louder. Against the more radical federalist proposals, the Conservatives aligned with the most moderate parties present, including those from the Scandinavian states, and the Labour MPs present.³⁹ The fragmentary nature of the other EM groups ensured that none of their plans commanded enough support to alter the terms of the pre-drafted reports. However, Churchill did not go nearly so far, courting continental opinion without boxing the Conservatives in by endorsing concrete proposals. He argued it 'would not be wise in this critical time to be drawn into laboured attempts to draw rigid structures of constitutions'. As such, while driving the general agenda, the Conservatives joined Labour MPs in a coalition of actors who frustrated the true federalists' progressive propositions. Had there been a single Labour minister present, the Government might have appreciated that the Conservatives had

³⁸ *ibid* 336

³⁹ Rebattet (n 18) 339

little appetite for federation but the party's unofficial, ineffectual, boycott ensured that only peripheral Labour actors were exposed to the events.

In keeping with the pursuit of perceptions before substance, the final report of the Congress was expressed in the form of an 'open letter', (a Press Release by modern standards), outlining collective aims for post-war Europe. This 'Message to Europeans'⁴⁰ called for, amongst other developments, the creation of a European Assembly, the passing of a Charter of Human Rights, and the establishment of a 'court of justice with adequate sanctions for the implementation of this Charter'. The letter resolved, in vague but purposeful terms, 'that a Commission should be set up to undertake immediately the double task of drafting [a Charter of Human Rights] and of laying down standards to which a State must conform if it is to deserve the name of a democracy.' This proposal contained the seed of a supra-national human rights system in Europe but also bore the unresolved tension between federal and unionist approaches. While the letter vaguely alluded to sovereignty transfer it offered no substantive suggestions as to the form or occasion of such transfer.⁴¹ The Congress can be seen as an unqualified success for the Conservatives, Churchill had upstaged Labour in spectacular fashion, capturing the agenda by talking a good game but committing himself to almost nothing more substantive than a European talking shop in the form of the European Assembly.

⁴⁰ 'Message to Europeans' (The Hague 10 May 1948) in Congress of Europe, *The Hague-May, 1948: Resolutions* (International Committee of the Movements for European Unity 1948) 15-16

⁴¹ Congress of Europe, *The Hague-May, 1948: Resolutions*. (London-Paris: International Committee of the Movements for European Unity 1948)

Unsurprisingly, for those on the continent who had expected rather more from their patron, this outcome was viewed as a significant disappointment.⁴² The Congress had been under the media spotlight and Churchill's evasive approach was not lost on careful observers. In the UK the *Manchester Guardian* saw through the smoke, noting that vagueness around the terminology of 'federation' and 'union' was deliberate and that while The newspaper further picked up that while 'one-third of the delegates are federalists and they usually – but not always – use the word “federation” in its exact sense' the other 'non-federalists' used it to mean nothing more than 'a league of States with some common institution'.⁴³ Noting the lack of substance to the proposals it concluded: 'one discovers in conversation with delegates that some of them have not thought out the implications properly' and that had the federalists 'tried seriously to argue the case for federal as against non-federal solution [the result] would have been to split the congress hopelessly.'⁴⁴

I have not so far dealt with Maxwell-Fyfe, who after the Congress, went on to take the leading role in editing down the drafts of the Universal Declaration to provide the first draft of the European Convention. Duranti identifies interesting material on Sir David's background of public speaking and publication on the perceived misuse, by Labour, of wartime emergency powers and demonstrate that he did appear to have considered the Attlee Government to be a serious threat to British political stability.⁴⁵ This omission is in part

⁴² Robert Cusin, 'Déception à La Haye' *L'Aurore* (Paris, 8 May 1948) 4

⁴³ Guardian Correspondent 'Congress of Europe goes warily: Against Elected Parliament, Vote for Assembly chosen by Governments' *The Manchester Guardian* (Manchester, 10 May 1948) 5

⁴⁴ *ibid*

⁴⁵ Duranti (n 5) 293

because Maxwell-Fyfe was not on the political committee but instead attended sessions on social co-operation at the Congress and partly because, when compared with the rest of the Conservative elite, these contributions mark him out as an outlier. Far from the constrained and carefully ambiguous speeches of the other leading Conservatives, Maxwell-Fyfe made several contributions to the Congress that bordered on the inflammatory. Steering away from the apolitical consensus-building of Churchill and the rest Maxwell-Fyfe lambasted the 'squalid pseudo-paradise of Socialism'.⁴⁶ Drawing upon his Nuremburg experience he warned the social-committee at the Congress of the gradual onset of totalitarianism. As Duranti notes, a few days after the conference, at a talk in London, Fyfe developed this theme in an attack on the Labour Government in which he stated '[a]ll over Europe, Socialism is proving no defence against Communism's attack on the triple European heritage of Christianity, mental freedom and even-handed justice.'⁴⁷ The tenor of these comments goes beyond anything seen from the other Conservatives and connotes either a different motivation, or at least a markedly different degree of motivation, from that possessed by Churchill. Despite his outlying status, it fell to Maxwell-Fyfe to furnish the EM with a Europeanised draft convention. Here I come closest to agreement with Duranti's first argument: in his privileged influence over the first draft I do not doubt that Maxwell-Fyfe will have had in mind the task of creating a concrete system of rights that were enforceable in a meaningful manner and not just declaratory. I do not, however, believe that the available evidence points to this as the primary concern of the other Conservative actors,

⁴⁶ *ibid* 369

⁴⁷ *ibid* 369-370

and, for Churchill in particular, I believe that the major motivator was a more general entrepreneurial motivation to gain first mover's advantage in the new European space.

That Maxwell-Fyfe was acting out of personal conviction rather than along the party line dictated by Churchill is most clearly demonstrated by events after the completion of the Convention. In the days after the Convention's ratification Duncan-Sandys chided the Labour party in Parliament for their resistance to Europe, mocking their loss of solidarity with the continental socialist parties and expressing his hope that 'His Majesty's Government will be in a position to make a statement, if possible tonight or at any rate before this matter is debated in a week's time at Strasbourg, that they intend to accord their recognition to this Court.'⁴⁸ It came as a surprise to some at home and many abroad when the victorious Churchill administration in 1951 was no warmer towards the Convention than Labour had been before them. Despite their key role in pioneering the new European political space and Cabinet positions for central members of its Assembly delegation,⁴⁹ the attitude towards Europe was markedly frosty. No surrender of sovereignty was on the cards⁵⁰ even to the court they had themselves proposed.

On the matter of the optional articles, those in Strasbourg might have been forgiven for thinking that no change of government had actually occurred. The position of Her Majesty's Government was uncompromisingly stated in a

⁴⁸ HC Deb 13 November 1950, vol 480, col 1412

⁴⁹ Duncan-Sandys was Minister of Supply and Maxwell-Fyfe Home Secretary.

⁵⁰ A Zurcher, *The Struggle to Unite Europe 1940-1958: an historical account of the development of the contemporary European movement from its origin in the Pan-European Union to the drafting of the treaties for Euratom and the European Common Market* (New York University Press 1958) 62

brief for the UK representative at Strasbourg: 'The attitude of Her Majesty's Government has consistently been that in no circumstances will the United Kingdom make these optional declarations.'⁵¹ In relation to human rights the Conservatives stepped wholly into the shoes of the Labour Government and at home and abroad the same justifications for British reticence were proffered. The only marked exception to this, demonstrating his outlying status, was Maxwell-Fyfe. Serving as Home Secretary (1951-1954) and Lord Chancellor (1954-1962), Maxwell-Fyfe continued to advocate greater promotion and protection of human rights, including proposals such as the creation of a national 'society for the promotion of human rights'.⁵² These deviations from party policy drew the ire of party colleagues and, in the case of the rights society resulted in his being directly chastised by the Foreign Secretary on the basis that '[s]uch as society might become an embarrassing pressure group, particularly in connection with the right of individual petition.'⁵³ While the Lord Chancellor was said to have 'acquiesced in the official view, on grounds of expediency'⁵⁴ it is clear that Maxwell-Fyfe had a far stronger ideological commitment to rights than Churchill and the party leadership, who abandoned the Convention on their return to power. Overall then, while a principled Conservative ideological influence flowed into the contents of the Convention, it did so only in so far as Maxwell-Fyfe had influence over the first drafts of the Convention and while the broader existence of the Convention is related to

⁵¹ Brief for 9th Ministers' Deputies Meeting (NatArch WU1072/15 in FO 371/107935, 16 March 1953)

⁵² Meeting of Foreign Secretary with Lord Chancellor regarding his proposed starting of a Human Rights Society (NatArch S17311/13, FO 371/117564)

⁵³ *ibid*

⁵⁴ Foreign Office Minute (NatArch WU1738/14, May 1 1956)

conflict between Labour and Conservative parties, there is good cause to believe that it was a different, positional and reputation-oriented, conflict that drove the broader Conservative strategy in connection with the Council and the Convention.

iii. Socio-Economic Exclusion

This brings us neatly to the second component of Duranti's thesis. A strong reading – that the Conservative elite contrived to purge the Convention of socio-economic rights so as to prevent Labour from coming to use it against them – does not appear to me to be well supported by the facts. A weaker reading, following from the above argument – that Maxwell-Fyfe sought, of his personal initiative, to purge the Convention of these articles – is more plausible but still rests on rather shaky ground.

At the start of his article Duranti rejects the Council of Europe's own account of why the Convention consisted largely of civil and political rights, namely, that socio-economic rights were not considered justiciable⁵⁵ by the drafters. Arguing that the decision was 'political rather than technical', he instead proposes a thesis rooted in Conservative anxiety and claims that such rights were ruled out by Conservative action and against Labour efforts to include them.⁵⁶ This argument builds on Duranti's assertion that Labour resistance to the Conservative-backed Convention expressed 'their distaste at its association with the predominantly classical liberal worldview that had been

⁵⁵ *ibid* 362

⁵⁶ *ibid* 375

at the heart of the EM's campaign for a European human rights court.⁵⁷ Both of these statements are problematic.

I deal with the detailed structure of Labour resistance in the next section but, in short, the Labour Government had a range of substantive concerns that were not limited to arguments born of its status as a reforming socialist government building a planned economy. The Conservative motivation to pare down the Convention may have been oriented towards an aversion to socio-economic rights, but this aversion was shared not just with some other states, such as Greece, but with the Labour Government itself. Additionally the issue of justiciability should not be so lightly disregarded.⁵⁸ Instead I am inclined to defer to the simpler explanation that the key goal for the Conservatives was finding a core of consensus so as to ensure the Convention's creation did not collapse in acrimonious disarray.

In the post-Congress period both the Conservative and Labour parties were forced to reassess their tactics. The momentum built by the Congress carried the EM through subsequent conferences in Brussels and London. The former saw the Movement flesh out the proposals for a human rights system, with Conservative control loosening in the more diverse environment of these subsequent gatherings. This resulted in calls for a Convention containing 'those individual, family and social rights of an economic, political, religious or other nature in the United Nations Declaration of Human Rights which it is necessary and practical to protect by judicial process', a Commission to investigate petition from states and persons (natural or corporate), and a Court with

⁵⁷ *ibid*

⁵⁸ My next chapter, on the European Social Charter, will demonstrate Conservative doubts over justiciability were both significant and shared with Labour.

‘jurisdiction to determine all cases concerning the precedent rights arising out of legislative, executive or judicial acts’.⁵⁹ The conference also saw moves towards proposing contents for the Convention and, alongside a selection of twelve political rights,⁶⁰ co-operation between the ILO and the EM economic committee was proposed to identify social and economic rights. Control over the rights project was beginning to escape Conservative control and further input was demanded to curb it.

Against this pressure to incorporate socio-economic rights, Maxwell-Fyfe succeeded in ensuring that only a carefully edited selection of the draft Universal Declaration’s protections would be employed in the EM proposed draft. However, it was not against Labour resistance but against continental socialist resistance that this exercise took place, Maxwell-Fyfe’s own, privately expressed argument against attempting to enforce the entirety of the UN’s instrument was that the UDHR was ‘not really drafted as a document capable of judicial interpretation and enforcement.’⁶¹ Duranti notes this in his article, as well as the contents of a memorandum appended to the final EM draft stating that the rights content of the draft had been constrained so as ‘to avoid all controversy’ and to keep to ‘the rights that are accepted as truly fundamental.’⁶² Rather than adopting a conflicting interpretation, as Duranti does, I suggest that these statements should be taken largely at face value. Socio-economic rights

⁵⁹ European Movement, ‘Conclusions and Recommendations adopted at the Inaugural Meeting of the International Council’ (LabArch, International Boxfile, Brussels 25-28 February 1949)

⁶⁰ Annexed to article 2. para. A. of the Congress report, under heading *European Court of Human Rights*, *ibid*

⁶¹ David Maxwell Fyfe to Jean Drapier, January 3rd 1949, European Movement papers, Box 691, cited at Duranti p.370

⁶² Duranti (n 5) 370

were not acceptable to all of the states and in the UK's instance were acceptable to neither Conservative nor Labour.

From the other side, Duranti claims that the Labour Government believed economic and social rights to be fundamental and that their resistance to the Convention was driven by the 'classic liberal' tenor of the instrument.⁶³ It is, however, clear from the overall pattern of Labour action that they too were resistant to economic and social rights and that, with the exception of the right to property, were arguably less opposed to many classic liberal rights than to most socio-economic ones. In fact, excepting elections, private life and property, Labour's own proposal contained broadly equivalent protections to those contained in the Maxwell-Fyfe EM draft. When contrasted with the Consultative Assembly's final draft, the only additional protections it missed were core socio-economic rights (covering union membership and marriage). A visual comparison reveals this point more clearly. The following figure illustrates the substantive content of the final Convention (ECHR), the Labour Government draft submitted to the Committee of Ministers (UK-CE), the Parliamentary Assembly draft (PA), Maxwell-Fyfe's original European Movement draft (EM) and the UK draft submitted to the UN (UK-UN).

⁶³ Duranti (n 5) 376

Substantive Right	ECHR	UKCE	PA	EM	UKUN
Life	2	3	2(1)(a)	1(a)	8
Torture	3	4	2(1)(b)	N/A	N/A
Slavery/Servitude	4	5	2(2)	1(c)	9
Liberty/Security	5	6(1)	2(1)(a)	1(b)	10(1)(5)
Arrest Rights	5(b)(f)	6(2-4)	2(3)	N/A	10(2)(3)
Fair Trial	6	7	2(3)(b-c)	N/A	N/A
Retrospective	7	8	2(3)(d)	N/A	12
Private/Family	8	N/A	2(4)	1(g)(h)	N/A
Conscience	9	9	2(5)	1(e)	13
Expression	10	10	2(6)	1(d)	14
Assembly/Association	11	11	2(7)(8)	1(f)	15/16
Trade Union	11	N/A	2(9)	N/A	16
Marriage	12	N/A	2(10)	1(h)	N/A
Discrimination	14	14	5	1(j)	Part II
Property	P1A1	N/A	N/A	1(k)	N/A
Elections / Opposition	P1A2	N/A	3	2	N/A
Expatriation	N/A	N/A	N/A	N/A	11

Fig. 1 – Content comparison between ECHR and prior draft texts by article

Looking at the table it is clear that the Labour Government's proposals were in fact leaner on socio-economic rights than Maxwell-Fyfe's first draft, excluding rights to private and family life and marriage. Compared to the Parliamentary Assembly final draft the UK text is even skimpier, omitting trade union membership, which had been present in the earlier UN draft, though it is possible this was intended to be included under the right to assembly and association, which came with a note on interpretation suggesting that 'association' should be interpreted in 'the widest possible terms'.⁶⁴ With the exception of one individual delegate's criticism of privileging the right to property over the right to work, the central party attitude towards social rights in Europe appears to have been uniformly unfavourable. This conclusion is

⁶⁴ UN Economic and Social Council, Commission on Human Rights Drafting Committee 'International Bill of Rights : Proposals / Submitted by the United Kingdom Representative on the Drafting Committee' E/CN.4/AC.1/4/add.1 18 June 1947 art 16

further reinforced by Labour's obstructive approach to the subsequent drafting of the Convention's social rights partner, the European Social Charter, (detailed in chapter 3).

Overall Duranti has developed our understanding of the Convention's origins by asking several important questions. He is entirely correct in placing core responsibility for the existence of the Convention at the feet of the British Conservative elite. His answers also start to fill in an important new part of the picture but they also read too much of Maxwell-Fyfe's thinking into that of his colleagues in general. His central thesis, that elite Conservatives were so concerned by Labour totalitarianism that they 'were temporarily willing to cast aside a long-standing ambivalence toward declarations of rights, concerns over national sovereignty, and the constitutional principle of parliamentary sovereignty'⁶⁵ is thus not entirely made out. The Conservative involvement in the Convention is both fundamental and surprising but beyond Maxwell-Fyfe, the evidence points to relatively limited enthusiasm for a thoroughgoing instrument, and a system, strong enough to legally fetter Labour and a far greater concern with political gamesmanship.

In making these points my intention is not to dismiss the importance of the Conservatives' status as a party of opposition – it would appear that the Convention was driven by inter-party conflict and would have been unlikely to have occurred had the Conservatives been in power. It is however to question how far the interest in Europe and a Convention was a political manoeuvre and how far it was a genuine attempt at constitutional constraint of a radically

⁶⁵ Duranti (n 5) 362

reforming government. While the probable answer is that both motives played a part, principled explanations cannot capture the full scope of the conflict between the parties or their feelings towards the Convention. The 'technical' obstacle that some rights were resisted because they were not suitably justiciable, rejected by Duranti in favour of 'theoretical' objections, should, for example, not be discounted as a relevant component of Labour's resistance. In fact the basis for Labour restraint was pragmatic as well as principled and through the next section I offer a fuller analysis of Labour's specific concerns and a clear set of points for comparison in following chapters.

3. Analysing Labour's Resistance

The complex nature of Labour resistance to the Convention can be seen through a number of different points of tension between the Labour and the, (EM based but significantly elaborated), Parliamentary Assembly models for the Convention. These points relate to discrete, though related, areas of concern that held Labour back. The lack of clear definition around the conception of rights, particularly during the early post-war years, meant that much of the contemporaneous argument, and as a result subsequent commentary, has employed rather broad terminology. Complaints that human rights were 'incompatible with domestic approaches to civil liberties or that they were 'liable to abuse' have often been repeated by politicians resistant to the Convention but these vague assertions are conceptually unclear and require some unpacking. The following analytical exercise is an important precursor to detailed study in that it provides a more rigorous framework through which to identify areas of both ideological stasis and movement. Analysing the various

viewpoints expressed during contemporary debate I identify four key forms of objection to the Convention as a novel human rights instrument. These relate to its *supranational*, *judicialising*, and *codificatory* qualities, and in *substance* to its exact terms.⁶⁶

Before moving on I elaborate these terms a little further. *Supranational* complaints relate to concerns over the desirability of transfers of sovereignty to supranational domains and the attendant surrender of sovereignty that such transfers imply. *Judicialising* complaints relate to concerns over providing courts with powers of judicial review, shifting the balance of power from the executive and legislature to the Courts. *Codificatory* concerns regard the suitability of replacing unwritten constitutional conventions or areas of policy discretion with binding rules. *Drafting* concerns involve disagreement over the specific style in which a right is expressed without any broader, underlying principled concern or objection to the right's substance being expressed in some other form.

By examining the extent to which each of these four kinds of objection featured in the Labour arguments against the Convention I offer a profile of Government resistance to the Convention in 1950 that can be compared longitudinally with future governments during subsequent periods of rights development or consideration.

i. Supranationalisation

Of the four main focuses of concern for Labour, the most fundamental related to determining the approach to transnationality that would underlie the

⁶⁶ A fifth possible objection, cost of enforcement, was considered but was not included as it was invoked only rarely and by peripheral, non-elite, actors.

Convention's rights regime. Conservative stewardship of the EM had succeeded in creating the Council but had done so at the cost of skirting around differences in opinion as to the best approach for international co-operation. These enduring tensions were inevitably driven closer to the surface by the negotiation of the Convention – an instrument whose defining feature is its privileging of collective transnational interests over the sovereignty of national political institutions. Borrowing from the literature on international relations, on this sub-section I examine the division between intergovernmentalism and federalism in the Labour administration's intergovernmental draft for the Convention and the loosely federalist Maxwell-Fyfe draft.

This division is particularly interesting for its relationship to the contemporaneous geopolitical milieu. The emphasis on federalist ideas in the creation of the Council was a significant innovation and represented a marked departure from the recent precedent in the formation of the United Nations. The UN had been created in a similar form to the defunct League of Nations, providing a grand forum for diplomatic interaction but with extremely circumscribed abilities to impose upon member states. This firmly intergovernmentalist take on international co-operation is reflected in the declaratory form of the UDHR, which rapidly overcame proposals for a more robust federally enforceable instrument.⁶⁷ Outside the UK, in addition to the domestic European federalists (who saw Europe's economic recovery to depend upon economic federalisation), there were also pressures for a more integrated European community from the US (who looked for a politically united Europe to

⁶⁷ M Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2002) Ch 3

hold the communist East at bay).⁶⁸ In the UK there had been broad interest in political convergence both before the war, as a matter of general concern, and during it, as a strand of a broader public debate regarding the nature of the post-war settlement. This was reflected in the actions of non-political elites with prominent literary and civil society figures generating a substantial body of literature on federation.⁶⁹ Amongst the political elite however the abandoning of domestic sovereignty in the creation of federalist, supranational authority inevitably held less attraction. Labour had mooted only modest measures of mutual co-operation and Bevin and colleagues were only content to accept intergovernmentalist progress through harmonised domestic action.⁷⁰ When it came to the question of rights they sought a Convention that would do no more than this, and ideally less. It was for this reason that Labour delegates complained that the first complete Assembly draft⁷¹ 'could not be regarded as forming the basis of a satisfactory Convention'.⁷² It was this trigger that drove the Labour Government to submit its own 'Draft International Bill of Rights' to rival the Assembly recommendation in the Committee of Ministers and it was the tensions between these two distinct proposals that dictated the dynamic of conflict that surrounded the later stages of the Convention's drafting.

⁶⁸ M Dedman, *The origins and development of the European Union, 1945-95: a history of European integration* (Routledge 1996) 16

⁶⁹ For instance J Pinder, 'European Community and Nation State: a Case for a Neo-Federalism?' (1985-6) *International Affairs* 62(1) 41 as well as others cited in W Lipgens (ed.), *Documents on the History of European Integration: Plans for European Union* (Walter de Gruyter 1998) 12

⁷⁰ For instance through interstate agreements on measures such as the formation of a customs union, rationalization of economic policy and enhancement of social co-operation.

⁷¹ As forwarded to the Committee of Ministers in the form of Assembly Recommendation No. 38

⁷² TP vol 3, 190

Looking at this Bill we can gain a relatively clear insight into Labour's view of the desirable extent of an international rights instrument. It also shows us that this view had remained relatively static throughout the course of the Convention's drafting as the draft Bill, sent to Strasbourg in early November 1949, largely followed the structure and contents of the International Bill of Rights submitted to the UN's UDHR drafting committee two and a half years earlier.⁷³ That the prototype Bill of Rights was left only moderately altered from the proposal put before the UN, an organisation explicitly distanced from federalism, is indicative of the Government's continued preference for an intergovernmental form for supranational human rights.

As detailed above, the draft was similar in terms to the Parliamentary Assembly draft and the main difference between this instrument and the others is, instead, in relation to the institutional framework surrounding these substantive terms. The UK draft did contain a form of enforcement mechanism but the rudimentary proposal struck a very different tone from the EM's ideal. In keeping with an intergovernmental approach to international relations the UK Bill envisioned no new institutions but instead merely stated that breach of the Convention would leave the member state liable to be ejected from the Council.⁷⁴ The EM and Assembly drafts may have been slimmed down from the Universal Declaration but in their acquisition of an enforcement apparatus they clearly marked themselves out both from the merely morally binding UDHR and the blunt enforcement, based just on international political pressure, preferred

⁷³ (n 64)

⁷⁴ Mirroring Art 7 of the draft submitted to the UN. (n 64)

by Labour.⁷⁵ While it begins to overlap with the objection to judicialisation, discussed next, the system of appeal to the Commission and Court, imagined by the EM and endorsed by the Assembly (albeit with Labour resistance), made the draft Convention so objectionable to the Labour Government that when resistance through the Committee of Ministers, Committee on Legal Experts and Conference of Senior Officials failed to secure their removal, the UK nearly boycotted the Convention entirely.⁷⁶ That this was in part down to supranational rather than straight judicialising concerns is strongly suggested by the far greater anger expressed towards the right of individual petition than to the Court alone.⁷⁷

Some authors have presented the Government as short sighted in not appreciating the revolutionary federalist character of the Convention.⁷⁸ This is an ungenerous interpretation given the extent of Government engagement with the problematic Assembly model and the concerted efforts to supplant it. The worst that can be fairly levelled is that the Government was too slow to react. Whereas the Foreign Office had submitted its draft to the *first* meeting of the UN's Human Rights drafting committee, it provided ample time for the EM to consolidate the standing of its text through the Assembly.⁷⁹ Whether this was

⁷⁵ And from the reporting based systems of the Organisation of American States's Declaration of the Rights and Duties of Man 1948 and many subsequent UN instruments such as the 1968 International Covenants (the ICCPR and ICESCR)

⁷⁶ Foreign Office Minute of August 4th 1950 (NatArch US17311/76 in FO 371/88764). This ultimatum is examined in depth at the beginning of ch 4.

⁷⁷ See ch 4 s 2.i

⁷⁸ For instance Elizabeth Wicks, 'The United Kingdom Government's perceptions of the European Convention on Human Rights at the time of entry' [2000] PL 454

⁷⁹ Further developing the European Movement's control, the first stage of detailed study and modification in the Assembly's Committee on Legal and Administrative Questions was led by EM jurist Professor Tietgen as rapporteur with Maxwell-Fyfe as chairman.

out of a continued anxiety over lending credence to the Conservative dominated Council's work or simply out of a failure to decide on a course of action and react, the UK Government certainly allowed the EM to steal a march. Given the significant material similarities this might not have been such an issue but for the difference in the style of drafting between the two (discussed in subsections iii and iv below). However, dealing with these issues I deal first with the other facet of the procedural objections to the Convention, transfer of sovereignty to a judicial body.

ii. Judicialisation

Alongside the loss of sovereignty to Europe, the loss of parliamentary supremacy and executive discretion entailed by making the Convention enforceable by judicial processes was at the heart of Labour's concerns. The issue of enforcement generated significant conflict both in the Assembly and through subsequent committees and, despite EM delegates' assurances that the proposed Court would not cannibalise domestic court's jurisdiction, Labour anxiety was stoked by the ambiguity around Conservative motives and the flawed belief that they had become marginalised in their resistance to a federal enforcement apparatus.⁸⁰ Despite the unattractiveness of a human rights instrument without any form of enforcement, Labour pushed hard for such a

⁸⁰ After the Convention's passage the Labour Under-Secretary of State in the Foreign Office would remark in the Commons 'from the outset certain sections of the delegations which went to Strasbourg were inclined to use the Assembly as a platform on which to attack their own home Governments', and aver that 'many of the members who went to Strasbourg from all countries there represented seem to have been drawn together not so much by ideological ties or by common ideals but because they were friends in political adversity.' HC Deb 13 November 1950, vol 480, col 1392-3

model and, as a result, fundamentally altered the Convention (albeit only in the short to medium term).

Labour was not misguided, the feared sovereignty-challenging, interventionist, court that caused such concern during the Convention's drafting is essentially the Strasbourg Court as we recognise it today. Socially, as its most publically visible element, legally, as the ultimate interpreter of the Convention rights, and politically, as the machine through which the development and diversification of the scope of the Convention has been achieved, the Court sits at the heart of the Convention system. That it would acquire this status was far from clear in 1949.

The proposal for a Court came from the EM but, in keeping with many of the organisation's propositions, explanations of the purpose of the Court lacked clarity. After the Convention's passage, Professor Tietgen claimed that the Convention's purpose was '[n]ot to institute a European guarantee which would rectify in our various countries the errors committed here and there by particular administrations' and, therefore, that its target was not 'isolated illegal actions'.⁸¹ Minor and one-off administrative legal issues were to remain the concern of existing, domestic, tribunals 'which themselves correct the illegality committed in the immense majority of cases' and it was only such systematic abuses as might lead to 're-establishment or the establishment in some countries of totalitarian dictatorships' that would warrant the attention of the Convention authorities.⁸²

⁸¹ TP vol 5, 292–294

⁸² *ibid*

The Labour Government was, as time has proven, justifiably sceptical of such suggestions and even before the first meeting of the Council, the Labour Government was clear that any 'International Court of Appeal' for human rights was unacceptable. The Foreign Office was so concerned that they suggested to the Prime Minister that the absence of a Court needed to be expressed as a point of principle by the Brussels Treaty powers and that the UK should seek 'to ensure the inclusion of some provision in the final constitution of the Council of Europe which would make it explicit that no Court of this kind was to be set up in connexion with the Council of Europe.'⁸³ However, the Hague Congress's 'Message to Europeans' with its call for 'a Court of Justice with adequate sanctions' 'guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition'⁸⁴ was a hard proposal to reject, particularly when paired with Churchill's sweeping rhetoric of subjecting rights violations to the 'judgement of the civilised world.'⁸⁵

The importance of a Court to the EM was not however tied to protecting against a limited set of extreme and systematic violations. The EM desired a Court of European opinion as a federalist tool to develop ideological consensus, negotiating and enforcing a growing body of European norms. At an earlier stage in the drafting Tietgen had explained the dynamic in these terms:

the Court deals with cases; it progressively establishes a jurisprudence [and c]onfidence is inspired according to the value of this jurisprudence. In order to develop this

⁸³ Briefing Paper drafted for Attlee and Bevin in June 1948 in preparation for a meeting with Churchill regarding human rights and the, then planned, Geneva Congress (NatArch FO 371/73096) cited by FO 371/73096 cited in Geoffrey Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950' (1993) 42(4) ICLQ 796, 801

⁸⁴ TP vol 1, 276

⁸⁵ TP vol 1, 134

jurisprudence the Court must, day after day, examine the law which it administers following the practice and custom of the countries which it represents. And then, a long time afterwards, codification may be achieved. This will define and crystallise the results acquired by judicial experience.⁸⁶

This process, and its purpose, was not embraced in the Council and, even amongst those in the assembly who endorsed the federalist draft, many joined Labour in rejecting the necessity of the Court – believing the existence of an investigative Commission alone to be an adequate disincentive to breach and an appropriate channel for recourse. The Labour Government’s strong preference was that the Convention system should, despite rigorous legal form, be purely politically and diplomatically interpreted and enforced. Moving adjudication into the opaque sphere of international diplomacy was doubly problematic for the federalists’ plans. In addition to undermining a Court-centred process of active, ongoing, codification, the EM also required a means of broadcasting their developing human rights norms to the European public. The second critical quality of a judicial process (rather than an investigatory commission report being followed by a politically motivated Ministerial ruling) was the high profile and ‘moral prestige of the Court behind it’.⁸⁷ Tietgen specifically recognised that ‘the rule of law and the sentences of justice are much more respected and obeyed if they possess in advance the confidence of public opinion.’⁸⁸ In other words the public adoption of human rights was as dependent on the Court’s profile as it was on demonstrating the relevance of European rights through their application to developing politico-legal issues.

⁸⁶ TP vol 1, 276

⁸⁷ TP vol 2, 124

⁸⁸ TP vol 2, 176

An additional irritant to Labour was the fact that, as with the UN's Universal Declaration, the substance of the Convention was being negotiated at the same time as debate over the system's machinery of enforcement. The Foreign Office expressed anxiety that agreeing to any details on enforcement without knowing the final substantive terms to be enforced was 'tantamount to signing a blank cheque'.⁸⁹ Having an open-ended and ongoing codification exacerbated this problem. As such the UK representative in the Conference of Senior Officials voted not just against the creation of a Court with obligatory jurisdiction but also against the creation of a Court with jurisdiction dependent on the acceptance of an optional clause. (It is worth noting, as an aside, that Labour was not alone in these concerns. While in a minority of 3 to 9 in a vote on an optional Court⁹⁰, an obligatory Court was rejected by 7 votes to 4 with 1 abstention.)⁹¹

Partnering the proposal for the Court, the EM's other crucial innovation, individual petition was designed to provide an on-going supply of raw material for the Court to work on. The refinement of principles and the embedding of human rights norms into the social, political and legal fabric of the member states could not occur without ongoing judicial dialogue and such dialogue was unlikely to be adequately stoked by occasional interstate petitions. However this desire to stimulate a constant stream of complaints for the Court was largely antithetical to the stated aim of the Convention as a system to deal only with systematic breaches indicative of a slide towards despotism and a number

⁸⁹ Marston (n 83) p.806

⁹⁰ Only Norway and the Netherlands joining the UK in resisting.

⁹¹ Belgium, France, Ireland and Italy for, Denmark, Greece, Norway, Netherlands, UK, Sweden and Turkey against, Luxembourg abstaining.

of governments, including the UK's, protested that individual petition radically redefined the scope of public international law, hugely enhancing the status of private individuals.⁹² A French Assembly member successfully had the draft article removed during the early stages of the drafting on the basis that only member states should be able to make such grave allegations against a member state government'⁹³ and it was on a similar basis that Labour complained after the article was reinserted at Committee. Emphasising the potential for abuse of individual petition, in particular by communist elements within the member states, Sir Michael Le Quesne, a Foreign Office representative to the Council of Europe, warned the Government that a court with individual petition 'in the present circumstances of the cold war ... could become more of a weapon of political warfare than a means of ventilating genuine grievances.'⁹⁴ A cruder expression of this problem ran that communists would submit vexatious and baseless applications to harass national governments. This complaint was effectively challenged by the EM, who emphasised the filtering processes of the Commission as a means to dismiss unfounded applications without providing them with the publicity of the Court.

The Labour Government's resistance went deeper than this, however suggesting not only that such petitions posed potential, extrinsic, PR problems but that extending justiciable political rights to hostile political actors was intrinsically undesirable. In Article 12 of the UK's draft Bill (the only new article over and above the content submitted to the UN) Labour attacked the idea of

⁹² The Foreign Secretary describing the novel model as wholly unacceptable in FO 371/78936 cited in Marston (n 83) 804

⁹³ TP vol 1, 224

⁹⁴ M Le Quesne letter (NatArch FO 371/88754, 20 July 1950) cited in Wicks (n 78) 452

extending the Convention's political freedoms to foreign citizens, suggesting that only member state nationals should enjoy the protections of the instrument. This stronger position was vigorously challenged in the Conference of Senior Officials by the French member M. Chaumont who contended that: 'if an [individual petition] was unfounded it would be rejected under Article 20' and 'if justified it should be dealt with, even if lodged by a communist.'⁹⁵ Such a clear and principled stance did nothing to answer the UK's underlying concern. Instead it simply restated a belief in the universalism of human rights when at heart the UK Government sought to reject such universalism.

While resisting communism was a core concern of the UK, it was similarly a concern of other states that none the less acceded fairly readily to the creation of a Court and the acceptance of individual petition. Labour's stronger resistance may have partly flowed from a lack of faith in the competence of the Commission to filter petitions and other practical concerns, but (as outlined in chapter 4 section 2) appears also to have been fuelled by more principled concerns. Over the next two subsections I explore the disagreement between the UK government and the EM, and other member states, over the codificatory extent and style of drafting of the Convention. Through this I outline the Labour perception of human rights as a protection for democratic structures primarily and that protection of individuals was, at best, a secondary concern.

⁹⁵ TP vol 4, 134

iii. Drafting Style

Lacking confidence in the potential Court, and unsure of the possibility of blocking its jurisdiction, the Labour Government also went to great pains to ensure that it would not find itself in the firing line, scrutinising the Convention language in detail to ensure compatibility with existing national legal practice. This scrutiny fell into two parts. One was the removal of 'rights' that pertained to issues not considered appropriate subjects for codification in legal form. The other was ensuring that issues that were deemed acceptable were expressed in a form that fitted existing law in the UK. These two approaches represent different considerations: a codificatory objection aimed at keeping the Convention out of policy areas in which the Government did not want to be fettered (e.g. education), and a drafting objection involved an area in which the Government were willing to tolerate a right but where they were concerned about overly broad drafting style and the potential for future rights creep. There is an overlap between these two categories as a broad drafting style risked creating a more extensive codification but as the two sets of objections appear distinguishable in the debates (the drafting objection being more about certainty than about unacceptable fettering of the Government's policy making discretion) I deal with them separately, starting with the drafting issues here and then moving on to consider codificatory issues in the next sub-section.

The Labour treatment of the Convention's drafting form is one of the most interesting aspects of its overall strategy. In the awkward position of not knowing how the Convention would end up being enforced, if at all, the Labour strategy was pulled in two opposing directions. In the hope that the Convention would devolve into a purely declaratory text the Government sought to keep its

terms as vague and political as possible.⁹⁶ However, given the risk that the instrument might end up being enforced it was also deemed essential to ensure the Convention's terms were clear enough, and contained such exceptions as were necessary, to ensure British law was in complete compliance. While both approaches stemmed from a desire to divest the emergent regime of any potential influence over the UK, this conflict between broad strategic considerations and prudent cautionary tactics left the Government's representatives with no choice but to pursue pedantic scrutiny rather than a higher level political effort to undermine the Convention.

Facing two related questions: how to go about drafting the language of the Convention and what form of legal system ought to be created through which such rights could be interpreted, the Labour Government adopted a, small-c, conservative approach. Seeing the codification of rights to be a one-off process that would be wholly contained within the drafting exercise, their approach here ran completely counter to the dynamic EM model of evolving codification. The latter model, which ultimately won out (as seen in the Court's adoption of a 'living instrument' approach),⁹⁷ saw the drafting of the Convention as contributing a significant first component to the codification of European norms as rights, but certainly not its end point. The initial, slim, Convention was, in effect, serving two functions. The first, acting as a basic touchstone for states that might otherwise slide into communism and an archetype for those wishing to transition out of it was dwarfed by this second purpose, sowing a seed for an ongoing process of European harmonisation through codification. Foreign

⁹⁶ Marston (n 83) 796

⁹⁷ *Tyrer v United Kingdom* (1979-80) 2 EHRR 1

Secretary Ernest Bevin believed that this evolving approach contained a 'mistaken proposal' and that any statement should be narrow, legal and static.⁹⁸ This thinking fit tidily with English practices of statutory drafting,⁹⁹ determining the application of the text in detail at the time of drafting and the Government placed consequent emphasis on fully elaborating rights to include appropriate limitations and exceptions. Against this desire for a traditional, and limited, *bill* of rights, the Assembly draft framed the Convention in broad, brief statements of principle that would provide greater scope for later interpretation and elaboration. A proliferation of detail would inevitably stifle any interpretative authority's scope for adaptation, consolidation and consensus building. Thus, despite significant agreement on the basic terms (noting again the similarities in content detailed in figure 1 above) the supporters of the British draft and the Parliamentary Assembly draft found themselves fundamentally divided on drafting style.

When the Committee of Ministers sought to produce a single draft proposal out of the two texts, first through their Committee of Legal Experts¹⁰⁰ and subsequently in its Conference of Senior Officials, they were distinguished primarily on the basis of the amount of detail contained in the drafting (the Assembly and UK drafts being described as those of 'enumeration' and 'definition' respectively).¹⁰¹ As a result of this labelling, despite absence of consensus on the deep issue of what form of legal architecture should be

⁹⁸ United Nations UNE 3567/17311/96/1949 cited in Marston (n 83) 804

⁹⁹ Though obviously not with the subsequent common law treatment applied by the English Courts.

¹⁰⁰ Not to be confused with the Assembly's Committee on Legal and Administrative Questions.

¹⁰¹ TP vol 3, 7-8

employed for the Convention, consideration centred instead on the superficial differences in language that represented only the most visible consequences of that division.

This shallow perception has continued into the literature and whilst the issue of detail is germane to debate regarding the Court's legitimate scope for developing Convention rights, there has been a broad failure to engage with the greater difference underlying the drafting issue. The only author who does discuss the ongoing nature of the EM's proposal is Nicol but, despite identifying that '[m]any of the negotiators clearly wanted the kind of rights instrument that went beyond consolidation of the 1950 human rights status quo',¹⁰² he suggests that their proposal failed to come into being,¹⁰³ rather than viewing the Court's later evolutive approach as the fruition of the EM's original intentions, seeded in the essence of the Convention text.

The enduring presence of the EM scheme, despite Labour resistance, was facilitated by the failure of the Committee of Ministers sub-committees to make a clear decision on which legal architecture/heritage the Convention would adopt. Instead, attempting to resolve the two opposing approaches, the committees found themselves facing an arguably intractable problem. The Legal Experts identified the difference between the approaches a matter of political preference rather than legal expertise and the Conference of Senior Officials, formed to make this political decision, were split down the middle.¹⁰⁴ Attempts

¹⁰² Danny Nicol 'Original intent and the European Convention on Human Rights' [2005] PL 158

¹⁰³ *ibid* 159

¹⁰⁴ United Kingdom, Netherlands, Greece, Norway and Denmark supported 'definition', while France, Italy, Ireland, and Turkey supported 'enumeration'. Sweden was uncommitted and Belgium and Luxembourg favoured 'enumeration' only if a court was

to formulate a methodology for rationalising the two drafts generated serious consternation. The UK delegate recognised that the two drafts were irreconcilable on account of being rooted in different legal heritages (mirroring the remarks of the Legal Experts)¹⁰⁵ but, against this, the French delegate, M. Chaumont, emphasising the similarities in superficial style and content, suggested a superficial linguistic compromise between the wordings of the two (a kind of moderate definition). A third approach, proposed by the Chairman of the Committee, (future Swedish ECtHR judge Sture Petré), who suggested taking a number of articles from each version (providing a patchwork of defined and enumerated).¹⁰⁶ Despite this lack of consensus, and the serious challenge faced, it was resolved that ‘it was not impossible *a priori* to include in [the UK ‘detail’ draft] certain general principles which are contained in [the ‘enumeration’ draft]’.¹⁰⁷ This finding is particularly confusing when it was also resolved ‘that it was necessary to exclude from [the Assembly draft] the detailed definitions of human rights, since the system of [the draft] was to reproduce the text of the United Nations Universal Declaration for the enumeration of these rights’.¹⁰⁸ This compromise was far from comfortable and while it at first appeared to favour the UK draft, it actually did nothing of the sort. By making no clear statement on the legal architecture adopted, and leaving some articles more thoroughly phrased than others, the door was left open to interpretation, an approach the Court readily adopted in the 1970s.

established but ‘definition’ if one wasn’t. TP vol 3, 178 Nicol suggest that the UK Government lacked support for its proposal at this stage but this is far from clear on this vote. Nicol (n 102) 158.

¹⁰⁵ TP vol 4, 104

¹⁰⁶ *ibid*

¹⁰⁷ TP vol 4, 258

¹⁰⁸ *ibid*

This highly pragmatic and somewhat flawed process is also somewhat under emphasised in the literature. Nicol notes that ‘at one stage, the founding states seemed almost evenly split over whether to opt for enumeration or definition’ but, in stating that the Conference of Senior Officials’ compromise draft, ‘satisfied states on both sides of the argument’,¹⁰⁹ does not draw attention to the tensions that remained. Further from the mark, Madsen describes the Senior Officials contribution as ‘a final screening and fine-tuning’,¹¹⁰ badly underestimating the substantial degree of indecision present at this crucial stage of the drafting.

iv. Codification

The fourth major source of concern for Labour and tension between the UK Government’s approach and that of other actors in the Council regarded the limits of what was deemed appropriate to codify in the form of a rights instrument. In this final sub-section I contrast Labour’s preferred boundaries for the Convention against two competing versions put forward by other member states. I also discuss the contestation surrounding some of the most controversial inclusions and detail the UK Government’s relative success in restricting the drafting to its preferred terms.

In terms of scope the Labour hope was that the Convention should be a ‘collective guarantee’ only of ‘the minimum necessary to constitute the cardinal principles for the functioning of political democracy’.¹¹¹ In direct opposition to

¹⁰⁹ Nicol (n 102) 159

¹¹⁰ Mikael Rask Madsen ‘From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics’ (2007) 32(1) Law & Social Inquiry 137, 142

¹¹¹ TP vol 2, 52

this approach, a group of liberalist delegates argued that the Convention should be primarily an instrument protecting the individual against the state. As such they sought a broader statement of freedoms¹¹² and, concentrating on those areas particularly attacked by the Nazi regime, fought vigorously for the inclusion of further rights such as choice over education, protection for property and representative elections.¹¹³ The EM adopted a middle approach and, in the first instance, prioritised the immediate safeguarding of democratic structures as ‘the common denominator of our political institutions, the first triumph of democracy, [and] also the necessary condition under which it operates.’¹¹⁴ In the longer run however their plans tended towards the liberals with their aspirations being, in the words of a French EM member ‘infinitely more vast’ and their belief being that ‘man will only be really free when his political rights are supplemented by economic rights’.¹¹⁵ Professor Tietgen openly acknowledged his belief that: ‘[a] theoretical ideal... would consist in drawing up for Europe a complete code of all the freedoms and fundamental rights; all the individual freedoms and rights, and all the so-called social freedoms and rights.’ but, he recognised that ‘[a] full and complete realisation of this aim would, however, be something beyond [the Council’s] power.’¹¹⁶

Alongside Labour’s simple, principled, rejection of non-political rights as an appropriate subject for international law, Maxwell-Fyfe argued that all of the UDHR’s ‘so-called economic or social rights’ were ‘too controversial and difficult

¹¹² TP vol 1, 142 per Mr MacEntee (Ireland)

¹¹³ Described by Mr Higgins of Ireland as ‘primary principles of democracy’ at TP vol 7, 100

¹¹⁴ TP vol 1, 194 per Professor Tietgen

¹¹⁵ TP vol 1, 136 per Monsieur Jaquet (France)

¹¹⁶ TP vol 1, 46

to enforce ... and their inclusion would jeopardise the acceptance of the Convention.’¹¹⁷ The most significant challenge to the limited political Convention was posed by a selection of further protections that Tietgen referred to as the ‘family rights’ (specifically protection for marriage, founding a family, education, the home and of property more generally).¹¹⁸ These rights, which potentially blurred the line in places between political and social protection, were recognised to be controversial from their first mention but were deemed to be justified¹¹⁹ as a direct response to some of the Nazi regime’s egregious violations of family life.¹²⁰ Liberalists argued that the family rights were as important as any of the other, more generally accepted, political protections. Like freedom of speech, they asserted that without them it was easy for a state to undermine an individual’s ability to function as a political actor and thus they ought to be treated on a par with the other political rights. Despite Labour members, amongst others, claiming that these protections were inappropriate additions, as there were no ‘fundamental’ rights at stake,¹²¹ consensus formed in favour of retaining the extra rights and this was reflected in the Assembly’s proposed text for the Convention, as forwarded to the Committee of Ministers.¹²² This was a problem for Labour, who as a socialist administration, sought to retain free reign over social and economic policy and were fundamentally opposed to any measure promoting or protecting the legitimacy of property rights. While Labour delegates to the Council adopted

¹¹⁷ TP vol 1, 116

¹¹⁸ TP vol 1, 198

¹¹⁹ By the Assembly’s Committee on Legal and Administrative Questions.

¹²⁰ Specifically raised were the racial restrictions on the right of marriage and the forced regimentation and indoctrination of children. Ibid.

¹²¹ TP vol 1, 194

¹²² Assembly Recommendation No.38

relatively conciliatory language, the principled objection was not hidden. In the Assembly's Committee on Legal and Administrative questions for instance, the Labour MP, NEC member, and future party chair, Alice Bacon stated that while '[a]ny person, whether physical or moral, has a right that his property shall be respected' the party would not tolerate provisions 'infringing in any possible way, the rights of States to pass the necessary laws in order to assure use being made of this property in the general interest'.¹²³

At the governmental level Labour was able to put more weight behind such objections and when the Committee of Ministers returned its final compromise draft to the Assembly only Articles 12 and 8, as they now are, remained. The first, the right to marry and found a family, was let pass on the basis that, while undesirable, it was essentially innocuous, and the latter, the right to respect for private and family life, home and correspondence, was treated, rather short-sightedly, as an essentially political protection.¹²⁴ Gone were the right to property, the right to education, and, outside of the family right bracket, the right to elections.

In the dying stages of the Convention's drafting the Assembly renewed its call for the inclusion of these rights, albeit in a weaker form, sending a second recommendation to the Committee of Ministers with a letter, authored by Tietgen, emphasising the perceived importance of these rights.¹²⁵ Maxwell-Fyfe lobbied a joint committee (formed from members of the Standing

¹²³ TP vol 6, 148

¹²⁴ Art 8 was treated more in the vein of the US fourth amendment's protection against searches and seizures than that of the UDHR Art 12 protection of integrity of personality from which its language was adapted.

¹²⁵ Recommendation No.24 to the Committee of Ministers, adopted 25 August 1950, at the conclusion of the Debate on the Report from the Committee on Legal and Administrative Questions, reproduced at TP vol 6, 198-224

Committee of the Consultative Assembly and a number of members of the Committee of Ministers) on the importance of even a weakened form of the extra rights, albeit not at the expense of the Convention failing to be accepted at all,¹²⁶ but, notwithstanding such protestations, they were once again excluded on the basis that 'national Governments were not in unanimity'.¹²⁷ This should not be mistaken as anything other than a Labour veto as, while Committee of Ministers discussions are not publicised, a motion was successfully moved to have it noted on the Committee's record that it was only the UK who would not accept the proposed amendments.¹²⁸

Members of the Assembly perceived the exclusion of extra rights as a significant snub. The French and German members of the Assembly's Standing Committee boycotted the Convention's signing ceremony,¹²⁹ and fierce criticism was offered from both EM and liberalist assembly members during the subsequent third meeting of the Assembly.¹³⁰ While, as a concession, the rights were allowed to remain in consideration – leading to the adoption of the first protocol in early 1952¹³¹ – the original leverage applied by time pressure and the potential bad press for those states seen to be dragging their heels had passed.

While it falls outside the scope of the Labour objections the passing of the first protocol is valuable as a brief excursus to consider the similarity in approach of

¹²⁶ TP vol 7, 26

¹²⁷ TP vol 7, 4

¹²⁸ TP vol 7, 28

¹²⁹ TP vol 7, 46

¹³⁰ See for instance Tietgen's infuriated contribution at TP vol 6, 92-96 and Mr Higgins (Ireland)'s diatribe at TP Vol 7, 100.

¹³¹ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Adopted 1952) ETS 9

the Conservatives as Government at the time of acceptance of the first protocol to that of Labour during the main text. As with Labour the Conservative Government resisted different articles to different degrees and for different reasons.

The weakest modifications were made to the right to free elections while more substantial changes were required to the remaining 'family rights'. The right to elections had been a difficult target for Labour, being apparently benign and apparently at the heart of even their preferred political stability model for the Convention. However, despite only seeking to entrench protection for free and representative elections, Labour repeatedly rejected the article through fear of opening the door to a potential challenge to the UK's unelected higher chamber. Compromise wording – which called for elections 'under conditions which will ensure that the government and legislature shall represent the opinion of the people' – was resisted through the first protocol debate. Under the Conservatives fears that the article might be used to challenge the first past the post system¹³² ultimately gave way and the weakened drafting was accepted.¹³³ Changes inflicted on the right to property were more significant with an extremely broad public interest exception significantly ameliorating the article's scope. Worst off was the right to education, where concerns remained regarding the potential for the right to take on positive obligations (with implications in planning and expenditure on education). Here the Labour Government had refused to accept even the renegotiated, and substantially curtailed, draft language.

¹³² Surprisingly the Liberal party subsequently made just such a challenge. An account of the failed endeavour is included in Ch 5.

¹³³ TP vol 8, 14

The Conservatives followed this on and, breaking with the pattern of universal acceptance of the whole Convention by every signatory state, a specific reservation was entered at the time of signing, restricting the scope of the Article's application in the UK to that which was compatible with the terms of the Education Act 1944. This move, which would have been politically awkward in connection with the initial Convention, was rendered far less hazardous in the subsequent, and lower profile, protocol debate. Overall then the Conservatives in power adopted a very similar line to Labour, slightly more liberal in permitting the passage of the additional articles, but not so much so as to accept them in anything like their original terms (perhaps because the sense of socialist threat had passed with their return to power).

Overall the success of Labour efforts to limit the extent of the Convention demonstrates not just that the Labour Government had a clear idea of what they considered appropriate to fall within the aegis of international human rights but also that they were willing to act fairly forcefully to ensure that their view was adopted. The steps taken also demonstrate the first clear awareness of the potential implications for resource allocation that even a modestly enlarged statement might entail. Conservative support for compromise language in the final stage of the Convention drafting shows that Labour was not on its own in worrying about the implications of the Convention and emphasises again Churchill's opportunistic and tactical aims during the Conservatives' time in opposition.

4. Conclusion

In this chapter I have examined the relationship between the Conservative party, the Labour party, and the Convention. Rejecting simple accounts of the Convention's drafting that focus on singular 'British' input I have critically examined Duranti's claims about the motivating factors underlying Conservative advocacy for the Convention. Whilst the broad connection between the Convention's passage and domestic British political tensions is an important one, and I agree that the Convention was a response to the Conservative loss in 1945, I find Duranti's specific points harder to accept. As shown in section 2, it is necessary to drill down to the individual level to understand the relevant dynamics of the Convention's inception.

While Maxwell-Fyfe's motives appear to be well reflected in Duranti's work, the broader attribution of this motive to Churchill and other Conservatives is not justified. Instead I propose that the broader Conservative motivation in laying the foundations for the Council of Europe and the Convention grew out of Churchill's desire to cuckold Labour rather than an intention to create a functional legal instrument that might seriously hamper Labour's plans in Government. Consolidating allegiances with continental socialist governments and adopting a dominant role within the European space, I suggest, were far more important to most Conservatives than supranational constitutional review. Labour anxiety, arising from an early and, arguably preventable, loss of control over the developing European space was sufficient motivation for Churchill's European strategy and while Maxwell-Fyfe was clearly extremely hostile to the Labour leadership, it is questionable whether

any of the other senior Conservatives seriously sought an instrument that would concretely bind the UK.

Through section 3 I have mapped out the key motivating dynamics underlying Labour resistance. Profound aversion to supranationalising pressures, rejection of judicial scrutiny, anxiety about the extent of the Convention's codification, and a clash between two drafting models all married together in Labour resistance, generating significant anxiety in the Attlee administration. That Labour desires were not that different from Conservative ones when it came to rights one can look at the similarity of the Labour draft to the EM drafts and also the siding of Labour MPs with the Conservatives in the Hague Congress. I have also argued that Duranti's second contention, that there was a tension over the inclusion of socio-economic rights in the Convention, is not well founded with neither domestic party wanting any socio-economic protections included (as shown by the extremely circumscribed scope of Labour's draft Convention). In Chapter 3 I show how closely the Conservatives and Labour sat on the issue of social rights and identify the ongoing importance of conflict to successful rights development.

Chapter 3 Finessing the European Social Charter

'This is a tiresome venture typical of the Council of Europe.'

Colonial Office Official,¹1954²

1. Introduction

While both Labour and Conservative parties helped to keep the socio-economic content of the Convention to a bare minimum, this did not put the issue to bed. Quick on the heels of the first protocol came proposals for a second, socio-economic, instrument in the ECHR's mould. In this chapter I examine this second European drafting process from its inception soon after the Convention's completion, up until its fruition in the European Social Charter³ in 1961. This second rights debate carried far less momentum than the Convention's, and has consequently received very little academic attention. This is a substantial oversight as the Charter's drafting is valuable in its own right for a number of reasons. As well as being of general interest as an example of British governmental involvement in Europe post-Convention but before aspirations to join the European Economic Community had taken shape – it also offers numerous counterpoints both to the Convention drafting, as considered in the previous chapter, and to the domestic re-importation of rights considered in the following chapters.

¹ By Edward West a 'Principal' in the Colonial Office, equivalent to the modern day civil service rank of 'Assistant Director'.

² EM West 'Cover minute by E.M. West, Principal in the Colonial Office' (NatArch CO 936/300, 1954)

³ European Social Charter (adopted 18 October 1961) ETS 35

In this chapter I subject the Charter drafting to the same scrutiny applied to the Convention in chapter 1 and consider continuities and discontinuities in the attitudes and reservations of the two main parties. Considering factors such as the reversal of parties in power, the more established status of the Council of Europe, the exclusive concern with socio-economic rights and the inclusion of explicit positive obligations I identify which differences seem to have underlain the very different shape and outcomes of this second European rights debate. Additionally I seek to explain the party positions with reference to contemporaneous socio-political issues and, in particular, identify the inhibiting effect that Britain's strong but fragmented unions had on both of the main parties during the negotiations.

i. Introducing the Social Charter

The Social Charter and the European Convention differ significantly in a number of ways. The Charter has no Court and permits no individual petition; its substantive terms are split into two sections with overlapping aims (one part containing broad strategic goals and the other more specific policy guidance); ratification requires commitment only to limited portions of the total text; and the only form of supervision is an infrequent, UN Treaty Body-style reporting regime.⁴ On the other hand the Charter has much in common with the Convention, mostly in adopting many of the same weaknesses. It is ambiguous in its drafting form, offers no guidance as to the kind of legal interpretation it should be subjected to, the text oscillates unhelpfully between generality and

⁴ A channel for collective complaints to the supervisory 'Committee of Independent Experts' was not introduced until the 1995 Additional Protocol (ETS 158) and even then only if brought forward by an NGO who had been granted 'consultative status' by the Council.

specificity, and the structure protects a backward looking minimum of protections rather than striving for perpetual raising of standards. To some degree the differences may be attributable to differences (perceived or actual) between 'social, economic and cultural' rights and 'civil and political rights' but some of these similarities are the opposite of what one would expect for an instrument oriented towards the less certain sphere of socio-economic policy and, in any event, the Charter contains notably little in the way of social or cultural rights anyway.

The lack of progressiveness, aspiration or commitment demanded by the Charter have crippled its scope for action and despite several protocols to extend and reinforce the Charter,⁵ not to mention a substantial re-write in 1996,⁶ the relative lack of attention the Charter has received, especially in comparison to the Convention, is hardly surprising. This lack of attention, however, belies the importance of this episode as a separate and distinct negotiation towards a supranational human rights instrument. Another remarkable factor about the Charter drafting that makes it worthy of attention is the degree of co-operation between the Conservatives and Labour in Europe so soon after the tensions of the Convention drafting. As in the Convention drafting British actors were of central importance to the Charter negotiations. However, unlike that earlier process, Conservative and Labour actors united to ensure that the final instrument was of extremely limited scope. Where an idealised narrative might claim that European rights emerged out of

⁵ Additional Protocol to the European Social Charter (1988) ETS 128; Protocol amending the European Social Charter (1991) ETS 142; and Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995) ETS 158

⁶ European Social Charter (revised) (1996) ETS 163

international unity and consensus, this examination of the Charter, taken together with my examination of the Convention, demonstrates that they seem instead to have depended on British domestic discord.

ii. Chapter Structure

As the Charter negotiations have received no prior attention in the literature I begin by providing an overview of the protracted processes of the Charter's genesis. This general summary maps the key bodies, stages and drafts involved in the instrument's preparation and flags the general areas of tension. Drawing upon previously unexamined materials from the Council of Europe's Archive in Strasbourg (detailing the drafting debates), in this section I describe a disjointed drafting process wherein an initial impetus for a binding social rights document as the first step towards a unified approach to European social policy dwindled. The gradual weakening inflicted by multiple drafting rounds, passing from Committee to Committee before finally being totally undermined at the hands of governmental representatives is documented along with the ill feeling generated between the mixed Parliamentarians and notables of the Consultative Assembly, and the Committee of Ministers' Social Committee (constituted just of the governmental representatives of each member state).

In the second section of the chapter I elaborate upon this first pass through the eight years of drafting, between 1953 and 1961, by providing a detailed account of British perspectives. Supplementing the detailed, and previously unexplored, Council records with documentation held in the British National Archives, Hansard and other domestic sources, in this section I provide a finer grained picture in which the leading role taken by the British

Conservative party again comes clear. Against the advocacy and support, both rhetorical and financial, provided for the Convention, this section shows the meticulous steps taken by Conservative actors to constrain the Charter through control of its tone, language, structure and scope. Developing upon the analysis in chapter 2, I compare the objections raised and consider the relative importance of my framework factors of codification, judicialisation, supranationalisation and drafting style.

Having concentrated on the role of the Conservatives in the second section and demonstrated their role in curtailing the Charter, in the third part of this chapter I return to consideration of the Labour party. Looking at the earlier, Assembly dominated, stages of the drafting I show how the Labour party acted in concert with the Conservatives from the point of the Charter's inception. The apparent contradiction of a socialist party fighting against the protection of workers' rights is considered and a potential explanation rooted in the unique structure of Britain's organically developed systems of industrial relations is advanced. This theory is then proposed as the uniting factor explaining why neither party was willing to support the Charter idea, as well as bringing forward underlying issues that will be of relevance to following chapters.

2. Mapping out the Development

The drafting of the Charter was both protracted (taking over eight years) and convoluted (involving six different committees) and as such I begin with a principally chronological overview. This section serves both as an aid to orientation during the analysis of the next section and also as an opportunity to

draw out some of the similarities and differences between the drafting processes for the Convention and the Charter.

The Charter's genesis was largely similar to that of the Convention. Its basic roots lay in the EM's federalist agenda and can be traced, albeit in a loose form, to the The Hague Congress, as well as other pre-Council meetings. Its advent in the Council came from the Assembly, rather than the Ministers, and it was raised with an emphasis on seeking out further areas of common ground around which standardisation of law and policy could take place. The Charter's formulation was worked and reworked by a series of sub-committees, extant and ad hoc, with conflict being resolved through further delegation as much as discussion and with the final say eventually ceded to the Ministerial level where a different attitude altogether prevailed. In all these respects the Charter and the Convention remained in close company.

Unlike the Convention the negotiation of the Charter witnessed a broad variance in opinions amongst the delegates at both Assembly and governmental levels. This variation led to a more fragmented drafting process and resulted in a different development trajectory to that seen for the Convention. Whereas the Convention was drafted in a form of uneasy dialogue between the Assembly and the Committee of Ministers – each taking turns to consider the work of the other through their respective expert committees, making amendments and forwarding the new version back to the other – the Charter saw little willingness to engage in such to and fro. As a result of this the Charter drafting saw a period of several years during which both tiers of the Council worked in parallel on their own separate drafts with little cross fertilisation of ideas or language.

Within the Assembly a number of different approaches developed with some, but not all, of its Committees agitating for a 'progressive', binding and enforced instrument. Separately the governmental Social Committee, who ultimately dictated the form of the Charter, pursued a rather more restrained and substantially less momentous text with no emphasis on future development. While the final text of the Convention owed a great deal to the Assembly's drafting work, the Charter bore relatively little resemblance to either the original Charter idea proposed by the Assembly or the text it eventually put forward.

i. Assembly Origins

The first concerted effort in the Council to seek out common ground on social and economic affairs came in December 1951, just over a year after the Convention's acceptance in Rome. This took the form of an Assembly motion advocating the development of common social policy, which was passed and duly communicated to the Committee of Ministers before the end of the year.⁷ The Ministers acted upon the recommendation in May of 1952 by instructing their secretariat to draw up a memorandum of proposals by which such a harmonisation could be achieved. A year later the Secretariat-General published a proposal outlining the role, and potential, of the Council of Europe within the social field, stating that:

[t]he social progress which the members of the Council of Europe have set forth as an objective should ... be based on common principles. It thus appears that the first task of the council in the social field should be to define and develop these

⁷ Assembly Doc. 140 (CoEArch 7 December 1951)

principles. The importance of so doing is such as to warrant their enunciation in the form of a European Social Charter.⁸

This first document started the Charter off on its uncertain path. The Charter was expected to exist on the same plane as the Convention and the aim from the start was that the two would exist in a mutually supportive fashion. On the other hand the second Council of Europe rights instrument was also clearly demarcated as being of a different kind both in the decision to dub it a Charter, rather than a Convention on Social Rights, and also in emphasising the prospective nature of the Charter. The memo stated that:

[t]he social charter would, together with the Convention on Human Rights and Fundamental Freedoms, constitute a solemn declaration by the European states of the spiritual values underlying western civilisation.⁹

But also that:

*[t]he principles enshrined in [the] Social Charter would serve as a guide for the future action of the Council of Europe in the realisation of social progress and in the achievement of greater unity between its Members.*¹⁰

This tension between the Charter as a totemic statement of common, extant, principles and the Charter as a forward-looking guide for policy development may not be unique to the European Social Charter but it is particularly acute here within the broader context of movement towards European supranational development. Oscillating between these ideas of heritage and progress, the report was at pains to find a strategy that would weave the two together. To this end it asserted that pursuit of improvement in standards of work and living

⁸ Council of Europe Secretariat General, 'Memorandum by the Secretariat General of the Council of Europe on the role of the Council of Europe in the social field' (CoEArch Document SG (53) 1, 16th April 1953)

⁹ *ibid*

¹⁰ *ibid*

were part of the common traditions of the member states. This was then connected back, to an overarching thematic underpinning of human dignity, lending the necessary essential quality, and forward, to a range of prospective policy commitments that would structure the practical development of economic and social security.

Despite the recognition that the economic difficulties of the post-war period might militate against substantial and immediate progress, the memo went so far as to propose concrete commitments with regard to: harmonisation of social rights, free movement of workers, the removal of discrimination on the grounds of nationality in provision of socio-economic rights, protections for employment security, set living wages, minimum standards for work conditions, minimum weekly rest, basic social security, legislation covering industrial health, and special measures to protect vulnerable persons. Additionally, and more controversially, it also went so far as to moot the adoption of overarching principles regarding fair taxation as well as rules to govern the distribution of societal burdens. If implemented in full these proposals would have involved an enormous transfer of sovereignty, arguably greater even than that created by the Convention. Such an enormous intrusion by the Council deep into the bread and butter of modern government was justified in the memorandum only briefly, and somewhat insubstantially, on the basis that:

[g]overnments should recognise that although the planning and implementation of social policy is essentially the concern of national authorities, its success in present-day conditions depends to a large and growing extent on greater international unity, pooling of experience and common action.¹¹

¹¹ *ibid*

In April 1953 the memorandum was forwarded to the Assembly for consideration during its fifth session; it was also circulated to member states for their information. In the Assembly an ad hoc 'Committee of Social Experts' was created to consider the proposals over the course of the summer. In September they reported back with the majority endorsing the creation of a Charter as a rational extension of the Council's work on human rights and agreeing also that the time had come for a long term European strategy for social policy.¹² Behind this majority disagreements were already bubbling up over the drafting form, codificatory extent and legal force of the document. 'Considerable' discussion arose over whether the Charter should resemble a declaration or a convention. Absent consensus a compromise was developed proposing an instrument containing both a general declaratory part that would frame the state's obligations in principle and a more narrowly focused part creating binding obligations on specific issues.¹³

Whatever form the instrument was to take, the Assembly still firmly endorsed the idea of working up a Charter and communicated this continuing aspiration to the Committee of Ministers in late 1953.¹⁴ The Ministers responded formally by means of a 'special message to the Assembly', early in 1954, wherein they accepted a commitment to *'endeavour to elaborate a European Social Charter which would define the social objectives aimed at by*

¹² Committee on Social Questions 'Report presented by Mr. HEYMAN on behalf of the Committee on Social Questions on the request made by the Committee of Ministers for an opinion on the memorandum by the Secretariat General' (CoEArch CM (53) 99, 18 September 1953)

¹³ *ibid*

¹⁴ Council of Europe Consultative Assembly, Opinion No.5 (CoEArch 23 September 1953)

*Members and would guide the policy of the Council in the Social field.*¹⁵ The Assembly's success in getting the Charter firmly onto the official agenda came with a substantial caveat, however, as the drafting of the Charter was delegated to a newly created 'Social Committee', a body made up solely of governmental representatives (in the UK's instance being a Minister and supporting civil servants from the Ministry of Labour). The 'special message' was, in effect, notification to the Assembly that, while the Ministers had accepted their request, the matter was now being taken out of their hands.

Denying the Assembly any channel for input was a substantial snub and, as the governmental Social Committee sat for only a few days a year, the Ministers' move also meant that the Charter was going to be some time coming. In response the Assembly's standing committee (who orchestrated the Assembly's business between its sessions) decided at their meeting in July 1954 that the Assembly's own 'Committee on Social Questions' should immediately start work on an Assembly draft for the Charter.¹⁶ The Committee on Social Questions also responded to the Special Message, calling for greater flexibility in the Social Committees terms of reference and requesting frequent meetings with the Social Committee so that the Assembly could gain appropriate opportunity for comment and input. Thus another parallel with the Convention comes clear, with tensions between the Assembly and the Committee quickly bubbling up into confrontation and competitive drafting.

The Committee on Social Questions draft, Document 403, took a little over a year to produce and was given its first reading in the Assembly on 26th

¹⁵ Council of Europe Committee of Ministers, Doc. 238 (CoEArch 20 May 1954)

¹⁶ Council of Europe Standing Committee, 'Order of the Standing Committee of the Assembly' (CoEArch 19 July 1954)

October 1955. As with the EM's first draft of the Convention this first draft of the Charter borrowed extensively from contemporaneous UN drafts, in this case the, under-development, International Covenant on Economic, Social and Cultural Rights.¹⁷ These borrowed articles were then repurposed, in a similar fashion to that adopted during the Convention drafting, to provide a range of enforceable, but broad, 'rights' to be enforced by a novel supranational supervisory body (the 'European Economic and Social Council'). The rights proposed in the Charter were principally oriented toward the economic, with more covering workers rights and regulation of the employment relationship than those oriented towards social issues. Overall the tone of the document was bold and normative with a strong insistence on enforcement and extensive oversight built in to its terms. While not a Convention on Social Rights in name it was in many ways getting towards one in substance.

Unlike the first draft of the ECHR, Document 403 received a somewhat negative reception on its first reading in the Assembly. Members of the Assembly's Committee on Economic Questions directed particular hostility towards the draft, (they had attempted to have the reading delayed so that the text could be reworked prior to its first public airing).¹⁸ In their commentary on 403 they complain about it having content 'which was found fundamentally incompatible with general principles of economic policy prevailing within the orbit of the O.E.E.C.', as well as the inappropriateness of the proposed

¹⁷ General inspiration for the first, broader, section on existing traditions was also taken from the various Conventions and Recommendations of the International Labour Organisation. Council of Europe Consultative Assembly Committee on Social Questions, 'Preparation of a European Social Charter' (CoEArch AS/Soc (6) 1, 17 September 1954)

¹⁸ Council of Europe Consultative Assembly Committee on Economic Questions, 'European Social Charter and European Economic and Social Council – Draft Report by M. Kalbitzer, Rapporteur' (CoEArch AC/EC (7) 24, 28 February 1956)

enforcement mechanism and, even more fundamentally, the use of the concept of legal rights in relation to issues of social and economic governance. On this last point the Committee stated:

[t]he central pivot around which the whole Social Charter revolves is that of the "rights" it lays down: on the scope of those "rights" and on their economic and political implications will it be judged, both as a manifestation of social aspirations and as a practical body of government doctrine in the social field. ... A critical examination reveals that there is considerable confusion with respect to the "rights" proclaimed in Doc. 403 some of which are derived from recognised and enforceable obligations already undertaken by the State, while others are strictly speaking not Rights at all in the accepted legal sense. Among these latter one finds social desiderata which might be said to be ripe for legislation but also, many others, which are decidedly out of step with present day political thinking, and again others which are simply not of a nature that they can be made the object of legislation.¹⁹

Most interestingly the Committee also wished for the Assembly to limit itself to producing a schedule of principles for incorporation and suggested the Committee be left to undertake subsequent drafting.²⁰ The Assembly's somewhat dour response did not amount to an admission of defeat. Instead of reducing the scope of the task it ordered instead that the draft be reworked, acceding to the Committee on Economic Questions request to take the lead and demoting the Committee on Social Questions to a subsidiary, consultative, role.

The second Assembly draft, Document 488 was prepared over the course of the first few months of 1956 and was presented to the Assembly in April of that year. Somewhat surprisingly 488 retained much of the substantive content of 403 with only a couple of rights being removed. More importantly, however, the new draft completely gutted the enforcement apparatus of the earlier draft.

¹⁹ *ibid* cited in (n 20) vol 3, 50

²⁰ Council of Europe *European Social Charter: Collected Travaux Préparatoire* (CoEArch unpublished), herein 'ESCTP', vol 3, 47

Gone too was its 'Economic and Social Council' and independent, non-governmental, oversight by experts, replaced with purely political supervision by the Committee of Ministers.²¹ This draft, having swung a fair way towards the opposite extreme on the main issue of contention, again left the Assembly unimpressed. The draft Charter was referred back again, this time to the Assembly's third standing committee, the Committee on Political and General Affairs.²²

The third draft of the Charter, Document 536,²³ sought a compromise position between the approaches adopted in the previous two documents and suggested a new enforcement model that would centre around an individual 'European Commissioner for Social Affairs' with the assistance of a small 'European Social Chamber'. This suggestion satisfied neither side²⁴ and controversial tweaks such as re-titling the document as the 'Convention on Social and Economic Rights' served only to further push back the possibility of agreement. With no consensus in sight, and no more committees to refer the document to, this third draft was deemed the best achievable at the time and was forwarded to the Committee of Ministers. Given the failure to reach a consensus, the document was tagged with a note stating that it was to be treated as a work in progress and that, as a result, it needed to be read alongside

²¹ A forum in which, we must remember, a 2/3rds majority of the Member States' Ministers would be required to bring about any action.

²² Council of Europe Consultative Assembly, 'Directive 89 regarding the Return of Doc. 488 to the Committee on General Affairs' (CoEArch 20 April 1956)

²³ Council of Europe Consultative Assembly 'Draft recommendation for the establishment of a European convention on social and economic rights' (CoEArch 536, 27 September 1956)

²⁴ Discussed in the Assembly between the 24th and 26th October 1956, minutes found in ESCTP vol 3, 575-644

the minutes of the debates that had been held in respect of it.²⁵ Hopes that the document would receive such careful attention were to prove wishful.

ii. The Governmental Perspective

During the time it had taken the Assembly to produce their three drafts the governmental Social Committee had achieved significantly less. Meeting for only twelve days between receipt of their original mandate in 1954 and the arrival of the Assembly text in early 1957,²⁶ only modest inroads had been made in comparison to the extensive, if inconclusive, work in the Assembly. Minimal meeting time was not the only problem as slow progress was exacerbated by repeated efforts to consult with the member state governments through formal questionnaires.²⁷ Working in isolation from the Assembly the little that had been achieved during this period pointed towards a substantially different conception of the Charter.

Against the Assembly work, which understood the Charter as a prospective and progressive instrument of social legislation, the Social Committee adopted a limited and retrospective approach. While there are some methodological similarities between the procedures adopted in the Assembly committees and by the Ministers' Committee, (in particular their common resort to drawing upon existing international instruments – another parallel with the Convention), the emphasis in the Social Committee was on establishing

²⁵ Council of Europe Consultative Assembly 'Assembly Recommendation 104 (1956) concerning a European convention on social and economic rights' (CoEArch 26 October 1956)

²⁶ Sessions were held from the 4th to 7th October 1954, 4th to 6th May 1955, 24th to 27th April 1956 and 29th Jan to 1st Feb 1957.

²⁷ Three questionnaires of varying detail covering content, enforcement, and bindingness were sent during this period.

a core of accepted conditions that most states could immediately agree to abide by without fear of violation. No effort was applied to the selection of principles that might be applied to future action and the Assembly's motivating ideal of working towards common social policy was entirely absent. Alongside its questionnaires the Social Committee began to produce draft language that evinced little long-term aspiration. While debate was seen over issues such as enforcement, this existed only within the context of a far less ambitious instrument than was being envisaged by the Assembly. I analyse these debates in detail below but it is useful to note in advance that the principle dimension of disagreement was on how binding the Charter should be and not how progressive. While these two issues are not entirely independent it speaks to a more conservative atmosphere, reminiscent more of the terse latter governmental stages of the Convention's drafting than an attempt at boldly laying the foundations for a unified, European, social policy.

The first concrete output from the Social Committee in November 1956 was consequently restrained in scope, light on concrete measures, and did not propose any real oversight. Further muddying the waters the Committee was also sending out somewhat misleading messages about its work. In explanatory notes appended to its first draft articles it declared that: '[t]he Social Committee as a body has so far indicated its preference for an instrument of a declaratory nature, drafted in very broad, general terms.'²⁸ While there is truth in the statement that the work was, to date, designed to be principally non-enforceable, the suggestion that the text would be broad and general was

²⁸ Council of Europe Social Committee, *Draft text of Certain Articles* (CoEArch CE/Soc (56) 19, 8 November 1956)

somewhat disingenuous. What was in fact being produced could better be characterised as vague and highly circumscribed (creating rights that were constrained to specific areas and which were not drafted in sufficient detail to suggest at any particular need for action). In any case, neither the declared approach nor the actual draft work put forward were going to be acceptable to the Assembly, which had only a couple of weeks earlier reasserted its call for a progressive Charter. The potential for another damaging bust-up between Assembly and Ministers, of the kind seen after the Convention's signing, was growing and the Committee of Ministers was well aware of this risk.

Keen to temper relations between the two and avoid further damage to the Council's prestige, the Ministers sent back further instructions to the Social Committee in mid-December, drawing their attention to the 3rd Assembly draft – of which the Social Committee was already well aware – and asking them again to take account of the tone of the Assembly debate. Demonstrating a clear dissatisfaction with the approach adopted by the Social Committee to date the Ministers also requested, explicitly, that the Social Committee consider what measures could be adopted that 'moved beyond the merely declaratory'.²⁹ These instructions had little effect and while a spin-off working party was created in January 1957 to try and increase the speed of the drafting (with minimal success) the Social Committee continued to work along much the same lines. For reasons that are explored in the next section, when the Social Committee's full draft (Document 927) was completed in 1958 it showed no

²⁹ Secretariat memos confirm that this was a specific and slightly impatient attempt to check the conservative attitude of the Social Committee in the face of the heightened interest and activity of the Assembly.

signs of taking into account the tone of the Assembly draft nor of concerning itself with the content of the Assembly debate.

The problematic marriage of specificity and vagueness in the Committee's drafting style was reflected in the two-part structure of their proposed Charter. An opening statement of 'obligatory' but hopelessly vague and unenforceable principles in its first part were followed by a set of undertakings in the second part which were very much more tightly defined than and, consequently more limited than, any of those found in the Assembly drafts. While these undertakings did have some substance they were also only long-term aims couched in non-urgent terms. Furthermore a remarkable pick and mix model for ratification invited states to sign only those rights with which they were comfortable and made ratification conditional only on picking enough to satisfy a limited quota. To wrap things up the Committee draft envisaged no scrutiny beyond basic progress reports that would be considered by a mixture of political and expert actors. Compared to the first and third Assembly drafts this system looked extremely limited, and was only very marginally more substantial than the meager enforcement offering of the second Assembly draft.

This fragmented Charter, drained of even the significance of being a common statement of obligations still resembled a codification but it was a codification of only a very narrow set of rights with little common core. The broad sweep of the Assembly draft, with its implications for taxation, social services, welfare, and beyond was substantially absent. The aim of formulating a Charter of progressive European standards was sidelined with the whole of the Charter creating little more than a light bureaucracy of, non-binding, expert feedback.

In the hope of developing the Charter into something more meaningful the Social Committee draft was sent for consideration at a 'Tripartite Conference' of governmental, employer and workers' representatives.³⁰ This meeting, convened by the International Labour Organisation at the Committee of Ministers's Request, was, however, largely ineffective at changing the general structure of the Charter proposal and consisted mainly of close drafting changes to the already specific articles. Broad disagreement between the representative groups combined with a lack of impetus for the governmental representatives to accept any proposed change or compromise, ensured no meaningful amendment of the Social Committee Draft.³¹ Despite appeals from the Chairman of the Assembly's Committee on Social Questions to reinstate broad social aims (such as full employment), state representatives continuously insisted on the acceptance of only a small, core, 'nucleus of common obligations'. After the conference the Assembly's delegation reported back that the conference was excessively technical and that political discussion was intentionally stifled.³²

The conference findings, such as they were, and the draft Charter made one final lap around the Assembly,³³ its Committee on Social Questions,³⁴ the Committee of Ministers and its Social Committee before finally returning to the Committee of Ministers in December 1960. This text was signed as the

³⁰ The Social Committee being notified of this at their seventh session. *Minutes of the Social Committee Seventh Session* (CoEArch CM (58) 27, 7 March 1958)

³¹ International Labour Organisation, *Report of a Tripartite Conference Convened by the International Labour Organisation at the Request of the Council of Europe* (Geneva 1959)

³² Council of Europe Consultative Assembly delegation to the ILO Tripartite Conference, 'Social Charter and Tripartite Conference: Communication to the Recommendation 167' (CoEArch 942, 20 January 1959)

³³ CoEArch 927, April 1959

³⁴ CoEArch 1035, which was annexed to Consultative Assembly Opinion 32, January 1960

European Social Charter on 18 October 1961 in Turin. As with the Convention little concession was made to the Assembly in the final stages of the drafting. In effect little had changed over the latter years of the drafting except the willingness of the Committee of Ministers to accept the half-hearted instrument that was being proposed to them by their Social Committee.

In broad terms then the drafting process can be seen to resemble the Convention drafting in general direction of movement (ambitious, pro-federalist, ideas from the Assembly being toned down by Government representatives to create a final instrument that is ultimately unsatisfactory to its progenitors) while differing in a couple of crucial areas (notably the Assembly's internal disagreements, the bifurcated drafting process and the lack of any substantial use of the Assembly's output). Similarly the structure of the document contains some similar elements and tensions (such as the troubled marriage of vagueness and narrowness in the drafting of the document) with a number of novel departures (most notably the differentially enforced parts of the Charter and the fragmented system of ratification). As time has demonstrated, the end results were far from impressive.

While the Assembly could have perhaps submitted its more progressive ideas earlier or in a more united fashion it seems unlikely they would have received any warmer a hearing. The Social Committee appeared intent on going it alone and its refusal to abide by the Committee of Ministers guidance suggests some entrenched resistance to the Assembly's ideas from within the panel. In the next section I examine the Social Committee and show that its resistance stemmed principally from British contributions.

3. British Governmental Input

In this section I map the contributions of the British Government onto the processes described above and demonstrate that, in part continuity and part contrast to the Convention drafting, the Conservative Government were, from the outset, the most significant force of resistance to a developed, progressive or binding Charter. Considering both how and why the Government went about undermining the Charter, in this section I demonstrate that the Conservative resistance was a very significant driver behind the watering down of the Charter. As Conservative input was focused in the Social Committee this section concentrates on that side of the drafting process. Where relevant I also mention revealing speeches from the Assembly and further attention to the Conservatives in the Assembly is included at the end of the Labour section.

i. Early Resistance

That the British Government was not going to be supportive of the Charter was apparent in general terms from the very start of the project. From the first mentions of common social policy British representatives are singled out in the official records for the strength of their resistance.³⁵ The opening general criticism of the Charter was that ‘any single instrument could deal with social ‘rights’ only in the most general way’³⁶ and that ‘[t]o give effect to the principles concerned called for their elaboration in a series of detailed instruments ... the preparation of which was a matter primarily for the Specialised Agencies

³⁵ Only the British representatives were specifically identified with resistance in the minutes of the Assembly’s first Ad Hoc meeting of social experts.

³⁶ Council of Europe, ‘Report of Ad Hoc Committee’ (CoEArch CM (53) 99, 13 September 1953)

concerned.’³⁷ The degree of interest in some form of instrument was, however, too great for such a broad-brush rejection of the CoE even entering the social field. Attempting to trample further on what amounted, at that stage, to not much more than a scoping exercise, carried significant risks of marginalising the British representatives.

This starting position of suspicion, distrust and gentle attempts to derail the process in the Assembly continued with the British representative to the Committee of Ministers. Here the British were again singled out for their resistance, being minuted as having attempted to prevent the Committee from sending their ‘Special Message’ to the Assembly in 1954. We can extrapolate from the fact that the Special Message was sent in spite of British resistance that a two-thirds majority of the ministers must have approved of the Assembly’s general ideas and so, as with the Convention, the UK Government (albeit now of different political colour) found itself in a minority in the Council. Unsurprisingly the risk of finding the UK on the receiving end of another supranational rights instrument set off alarm bells in Whitehall. Unlike in the Convention drafting however the limited clout of the Council was now a known quantity and with a better appreciation of the Council’s institutional dynamics, preparations for an effective resistance were made from an early stage.

ii. Prospective Concerns Across Whitehall

Within Whitehall the Charter idea generated uneasiness and a uniform desire to limit the potential scope of any instrument that was to emerge. An early Foreign Office minute emphasises the sense of déjà-vu amongst civil servants and

³⁷ *ibid*

surprise at the return of rights instruments to the Council of Europe programme so soon after the Convention. As over the drafting of individual petition (discussed in chapter 4 below) officials appear to have formed a strong, and inaccurate, perception that the UK was isolated in its resistance to socio-economic rights.

One would have thought that, after the experience of drafting the U.N. Covenants, members of the council of Europe would have little enthusiasm for a European Social Charter, particularly for one which would impose binding obligations on governments. It appears however that this is not so and that practically nobody shares our dislike of the idea.³⁸

After the trials of the Convention drafting, anxious departments were quick to complain of issues, even where it was unclear they would arise. Fearing that the Charter was being proposed in a similar fashion to the Convention the Colonial Office wrote to the Ministry of Labour complaining that: 'a Social Charter on the lines proposed would be most inappropriate to prevailing conditions and in some cases policies in non-self-governing territories for which Her Majesty's Government are responsible.'³⁹ They made clear that they 'should therefore clearly prefer (i) that there should be no Charter at all; or (ii) if there is to be a Charter, it should take the form of a Declaration of Principles not a binding Covenant; and (iii) that the Charter in any form should avoid reference to non-self-governing-territories.'⁴⁰ This concern was ill founded, as no serious suggestion had been made that the Charter should have colonial application. The quickness to react, however, shows a greater engagement, presumably

³⁸ Cover Minute to file US 17331/1 (NatArch FO 371/112497)

³⁹ Letter from Colonial Office to J.G. Robertson, Ministry of Labour in file US 17331/2 (NatArch FO 371/11249, 3 Sept 1954)

⁴⁰ *ibid*

because of the Convention experience, than was present in the Convention drafting.

In terms of the more substantive objections of those closely involved in the work, the first reaction was that attempting to create a singular Charter in a one shot codification was neither desirable, nor likely to be terribly effective. In the Ministry of Labour's words '[t]he nature of the social objectives concerned does not lend itself to their being formulated in binding terms within the compass of a single general instrument'.⁴¹ Describing the new proposed protections as 'so-called economic and social rights' the objection continued:

[t]he protection of these "rights" is an evolutionary process, requiring constant adaptation to changing conditions many of which are outside the power of the State – they depend on the social and economic situation in the country and on world economic conditions. Therefore a State has not the same power to provide remedies for breaches of economic and social rights as it has in the case of civil and political rights.⁴²

As well as the issues raised by the forward looking aspect of many socio-economic topics the related division between codifying positive and codifying negative obligations was also emphasised as a Rubicon that should not be crossed (that the Convention had already generated a number of positive obligations was not yet appreciated). Law to constrain the state, as a means of increasing personal freedom, and law to oblige the state, as a means of increasing personal well being, were considered 'fundamentally different' in nature and the latter was rejected as an appropriate subject for regulation.⁴³ The issue of the appropriateness of codification in these areas also bleeds into a

⁴¹ Letter to Foreign Office from Ministry of Labour in file US 17331/1 (NatArch FO 371/112497, 26 August 1954)

⁴² *ibid*

⁴³ *ibid*

concern with further supranational proliferation and issues regarding the feasibility of drafting a useful Charter. Questioning the single instrument approach Joint Parliamentary Under-Secretary of State for Foreign Affairs, Anthony Nutting MP, 'wondered whether the Charter could do more than define social rights in extremely general terms and whether this would really be of any great value.'⁴⁴ Pointing again to the presence of existing and ongoing work in the field he further pondered 'whether there is really much to gain from drafting a European Social Charter [when] all the Member States of the Council of Europe were already parties to similar instruments such as the Universal Declaration on Human Rights or the Declaration under the ILO.'⁴⁵

Suspensions regarding the underlying motivations for the project circulated with the Foreign Office suggesting 'that France is handicapped by her high level of social services' and that the French representative 'regard[ed] the Social Charter as a possible device for forcing up production costs among France's competitors'.⁴⁶ In addition to warning the Ministry of Labour that they would 'have to be even more careful to forestall the other experts'⁴⁷ given the questionable nature of the subject matter and the unknown loyalties of the other parties present, the Foreign Office had also learned from previous mistakes and were concerned to avoid unsatisfactory technical and drafting input from non-governmental staff. A further letter to the Ministry of Labour thus made clear:

⁴⁴ CoEArch CM(54)CR 3

⁴⁵ *ibid*

⁴⁶ RF Stretton, 'cover minute' to file US 1733/1 (NatArch FO 371/112497, 24 September 1954)

⁴⁷ *Ibid*.

we should try to avoid the Secretariat being asked to do a draft of the Charter or of individual articles for the consideration of Governments. The Secretariat of the Council of Europe are notoriously lacking in technical competence in this field and it would be dangerous to let them suggest the initial pattern.⁴⁸

Lacking confidence in the secretariat, the other member states and with the threat of Assembly intervention it was thus crucial that the UK find some way to manoeuvre the Charter drafting into a cul-de-sac.

iii. Taking the Initiative in the Social Committee

To avoid losing control of the drafting process, the Foreign Office had advised from the start that it would be better 'if the UK representatives were prepared to make constructive suggestions about the form the Charter might take'⁴⁹ rather than continuously attempting to reel in the perceived excesses of others drafts. Not resisting too firmly was preferable as 'this would look to 'show willing' and encourage the production of a draft acceptable to HMG.'⁵⁰ Drawing parallels with the Convention this policy of staying within the mainstream, working on an acceptable Charter from within a group rather than attacking it from the fringes, is reminiscent of the Foreign Office advice made in connection with the enforcement articles of the Convention (discussed in Chapter 4 section 2 below). The success of this tactic in ameliorating the enforcement components of the Convention in the final stages of drafting was so successful, however, that the repetition of the tactic is unsurprising.

To maximise British chances of maintaining some semblance of control over the drafting one critical factor was ensuring a suitable forum for discussion

⁴⁸ Letter to M.P.L. Attlee, Foreign Office, from J.G. Robertson, Ministry of Labour in file US 1733/1 (NatArch FO 371/112497, 26th August 1954)

⁴⁹ Cover minute to file US 17331/1 (NatArch FO 371/112497, 10 September 1954)

⁵⁰ *ibid*

was obtained. Again, providing a direct mirroring of the Convention, the Government realised that it was essential to minimise the input of the Assembly and to work up the text in small committees where British diplomats could maximise their influence. Learning from the Convention, rather than struggling against a pre-drafted Assembly text, the Government identified the importance of starting with a clean slate. Committee minutes indicate that the British minister, Mr Nutting, lobbied hard to ensure that the responsibility for drafting was not returned to the Assembly at the time of their Special Message and instead should be forwarded on to a fresh committee.⁵¹

As described in the above section this new forum was a crucial element in restricting the exposure of the drafters to progressive propositions. The value of the Social Committee as the locus of discussion was further enhanced by the appointment of Geoffrey Vesey (the British Under-Secretary of State from the Ministry of Labour and National Service) as the Committee's Chairman, giving the British a guiding hand over the negotiations. While certainly not as satisfactory as a complete abandonment of the Charter idea, wresting control over the drafting process away from the Assembly and depositing it into the pragmatic hands of a British chaired governmental Committee was ample consolation. Responding to the success Foreign Office civil servants expressed the hope that: 'the Social Committee, which is composed of official representatives will take a more realistic view.'⁵²

Another strategy directly mirroring that applied during the Convention drafting was the suggestion by another Foreign Office civil servant that '[t]he

⁵¹ CoEArch CM (54) CR3

⁵² Letter from Mr Nutting, Foreign Office, to Mr Watkinson (NatArch WU 10727/44, 4 August 1954)

U.K. delegation should have at least a draft outline for the Social Charter framed positively, so that the Delegation do not [illegible] have a somewhat negative line to take on all the headings suggested.’⁵³ The suggestion here combines the tactic of attempting to pitch the UK’s resistance as constructive rather than obstructive, as seen in the optional article negotiations (see Chapter 4 section 2.i) and the general approach of submitting its own draft as an attempt to set at least an acceptable departure point for the instrument (as explored in Chapter 2 section 3). The Foreign Office pursued this approach, drawing up an extremely brief draft Charter containing a handful of short, relatively clearly defined, but non-binding, rights, and forwarding this to the British representative.

In these actions the Foreign Office laid the groundwork for the Government’s resistance. From here the diplomatic lead passed to the Ministry of Labour delegation as the Government’s representatives in the Social Committee. The relative lack of experience of the Ministry of Labour was of some concern to the Foreign Office who later commented in an internal memo that they *‘always behaved as if a fate worse than death awaited them in the Social Cttee.’*⁵⁴ However, anything that was lacked in confidence was more than made up in clarity of purpose with the Ministry notifying the other interested departments of their opinion that: *‘[i]t is clear that our first objective should be to keep the Charter to a statement of general principles without binding obligations.’*⁵⁵

⁵³ Unattributed minute (NatArch WU 10727/44, 22 September 1954)

⁵⁴ RF Stretton ‘Cover Minute to file File US/17331/3’ (NatArch FO 371/11249, 8th November 1954)

⁵⁵ Ministry of Labour ‘Attachment to Letter to Foreign Office from Ministry of Labour’ (NatArch FO 371/112497, 26th August 1954)

The expectation that the UK was in for a hostile reception over the Charter in the Social Committee was, as with the previous expectations in relation to individual petition, to prove exaggerated. The first reports were encouraging. Delegates were '*not at all as enthusiastic as the Committee of Ministers and their Deputies*',⁵⁶ and the French delegation, far from the masterminds of a stealth attack on British labour competitiveness, actually sought to postpone the drafting process indefinitely.⁵⁷ The mood was so circumspect that the Ministry of Labour delegation actually decided to hold off from taking the initiative as planned and instead to wait to see whether the obvious disagreements between members of the Committee would escalate by themselves.⁵⁸

The news was not all encouraging however. Once the work of drafting begun it became evident that a few governments' representatives were looking for a Charter that went some way beyond the declaratory. In particular Belgium stood out as being the most proactive in pressing for a Charter with binding elements while Italy, Greece and Sweden also voiced their support.⁵⁹ Despite the clear majority being either against concrete obligations or not yet inclined to speak out in their favour, this vocal minority insisted that alternative drafts be produced with binding terms so that the Committee of Ministers could decide. As such the drafting process began with division, bifurcated at an early stage

⁵⁶ British Delegation to the Council of Europe, 'Notes on the Record of First Session of the Social Committee, Cover Minute to file US/17331/3' (NatArch FO 371/112497, undated)

⁵⁷ Though when considered against the CoEArch minutes (CE/Soc (55) 1) of the meetings (4–7 October 1954) there is no clear reference to such a motion so this may have been an informal observation.

⁵⁸ NatArch US/17331/3

⁵⁹ (n 28) 2-3

with attentions divided and separate versions of each right being drafted.⁶⁰ In another direct repetition from the Convention drafting, the issue of drafting style risked generating another semi-civil style code with little clarity and no obvious limits on its extent. Worse still, one of the Foreign Office's fears appeared to be becoming substantiated with the Secretariat-General being instructed to prepare a documentary survey of existing work in the field before the next Social Committee Meeting.

Now that things had begun not to go the Government's way the delegation took to action stations. The UK representative began the fight back by insisting that the secretariat survey should not include any attempt to prepare any draft wording or even any indication of the form or contents of the Charter.⁶¹ He also attempted to constrain the scope of the enquiry, asserting that for now the Charter could not go beyond a cursory definition of objectives (emphasising the voluminous nature of more specific I.L.O. instruments). Insisting that only consideration of overarching principles could be dealt with in the first instance, he asserted that discussion of specific binding principles would have to be indefinitely postponed, until all more general discussions had been held (avoiding the issue of deciding on the detail of articles before deciding on their force, as occurred in the Convention case).⁶² Further still he suggested that, to make the Committee's task more practicable, for the time being it would be best to limit consideration to economic rights pertaining to employment and

⁶⁰ *ibid*

⁶¹ *ibid* ESCTP 59

⁶² CoEArch CE/Soc (55) 1 at ESCTP vol 1, 58

working conditions, these being comparatively simpler to agree than the social rights.⁶³

Having ramped up the tension somewhat it became clear that even preliminary agreement amongst the representatives was going to require significant consultation with the member state governments. Here again the UK representative took the initiative, proposing the preparation of a questionnaire that would ask what kinds of right would be acceptable and whether they would be acceptable in declaratory or binding forms.⁶⁴ This exercise served to draw the non-vocal middle ground of member states into admitting their lack of willingness to be bound and again broke the development of any momentum.

iv. Defeating the Assembly Draft

Responses to the first questionnaire revealed only a limited appetite from member state governments for binding terms.⁶⁵ I deal with the UK's response in more detail below but in brief terms it was the most strongly restrictive in outlook, containing detailed criticism of every single article and also indicating after each individual article that anything other than a purely declaratory form would be unacceptable.⁶⁶ While, in the opposite direction the UK did propose that social security might be added to the Charter and suggested further

⁶³ CoEArch CE/Soc (55) 9

⁶⁴ Social Committee Second Session, 1955, CoEArch CE/Soc (55) 9

⁶⁵ Responses ranged from the 'right to leisure' where none were in favour of binding terms and the 'right to work', where only Luxembourg were in favour, to the article dealing with special protection for children and young persons in employment where Luxembourg, the Netherlands, Norway and the Saar all backed binding obligations, Denmark, France, Greece and Italy expressed no preference and only Belgium, Democratic Republic of Germany, Turkey and the UK preferred a declaration. *ibid*

⁶⁶ Social Committee 'Third Session – European Social Charter (Rights Relating to Employment and Working Conditions) Report prepared by the Social Division of the Research Directorate on the basis of the replies from Governments to the Questionnaires drawn up by the Social Committee' (CoEArch CE/Soc (56) 4) at ESCTP vol 3, 668

consideration of health issues, this can be seen as delivering on the strategy of attempting to remain constructive and, in any case, both issues existed in areas where, thanks to the legacy of the Attlee regime, the UK was safely ahead of the curve.

As the Assembly draft neared 'completion' the debate entered a crucial stage where, having settled on the extent of the substantive terms of the instrument, there was a risk that it might be picked up by those states favourable to a binding document and allowed to overtake the Social Committee's work. After the Social Committee's second meeting the Ministry of Labour representative wrote to the Foreign Office warning of the traction that the Assembly text was gaining within the Council and the efforts being made by the secretariat to cement its legitimacy to the detriment of the Social Committee's (and consequently the UK's) influence.

The Secretariat suggested that the text now being drafted by the Assembly could be submitted to the United Nations and the I.L.O. for their views, before being referred to the Social Committee as a basis for its further work on the Charter, and that the Social Committee might later get together with the Assembly's Committee on Social Questions to work out a mutually acceptable version.⁶⁷

Fortunately for the UK the Social Committee was collectively affronted by this suggestion and rallied against it.

*A more objectionable proposal could not have been made, and the Committee as a whole were agreed not only that it must go ahead with its task as instructed by the Committee of Ministers, but also that it was important to avoid a situation which the Assembly's text went forward as a formal Recommendation or received publicity outside the Council of Europe, raising hopes which Governments would probably be unable to fulfill.*⁶⁸

⁶⁷ Letter from Robertson Ministry of Labour to R. F. Stretton, Foreign Office (NatArch C0936/300, 12 May 1955)

⁶⁸ *ibid*

Into this relatively hospitable environment the UK submitted its draft in the form of a 'working paper' titled unassumingly as a *'Preliminary Draft of Articles for Possible Inclusion in a European Social Charter'*.⁶⁹ Attempting to capture the mood, rather than introducing the document as an expression of British preferences, it was instead framed as a draft based on the collected Member State responses to the questionnaire, with Britain acting purely as a mediator (a proposal greatly facilitated by the UK's chairmanship). This presentation was entirely disingenuous as the text significantly pre-dated the questionnaire and its responses. The fact that the document slavishly followed the British line was defended on the basis that they had sought to draft the Charter in such terms as would be acceptable to all and, as Britain was the most reserved state present, this meant that it was forced to limit the text to that which was acceptable to them.

The UK draft's submission and the Assembly's Document 488 went head-to-head at the third session of the Social Committee. While the Committee was known to be hostile towards the Assembly's work, the UK draft was a much less developed text. The Italian representative complained 'that the European community should have an obligatory social Charter if it really wished to make any progress',⁷⁰ while the Belgian representative noted that the document had been 'drafted in very vague terms' and that this was not a necessary correlate of a declaratory approach.⁷¹ However, as the key UK goal was simply the adoption of the British text as a starting point for a more detailed, and non-Assembly

⁶⁹ CoEArch CE/Soc (56) 7, 27 April 1956

⁷⁰ ESCTP vol 3, 760

⁷¹ *ibid*

based instrument, rather than resisting such complaints the British representative embraced them. Accepting that the UK draft would need to be '*considerably amended*' Veysey leveraged his position as Chairman and suggested the formation of a working committee to make these alterations. Offering so little resistance, and against the backdrop of the Committee's general antipathy towards the Assembly's efforts, the British text was adopted and the Assembly text abandoned. In the light of the very significant difficulties that arose out of the attempted merging of British and Assembly drafts of the Convention, as exposed in Chapter 2, the importance of this success can be seen to be of great significance.

Reporting back to Whitehall, with apparent relief, a Ministry of Labour civil servant commended the Foreign Office's strategy:

[i]t was well that we went prepared to put in a preliminary draft text, for without that it is virtually certain that the Committee would have taken up the Assembly's draft as the basis of its own work. ... [W]hile we cannot assume with much confidence that the draft will keep the general shape that it now has nor that we shall be able to exclude all of the many suggestions for introducing more detailed proposals, it is satisfactory that we have succeeded in starting it off on what we believe to be the right lines.⁷²

The recalcitrance of the Committee did not go unnoticed and the Secretariat criticised the system of definition '**resorted to** by the Social Committee, on the proposal of the United Kingdom delegation'⁷³ (emphasis added) for being too restrictive (making comparison to the abandoned Document 488). This led to

⁷² Letter from Ministry of Labour (J.G. Robertson) to Foreign Office (W.N. Hugh-Jones) CCd to Home Office, Colonial Office, Ministry of Health, Ministry of Education, Ministry of Pensions and National Insurance, Board of Trade and Ministry of Labour Northern Ireland (NatArch PIN 34/165, 3 May 1956)

⁷³ Council of Europe Research Directorate, 'European Social Charter – Study of the nature, definition and legal scope of social and economic rights' (CoEArch CE/Soc (56) 15, 26 October 1956)

the critical Committee of Ministers resolution in December 1956 and the imposition of an aggressive timeline for completion. As mentioned in the first section, this did little to bridge the divide between those preferring a declaratory charter and those seeking some binding elements. It did, however, serve to accelerate the development of the Charter along the lines of the current best compromise (i.e. those laid for it by the British draft).

So far then the picture is one of a more careful and engaged strategy than was adopted in relation to the Convention. In place of the haphazard early interactions between the Attlee Government and the Council, affording the Assembly the opportunity to build momentum behind their work, the Charter drafting saw the Churchill and Eden administrations at the centre of the debate. While this was a different position for the British Government, from the Conservative perspective this was not a change but rather continuity. Aware of the mores of the Assembly, they were well versed on how to achieve their desired results. For the involved departments, and particularly the Foreign Office, lessons also appear to have been learned from the Convention drafting and while tactics such as submission of a minority draft were reused, they were employed far more strategically and effectively.

While there was further input from the British representatives steering the Charter to its limited conclusion the events outlined above detail the crucial efforts through which the real damage was done to any prospect of a binding instrument. By dominating the Social Committee the UK dominated the entire process as the rest of the Committee dutifully endorsed the Committee's work externally despite their differences internally. The International Labour Organisation's tripartite conference demonstrates this particularly well with a

Ministry of Labour letter reporting that proposals of the trade unionist workers' group were rejected on principle 'for the general reason that the Social Committee's text ought to be defended wherever possible.'⁷⁴

Having adopted the safe approach of rejecting, resisting or lodging reservations in respect of any article that the UK was not already compliant with, the end Charter bore barely any progressive or forward-looking elements at all. The signing of the Charter received no coverage in the mainstream British media though this was nothing new as the Charter had been mentioned only twice in the Times during almost eight years of drafting. Of these two only one⁷⁵ was substantively concerned with the Charter and this served only to bemoan the waste of time and energy spent on drafting a document which contained hardly anything 'which is not already included with greater precision in conventions and recommendations of the I.L.O.'⁷⁶ This lack of energy or feeling in the UK is another area where the Charter drafting is reminiscent of the Convention drafting with none of the Westminster parties seeing any value in stirring up domestic opinion. Here the relationship between the parties is somewhat different as one might have expected a Labour opposition to raise concerns over Conservative demolition of economic rights initiatives, Why they did not is considered in section 5 but, before that, I complete my survey of the Conservative approach and tactics in the Charter drafting by considering the question of attitude and establishing why the Conservatives were so opposed.

⁷⁴ Letter from C.A. Larsen, Ministry of Labour to Ministry of Social Security' (NatArch PIN 34/165, 5 February 1959)

⁷⁵ The other merely noted the occasion of the ILO's conference. Times Reporter, 'European Social Charter' *The Times* (London, 28 November 1958) 11

⁷⁶ Times Legal Correspondent, 'Strasbourg Talks On European Social Charter – Eighteen "Rights" As Aims Of Policy' *The Times* (London, 24 November 1958) 12

4. Principles of Objection

Having considered the strategic aims of the Conservative administration over the course of the drafting and the Conservative years of government (spanning the premierships of Churchill, Eden and Macmillan) in this section I apply my analytical framework to consider and compare the objections held by the Conservative Government in the Charter drafting to those identified in respect of the Labour administration during the Convention drafting.

While the ferocity of the resistance to the Charter might make it appear that there was just a singular principled objection, as with the previous chapter, when this is examined more closely one can unpack evidence of all the same four core points of resistance.

i. Codification

The principal objection in 1953 Whitehall pertained to codification and this would remain the case throughout the course of the drafting. As discussed in Chapter 2, the Conservatives were far from comfortable with the transition of social principles into legal constructs and this issue lay at the heart of the UK's resistance. While often masked by the noise of concerns over binding supranational rights, the codificatory underpinnings of Conservative concern show through in the continued and ferocious resistance to even weak formulations of the Charter. That resistance continued, even where the effect of the Charter would be only to compel domestic regulation with next to no supranational and potentially no judicial oversight. This strongly suggests an objection to codification rather than just to a loss of sovereignty. Such evidence

can be seen both in the language used by the delegates and also in the formal UK responses to the Social Committee's questionnaires.

At the core of the UK draft of the Charter lay an attempt to downgrade proposals for legal rights into a set of semi-specific guidelines that demanded no action. While the document was presented as a set of obligations, the emphasis was on creating stipulations so weak as to avoid creating substantive law. The brief instrument 'protected' social rights only indirectly via 'the attainment of conditions in which the rights and principles set forth herein may be realised'.⁷⁷ Despite such obligations being so hopelessly vague as to be entirely unenforceable the delegation would later claim that this wording gave the Charter a core of obligation that took the document well above the level of a mere declaration.⁷⁸ With only slight modification, this formulation went on to be used as the framing for the first part of the Charter, the only core content of the Charter that was required to be accepted by all signatories.

The push for the weakest possible formulations is also seen throughout the later stages of the drafting. In the UK's response to the second Social Committee questionnaire it proposed only two small tweaks but both sought to turn already weak obligations into mere suggestions.⁷⁹ When debating declaratory formulations a German proposal employing the, already weak, wording '*will endeavour*' was rejected outright as being pseudo-binding with the British Government proposing instead that Governments would merely 'undertake to accept as an aim of policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in

⁷⁷ CoEArch CE/Soc (56) 7 – 27 April 1956 ESCTP vol 3, 732

⁷⁸ ESCTP vol 4, 59

⁷⁹ CoEArch CE/SOC (56) 14 – 5 October 1956

which the full enjoyment of these rights could be realised'.⁸⁰ For the more 'binding' versions of the rights contained in the second part of the Charter the British even argued for phrasing using the equivocal 'should' rather than 'shall'.⁸¹ In all cases they emphasised the importance of making a Charter acceptable to all (where 'acceptable to all' remained shorthand for 'acceptable to the UK') and in reality the underlying aim remained avoiding any transition of governance norms into legal rights.

All attempts were made to preserve governmental flexibility and autonomy in the setting of policy. Much reference was made in the Assembly to a 'British approach' to achieving social ends with consequent resistance towards any setting in stone of narrow principles or specific methodologies. In the words of Conservative Assembly delegate, Dame Florence Horsbrugh, here speaking on the provision of social services:

I want to make it clear that I do not believe that a British Government of any political party could ratify this particular Charter in the way in which it is at present framed ... [i]n my country we are very proud of having some diversity in the methods by which we arrange our affairs.⁸²

Such a general resistance to any interference with domestic flexibility around social policy-making seems to follow on from the Convention drafting where the codification was objectionable as much on principle as in practice.

One area in which socio-economic rights codification posed a major threat to the status quo was the system of British labour relations. In a 1954 letter to the Foreign Office, the Ministry of Labour noted:

[a] number of the subjects likely to be included in the Charter

⁸⁰ ESCTP vol 4, 61

⁸¹ ESCTP vol 4, 760-784

⁸² ESCTP vol 3, 515

are in the field of industrial relations – pay and conditions of work, for example. The industrial relations system of some countries (of which the United Kingdom is one) leaves such matters to free negotiation between organisations of workers and employers. It is inappropriate in such cases to impose positive obligations on the State to guarantee the enjoyment of the “rights” in question.⁸³

This point punctuates the archive materials, being raised periodically in the Assembly.⁸⁴ The depth of the labour relations issue is explored further in the next section. In a discussion over protection for paid annual leave Dame Florence Horsbrugh commented that:

I speak for my colleagues as well as for myself when I say that we agree whole-heartedly with that policy in principle, but in my country the Government would be most reluctant to legislate on it, for the reason that in the United Kingdom questions of holidays for workers, and other matters of greatest importance to workers, such as wages and conditions of work, are decided upon by negotiation between the trade unions and the employers.⁸⁵

In more general terms she explained: ‘[w]e have diversity. There may be differences in scheme between one industry and another but we leave it to those parties to negotiate. That is our tradition and I cannot imagine any British Government would be able or would wish to depart from it.’⁸⁶ Even rights as innocuous as the proposed workers’ right ‘to join a union of his choice’ were viewed as unacceptable by the British Government with the Ministry of Labour warning that such a workers’ right would conflict with ‘the *rights of trade unions as regards their own membership*’, or in other words, that it could hamper the

⁸³ Letter from Ministry of Labour to Foreign Office (NatArch US 17331/1, 26 August 1954)

⁸⁴ See, for example, a letter from the Ministry of Labour to the Board of Trade dated 7 April 1956 noting the importance of non-governmental, voluntary, collective bargaining between employers and workers and noting the undesirable adverse implications of the Charter for the trade unions.

⁸⁵ ESCTP vol 3, 524

⁸⁶ ESCTP vol 3, 516

operation of closed shops.⁸⁷

While Conservative resistance to the creation of workers' rights is not a great surprise, it might be expected to be out of an anti-union attitude rather than out of efforts to shield the unions from external influence. This concern with union autonomy is easily explained as a result of the uneasy relationship between the Conservatives and the risk that any departure from the status quo might spark painful conflict. While the Conservatives had once been willing to interfere with the unions, and had persevered in their last major attempt to reform the unions back in the 1920s, they could no longer be assured of such success. The unions had grown in size and influence since the second World War⁸⁸ and while the Conservatives would have liked to curb union power (not to mention wages) ongoing economic problems (such as the continuing growth in inflation and falling value of sterling) ensured that their approach was, for the time being, conciliatory.⁸⁹ Serious industrial trouble would have benefited no one and, consequently the kid gloves were on. The Conservative policy of non-interference can be seen in Churchill's refusal to re-enact the Trades Disputes Act of 1927 upon his re-election in 1951, a hands-off approach justified using the same language as would be used in the Charter drafting (stating that such matters 'may well be left to common sense and the British way of doing

⁸⁷ Draft guidance note for Consultative Assembly Discussion (NatArch PIN 34/165, early 1956)

⁸⁸ D Barnes and E Reid, *Governments and Trade Unions: The British Experience, 1964-79* (Heinemann 1980) 2

⁸⁹ A Campbell, N Fishman and J McIlroy, 'The Post-War Compromise: Mapping Industrial Politics, 1945-64' in A Campbell, N Fishman and J McIlroy (eds.), *British Trade Unions and Industrial Politics: The Post-War Compromise, 1945-64* (Ashgate 1999) 79

things').⁹⁰

A second major codificatory issue for the British regarded potential interactions with regional governance. Local government in the United Kingdom, particularly prior to the 1972 Local Government Act, was substantial and convoluted. Amongst the patchwork of statutory counties, administrative counties, county boroughs, municipal boroughs, counties corporate and civil parishes a significant proportion of social and economic governance occurred outside of the direct control, or even supervision, of central government. To create even weak obligations that would be binding on the state risked making Westminster directly liable for much of the activity of these local and regional bodies. Of particular concern was the proposal that some articles should contain 'residual obligations' whereby the state would be obliged to step in to ensure provision where external organisations normally responsible for the relevant area of provision failed to fulfill their obligations.

Between the trade union issues, covering much of the economic content of the Charter, and the local government subsidiarity issue, covering much of the social content, one can see that the Government had very particular codificatory reasons to resist much of the Charter. While UK resistance to the Convention on codificatory grounds was, to a certain degree, dogmatic, a trenchant defence for the principle of Parliamentary sovereignty, in the Charter debates it was supported by at least two very significant substantive obstacles and takes on primary status amongst the grounds for objection.

⁹⁰ M Stewart, *Trade Unions in Europe* (Gower Press 1974) 184

ii. Supranationalism

While the issue of codification appears to be the most fundamental and runs through many of the practical objections raised to the Charter it is still possible to single out some signs of specific supranational concerns. The Government's direct, unequivocal and blanket resistance to binding formulations of any of the proposed rights (expressed most explicitly in the first questionnaire response) may be largely explained on the basis of objection to any codification but, as one might expect the major importance of supranational resistance during the Convention drafting, the issue again raised its head in the Charter drafting.

Signs of a distinct resistance to the raising of rights into the supranational domain can be most clearly distinguished in connection with those rights where extensive domestic regulation already existed in English law. In relation to rights such as the protection of children in the workplace the UK already enjoyed a well-developed legislative regime that comfortably exceeded anything proposed in the Charter and which was already judicially enforced in the UK. Despite this there was little willingness to give ground on formulations of these rights and there is nothing to distinguish the terms of resistance to those rights where the UK had already legislated effectively from those where it might arguably have found itself in breach. This shows that the UK was not simply concerned about the Charter breaking new codificatory ground in expanding the scope of legal protection for social rights, nor that it was concerned about creating new areas of judicial oversight.

Supranationalist concerns also emerge in the desire to subdue the proliferation of international instruments. Reference was made above to several Whitehall comments questioning the suitability of a single document when

existing work had been and continued to be done by organisations such as the I.L.O. and the UN. In the Assembly this was echoed by the Conservative delegation with Dame Florence Horsbrugh stating that she *'feared that the Chamber would duplicate the work of the I.L.O.'*⁹¹

In contrast to the Convention drafting there is nothing to suggest that concerns were raised about the Charter risking prejudicing the UK's external negotiating position (for instance in the UN where the ICESCR drafting was still in progress). The view that the Charter, where limited in its aims, was unnecessarily duplicating existing work and, where expansive, was stepping outside the legitimate scope of an international document does, however, bear moderate resemblance to the Convention drafting. Specific supranational concern may be broader than this but at least in those articles where legislation had already been passed we can be confident the primary objection was further development of the supranational domain. Given the invasive aspirations of the Assembly for centralisation of social policy, such resistance is entirely unsurprising.

iii. Drafting

The third category of drafting differences again seems obviously to have been important but, through its overlap with the previous two areas, is somewhat harder to isolate. That said, there are several points at which objections are made that appear to arise specifically as a result of concern over linguistic form without the heavy overtones of codificatory impact or supranational legitimacy.

⁹¹ ESCTP vol 3, 454

The first discrete treatment of drafting issues can be seen in the Assembly with Dame Florence Horsbrugh outlining the challenges involved in reaching agreement on a Charter. Identifying the particular problem of drafting an instrument within a complex policy space she noted both the diversity of situations that need to be covered and also the need to be exacting and precise. The puzzle of drafting a charter that would be general enough to cover broad swathes of social and economic policy but specific enough to avoid leaving any unfortunate gaps was, in her view, '*almost insoluble*'.⁹² Urging caution she rejected the prospective approach stating:

I have sometimes felt that we look too far to the ideal. ... I look on the Charter as the top, the peak, the high standard, and I say to myself, "Are we all sure we are going to start to get there?" Enthusiasm for words in a Charter, enthusiasm for voting for certain provisions in a Charter, is not enough.⁹³

At another point she also avers that '[a]s I read the Charter it seemed to me that in one article we have become, rightly, more general and, in the next too precise, with too much detail of method put in.'⁹⁴ While this pressure could have also stemmed from the issues with codification, when faced in the Social Committee with a proposal that would have radically simplified the spiralling Charter draft from three overlapping parts to one,⁹⁵ it was resisted forcefully by Veysey in favour of a lengthy and convoluted draft.

While superficially counter-intuitive from the approach of minimising the Charter's codificatory coverage, this action again displays the precautionary practice adopted in connection with the Convention, where Government

⁹² CoEArch ESCTP vol 3, 513

⁹³ *ibid*

⁹⁴ Council of Europe Consultative Assembly Minutes from 20 April 1956 ESCTP vol 3, 513

⁹⁵ *Ibid* Appendix VII

representatives sought out an extensively drafted but non-specific document. As discussed in chapter 2 this aim involved the uncomfortable marriage of two separate and partially conflicting aims. The first is the desire to limit flexibility in interpretation by drafting using common-law-style rigorous definitions of rights and the exceptions to those rights (rather than civil law style interpretable principles). The second element is to avoid the terms of the rights from actually being too specific so as to avoid risk of the terms becoming specific enough to pose a concrete and unavoidable obstacle.⁹⁶ While both components aim at avoiding the chance of being found in breach they do exhibit an obvious tension with one another. This tension is as apparent in the Charter drafting as in the Convention though with the notable difference that it was accepted that the UK would not be in line with all of the proposed terms of the Charter. As such more effort was put into ensuring the rights were non-specific than in creating closely defined exceptions, this underlies the value of the multi-part Charter to British objectives as it enabled the use of vaguer drafting terms to be used in the more declaratory section and the more detailed language in the latter, more binding, section.

Unlike during the Convention drafting, the realisation dawned in Whitehall, albeit rather too late to alter the text, that the pursuit of vague and non-specific rights was not an ideal way of avoiding accusations of breach and that the mildly enforceable but incredibly vague first part of the Charter was actually something of a liability. In a Foreign Office minute of 1958 an Assistant

⁹⁶ As a result some of the rights were so vague that the different member states were not even speaking about the same kind of right. The 'right to leisure', for instance, was variously understood as a right to annual leave (paid or otherwise), a limit on the maximum number of working hours in the week, and/or a responsibility to ensure adequate provision of leisure facilities.

Legal Advisor, who had just received the completed Social Committee draft, complained:

I realise that this draft Charter in various respects reflects efforts made by the United Kingdom representatives on the Social Committee to obtain a text acceptable to H.M.G. I am accordingly sorry to have to say that in my view it is an unsatisfactory document, ... [In earlier minutes] I said that I had no enthusiasm for the idea of proceeding by way of a combination of declaration and binding provisions. I also indicated objections to having the portion of the Charter which is meant to be purely declaratory included in the operative part. Now that I have seen what has emerged from the Social Committee, I regret that I was not more emphatic. ... That [an] obligation may be an imprecise one does not prevent it from being an obligation [and] where there is an imprecise obligation, while the lack of precision gives room to argue that there has been no breach of it, it equally gives room for argument that there has been such a breach.⁹⁷

This warning was unheeded and, given the successful ablation of supervisory terms, proved unnecessarily pessimistic, but this interjection does show a growing awareness that serious substantive engagement was required with relation to international drafting exercises and that the approach adopted heretofore was potentially risky (as was becoming apparent in the first few ECHR petitions).

Overall, exclusively drafting-based concerns do not appear to have played a major influence over the Charter drafting. While specific concerns were raised, these largely fell within the aegis of the higher-level codificatory and supranational concerns detailed above. Against the Convention, the importance of substantive issues appears to have been somewhat less. This reduction can mainly be attributed, however, to the Government's success in getting its draft adopted as the basis for further work, thus avoiding the substantial difficulties

⁹⁷ Cover minute to File WUC17331/1 by P.L. Bushe-Fox (NatArch FO 371/137785, 21 January 1958)

that previously arose through the Convention's awkward marriage of competing texts. Had the Charter been enforceable then similar problems would still have arisen but through successful avoidance of any substantial means of enforcement the issue became a moot one.

iv. Judicialisation

Remaining on this issue of enforcement, the final area of concern identified in the Convention drafting is that of judicialisation. While this was a very significant issue in the Convention drafting, with the Attlee administration being concerned to avoid a transfer of oversight and authority to the courts at a time of centralisation and enhanced Government control, the issue did not feature so significantly in the Social Committee's drafting. This reduced emphasis can also be attributed to the UK's early success in ensuring that no serious proposal for an enforcement body made it into the Social Committee negotiations. This is not to say that a proposed shift of authority in social and economic areas towards the Courts would not have constituted a very significant obstacle in other circumstances but for the majority of social rights there were prior objections at the codificatory stage and so suitability for determination by a judicial authority was not a significant feature of the drafting.

One possible candidate for a specific judicialising objection is the rejection of the proposed 'Right of Access of Migrant workers to Jobs' (i.e. free movement of labour) which was described as '*unrealistic and inappropriate for inclusion*'.⁹⁸ This article could be seen as a codificatory objection but given the

⁹⁸ ESCTP vol 4, 59

growing tensions over Commonwealth immigration⁹⁹ this may be more appropriately considered in terms of the desire to protect executive mobility from judicial interference. Another, albeit weaker example, also from the third questionnaire response, saw articles on industrial relations labeled as unacceptable by the UK on the basis that the arbitral procedures they required were not suitable. This, while ostensibly being a specific objection to judicialisation, must also be considered as being in large part a concern flowing from the labour relations codificatory issue dealt with above. In terms of the general drafting pressure for declaratory form there are glimmers of evidence to suggest specific concern with judicialisation. One Conservative comment in the Social Committee's third session (in 1956), on the right to work, was that 'if the Charter is based on broad statements, such as particularly the right to work, the Governments will have difficulties in accepting any binding obligations.'¹⁰⁰ Taken the other way round this suggests that revised formulations of certain rights, which did not envisage judicial or quasi-judicial scrutiny, might be acceptable.

Overall the conflict in the assembly over forms of enforcement took the wind out of any serious prospects for significant measures of judicialisation. Had this not been the case then it is probably safe to presume that the UK's reaction would have been robust but in the end the Government were never really tested on the issue.

Overall then the objections to the Charter from the Conservative Government demonstrate significant continuity with the objection to the

⁹⁹ The Commonwealth Immigrants Act 1962 coming only shortly after the Charter's acceptance.

¹⁰⁰ CoEArch CE/Soc (56) 4, 716

Convention from the Labour Government. These commonalities not only relate to tactics, such as the insertion of a British model text, the pursuit of a common law style of drafting (in tension with attempts to leave the document unspecific) and the avoidance of any public debate in the UK. They also cover the four fundamental areas of concern identified in the second chapter, namely, safeguarding British legislative and executive autonomy through resistance to extensive codification, objecting to transfer of power to the supranational level, obstructing growth of judicial oversight and specific substantive concerns with the draft texts developed.

On the other hand there are also clear discontinuities. Specific obstacles that had been so central to the anti-Convention argument, such as fear of communist abuse, and colonial issues (considered in Chapter 4 section 2ii) were far less evident in the Charter drafting.¹⁰¹ While the creation of a European supranational rights instrument was in itself the main cause of concern in the Convention drafting, the loss of the belief that Britain would be in line with all of the rights led instead to a principle concern with what was and was not suitable for codification in a rights instrument. The key shift appears then to be from a fairly even spread of objections under the four heads, with a little extra emphasis on the supranational, to a narrower pattern of obstacles with a very much heavier emphasis on the codificatory. Put simply where the Labour resistance to the Convention was a broad fight against the emerging authority of

¹⁰¹ The only occasion on which the possibility of extending the Charter to colonies arose was during the Assembly's 8th Ordinary Session, 14th April 1956, when a French representative suggested that the whole Charter should be applied throughout the European empires. The suggestion was not pursued. ESCTP vol 3, 585

the European legal space, the Conservative resistance against the Charter was a more specific fight against a move from social policy to social rights

In the final section of this Chapter I consider the contribution of the Labour party to the Charter debate and examine how far they were beholden to similar interests as those that constrained the Conservatives.

4. Labour Party and Labour Issues

In a debate over the creation of high-level legal protections for a range of social and economic rights one might have anticipated that the Labour party might have expressed, if not active support, at least some signs of enthusiasm. With roles reversed from those during the Convention drafting, the Labour opposition could have taken their turn to employ the Council's European forum as a channel through which to agitate against the incumbent party of government. Instead the Labour party's representatives offered no tangible support for the range of workers' rights under discussion and said little about the proposed social protections. Even more surprisingly the party made no attempt to stimulate public discussion regarding the Charter at home. In this section I examine this reticence and argue that Labour were as wary of interfering with the institutionalised practices of the unions as the Conservatives were.

In Parliament, as with the Convention, the Charter was not debated at any point prior to its passage. However, unlike the Convention, the Charter was afforded so little profile that it was not questioned after its passage either. The Charter was mentioned in the Commons on only three occasions during the years of its drafting. This included a passing reference during a 1957 attack on

the Council of Europe's inefficiency by a Conservative back-bencher,¹⁰² and twice in 1959 in the form of near identical Parliamentary Questions from a Labour back-bencher.¹⁰³ These two questions asked what measures would be taken to adopt the proposals contained in the draft Charter and enquired whether the Charter would be applied to the United Kingdom's overseas territories. Neither question received a substantive answer and the matter was not pursued further.

While the lack of energy in the domestic discussion of the Charter is reminiscent of the Convention it must have a distinct explanation. In the Convention case the Conservatives were the ones keen to keep discussion in the international space and away from Westminster while Labour were partly pre-occupied with their own domestic agenda and partly trying to starve the Council of legitimacy by non-engagement. Neither of these factors would apply in the case of the Charter debate. Conservative reticence to publicise the Charter can, however, be readily understood in terms of wishing to avoid a rise in public opinion and potential support that might make their efforts to suppress the instrument domestically awkward. Labour reticence however requires additional consideration and the rest of this section seeks to understand this reticence to subject the Government's actions, in issues so relevant to its core supporters, to public scrutiny and debate.

While there is little in the way of relevant, domestic, archive material (I could find no mention of the Charter drafting in the Labour party's own archive) we can still gain an insight into Labour opinion through the contents of the

¹⁰² HC Deb 8 February 1957, vol 564, cols 775-874

¹⁰³ HC Deb 11 May 1959, vol 605, col 830 and HC Deb 29 June 1959, vol 608, col 102

Assembly debates. Despite the Assembly and its committees being, in theory, gatherings of individuals acting on their own behalves and not necessarily as representatives for their respective party interests, the Labour representatives were certainly acting in close collaboration. This is demonstrated by the insistence of one Labour delegate, John Edwards MP, that the Assembly be adjourned, after an amendment was proposed, so that 'those of us who are organised in political groups have [the] chance to consult'.¹⁰⁴

These organised Labour party contributions are most notable for being almost indistinguishable from the Conservative delegates' contributions laid out above. I expand upon the possible causes of this below but it is worth noting at this stage that the support was not unidirectional and a collaborative air surrounds the contributions of the various British representatives both within and across party lines. For example, when Mr Edwards's request for adjournment was met with hostility from across the Assembly it was only as a result of Dame Florence Horsbrugh stepping in to support his motion that proceedings were suspended. No attempt was made to disguise the tacit collaboration and another Labour delegate, Dr Alfred Broughton MP, went so far as to invoke the Labour-Conservative 'post-war consensus':

I am a member of the British Labour Party, which has a proud record of having struggled for social justice and having advanced to a great extent social welfare in my country in the five years immediately after the last war ... [and] ... both the major political parties in Britain fully understand and appreciate the importance of our welfare services [and consequently ...] The differences between the political parties in Britain now are not of a fundamental nature; they are merely of degree.¹⁰⁵

¹⁰⁴ Council of Europe Consultative Assembly Minutes from 20th April 1956 ESCTP vol 3, 502

¹⁰⁵ *ibid* 523

The common resistance does not presuppose, however, the same set of perceived obstacles. The relationship between Labour and Conservative resistance is more than superficial however and here I explore how far this common approach grew out of common obstacles.

i. Drivers of Resistance

The Labour position, in mirroring the Conservatives', also touched on the same range of issues. Labour representative Miss Elaine Burton MP, who was Vice Chair of the Committee on Social Questions, took the lead in fighting the production of 'a statement of general principles'.¹⁰⁶ That the first draft, Document 403, was not of narrower scope can partly be attributed to Burton's absence from key working party meetings in early 1955 during which the document was being drafted (and, more importantly, at which portions of its drafting were farmed out to the Committee's secretariat).

On judicialisation Burton spoke out against the creation of a European Social and Economic Council, helping fuel eight hours of 'fruitless argument' over the issue (in the words of the Committee rapporteur) and ultimately carrying seven out of seventeen voting members with her on a motion calling for document 403 to be thrown out and for the Assembly to start over with the drafting exercise anew.¹⁰⁷ Once the proposal had been watered down to the creation of a consultative Social Chamber Burton's substitute, Frederick Willey

¹⁰⁶ Draft Minutes of the joint meeting of the Working Party of the Committee on Economic Questions with representatives of the Committee on Social Questions (CoEArch AS/Ec (7) 23, 23 January 1956)

¹⁰⁷ Draft Report of the Consultative Assembly, Committee on Economic Questions by M. Kalbitzer, Rapporteur (CoEArch AC/Ec (7) 24, 28 February 1956)

MP, continued the attack complaining that the body was increasingly coming to resemble supervisory 'organs of joint management'.¹⁰⁸

Potential evidence of Labour concern with supranationalism can be seen in their resistance to international involvement on matters which were entirely congruent with Labour policy. For example the party's representatives fought, successfully, against the inclusion of commitments to full employment, protection for savings and a developed version of the right to strike.¹⁰⁹

On drafting no clear examples are distinguishable but speaking generally another Labour delegate, Dr Broughton, called for refinement of the existing text. Recognising that:

many Representatives from many countries had hoped that this Assembly would give its approval to the Charter now, so that Governments could go ahead at once, or very soon, with the necessary legislation to implement its recommendations.

¹¹⁰

he cautioned:

I believe that it would be wise to tarry a little longer lest serious mistakes are made ... I fear that if we make haste to approve this European Social Charter in its present form, we shall find that we make less speed in implementing its proposals.¹¹¹

Almost exactly duplicating the words of the Conservatives he later added that: 'in some respects the proposals go into far too much detail and thereby permit

¹⁰⁸ Committee on Social Questions 2nd Session – Draft Minutes of the meetings held at 4 p.m. on Wednesday, 5th September and at 9.30 a.m. on Thursday, 6th September, 1956 (CoEArch AS/Soc (9) PV 2)

¹⁰⁹ Committee on Social Questions 5th Session – Draft Minutes of the meetings held on Friday 9th March 1956 at 10 a.m. and 2.30 p.m. at the Paris Office of the Council of Europe, 55 Avenue Kléber (CoEArch AS/Soc (7) PV 9, 13 March 1956)

¹¹⁰ ESCTP vol 3, 523

¹¹¹ *ibid*

of insufficient latitude in their implementation by Governments.’¹¹² He called for the Assembly to ‘pay close regard to established customs in their respective countries’, complaining that ‘[t]oo often the proposals cut across established customs in my country.’¹¹³

This view brings us back to the final and crucial issue of codification. Where the Conservatives had resisted the creation of rights that would have interfered with current practice in British labour relations so too did the Labour party. Broughton explained to the Assembly ‘[t]he history of our trade union movement is a long one. Customs have grown, traditions are rooted, and our system works reasonably well, to say the least. I could not subscribe to such interference with the activity of British trade unions.’¹¹⁴ Such interference was not objectionable only because it would limit the autonomy of Labour’s union backers, it was unacceptable because it would be an affront to the union’s status and domain. Expressing this Broughton added: ‘[i]f Her Majesty’s Government were to legislate on the questions of holidays with pay, minimum wages and on other aspects of fair conditions of work the effect would be to emasculate the British trade unions, and I fear that in the long run the British worker would be the loser.’¹¹⁵ This issue with British labour relations practices, prominent in both parties’ concerns, is thus revealed as one of the most significant obstacles to acceptance of much of the Charter for both the Conservative and Labour parties. I finish the Chapter by considering the issues underlying this aversion.

¹¹² *ibid*, 579

¹¹³ *ibid*

¹¹⁴ ESCTP vol 3, 524

¹¹⁵ *ibid*

ii. Labour Relations and Social Rights

The reluctance to impinge on the unions may appear strange in light of the actions of latter decades but in the late 1950s the unions enjoyed significant autonomy of action. While the mid-1960s would see the beginnings of labour law aimed at curbing the power of these bodies, in the 1950s the legacy of late 19th century legislation aimed at protecting and immunising the trade unions still endured.¹¹⁶ The twenty-year period from the end of the war up until this legislative revolution saw economic prosperity coupled with relatively little ideological or class tension.

The 1950s were not an entirely stable period in industrial-political terms, however, and the union landscape was politically volatile as a result of its highly fragmented and decentralised institutional layout. While the unions had grown throughout the war years¹¹⁷ the development was unfocussed and union membership was consequently split unevenly across a huge variety of unions. (In 1951 there were 9.48 million union members and in 1961,¹¹⁸ when the Charter was signed, there were 655 unions registered in the Department of Employment Gazette).¹¹⁹ Many of these unions were small, with fewer than a thousand members, while just over a dozen of the large unions had more than 100,000 members each. Even within industries there was fragmentation in union coverage, with different regions served by different unions. Involvement

¹¹⁶ C Baker and P Caldwell, *Unions and Change Since 1945* (Pan Books 1981) 62

¹¹⁷ K Mayhew, *Trade Unions and the Labour Market* (Robertson 1983) 42; A Hunt, *British Trade Unionism: A Short History* (6th edn, Camelot Press 1975) 197

¹¹⁸ Ministry of Labour Gazette, November 1952, Volume LX no.11, A

¹¹⁹ Department of Employment Gazette December 1972, 172

in unions also varied broadly between industries.¹²⁰ The landscape of British trade unionism was, in essence, swollen, complex and ironically un-unified.

While the Trades Union Congress (TUC) provided an umbrella for some portion of these many organisations, the British trade union space consisted of a preponderance of discrete, independent and opinionated voices from a range of locations with varying degrees of influence and all acting largely independently of one another.¹²¹ Even as the unions expanded and gained importance they also became less stable as they struggled to control their members and activists in a seller's market for labour.¹²² In other words, the unions did not and, without substantial reform, could not speak with anything approaching a singular voice.

Created from the bottom-up, the TUC stood in contrast to the dominant structures in continental labour relations. In terms of its course of evolution, its power structure and its relationship to the broader political sphere the TUC represented a very different model. In broadly generalised terms, the continental union structure was conglomerated with a high degree of centralisation and a rather more corporatist structure.¹²³ Whereas the TUC developed organically as an amalgam of various different bodies of different sizes and scopes, the continental TUC equivalents, having been created largely from the top down by the socialist parties, were much better consolidated.¹²⁴

¹²⁰ *ibid*

¹²¹ VL Allen, *Power in Trade Unions* (Longmans 1954) 17

¹²² JG Moher, "Trade unions and the law - history and a way forward?" (2007) History and Policy <<http://www.historyandpolicy.org/papers/policy-paper-63.html>> accessed 8 March 2012

¹²³ Stewart (n 90) 5

¹²⁴ The German TUC was developed with the assistance of the British TUC but was the most orderly in its structure as it had to be recreated post-war. The French and Italian union set-ups had multiple national centres but this was as a result of division along political lines and each was still closely bound to a political party. Benelux unions were

Consequently the continental unions existed in much closer dialogue with their political partners and were very much better integrated into their respective, domestic, political landscapes.

The closest the British labour movement came to a single voice was through the opinion of the Labour Party, which it had created at the turn of the century to represent its interests within the British political system. Thus, while for the Conservatives the labour relations issue was one of stability and not rocking the boat, for the Labour party there was the more direct connection between union opinion and party policy (overwhelming control over the selection of party candidates, the party leadership, and the party's purse all served to keep the party in line). For Labour, still deep in its search for a new orientation after its 1951 defeat, failure to maintain its relationship with the unions could have proved catastrophic. Additionally, as well as seeking to avoid aggravating the unions it was also important for both parties to prevent domestic union discussions and squabbles from spilling out into an international forum.¹²⁵

Whether or not the Labour party were moving closer to the Conservatives in accepting general capitalist economic principles, the two

split into Socialist and Christian unions but with a high degree of co-operation despite philosophical differences. Ibid p. 5

¹²⁵ The concern with providing a voice to the unions was also present in the Conservatives' actions. Even after the possibility of creating any supervisory body at which the unions would have had a seat was passed the British delegates continued to fight to prevent unions from being permitted to submit independent reports under the Charter's reporting mechanism. A letter from the Ministry of Pensions and National Insurance to the Ministry of Labour made clear that while excluding the unions entirely would be unpopular in the Council: 'we have however very much in mind the possibility of embarrassing biennial reports with the publicity that Parliamentary and Trade Union interest may lend them here.' (Letter from IG Gilbert, Ministry of Pensions and National Insurance to CA Larsen, Ministry of Labour, 11 September 1958)

parties were at their closest in their policies regarding the management of industrial relations.¹²⁶ Campbell et al. explain that between the parties *'there was agreement on the legitimacy of unions as economic social and political actors, as an estate of the realm whose voice should be carefully listened to in the councils of state [and] whose services should be solicited in regulating the economy.'*¹²⁷ As such *'[b]oth parties accepted the unions' special position in industry and politics, and calls for restrictive legislation went unheeded.'*¹²⁸

While each party had its own particular concerns with the unions, for both treated new law compelling the Government to regulate, monitor or intervene in their practices as anathema. Providing a separate, supranational, voice to the chaotic union structure was a concern for both parties (though particularly for Labour). The risks of meddling with, and thus, destabilising the fragile relationship between the unions and employers was too great. Even legislation oriented towards the protection of workers held the potential to aggravate the unions through shifting responsibility and authority for worker protection from the unions onto the courts. Both parties perceived the Charter as a threat to domestic economic stability and, irrespective of any other concern, this issue appears to have been sufficient to drive both parties' resistance.

5. Conclusion

The drafting of the European Social Charter represents a clear evolution from the drafting of the European Convention. While in many ways the Charter

¹²⁶ (n 89) 69

¹²⁷ *ibid*

¹²⁸ *ibid*

resembles its more significant predecessor its trajectory was markedly different. The failure of the final instrument to live up to the aspirations of its progenitors reveals significant differences in attitude amongst those involved in its production. As with the Convention British actors and British objectives heavily influenced the Charter. Unlike the Convention, however, the two major British parties were not in conflict and both acted to diminish the Charter's scope and potential. Together the two parties were dramatically more effective than they had been apart and, without the support of the Conservatives, the federalist elements in the Assembly lost much of their clout. All of these components contribute to explaining how the Charter failed to come together, though one must not dismiss the importance of lesser enthusiasm amongst other member states in general.

Looking at the approach of the Conservative Government there is much in common with the Labour Government's approach to the ECHR. The Conservatives pressed for a small, backward looking instrument, attempted to usurp Assembly work with their own draft language and attacked every proposed right that potentially conflicted with domestic law. In terms of actual objections, the two drafting processes divide, with a new set of practical issues. When examined using the categories developed in Chapter 2, while all of the same heads of concern are present, the balance between them had shifted with the issue of codification taking centre stage, superseding supranational worries.

Examining each head in turn: the boost in codificatory concern appears to have grown principally from a powerful aversion to the potentially destabilising effect of interference in the domain of the unions. This is supplemented by a second, somewhat lesser, concern with having to alter

patterns of devolution of power to local authority (a concern that was more prominent for the Conservatives than Labour). The cumulative effect of these local authority concerns with social elements of the Charter and labour relations issues with economic elements created robust grounds for objecting to most of the Charter's contents. What falls outside of this is made up for in the somewhat reduced but still pertinent supranational concern.

While ultimately eclipsed by the prior codificatory concerns, without which the supranational objections may have come more to the fore, supranational issues still account for some of the other articles that might have otherwise appeared relatively unproblematic. The low profile of judicialising concerns comes from the similarly low profile of enforcement propositions. Concerted opposition to even mild reporting obligations could show a continued rejection of enforcement the concern (though the concern could also stem from an objection to supranationalisation of domestic labour issues). Put another way, a concern with transfer of authority from executive to court can only exist where the Government enjoyed the relevant authority in the first place and given the desire to remain hands off the objection is really to anyone claiming authority over the largely autonomous labour relations domain. Finally the relative absence of drafting concerns is largely attributable to the Government's success in pushing its preferred form of drafting, avoiding the conflict that plagued the Convention drafting.

While some in Whitehall were not happy with the Charter notwithstanding the very significant concessions extracted¹²⁹ the Charter was

¹²⁹ A 1958 Foreign Office brief sent to Strasbourg warned that The United Kingdom is so near the borderline between being able and not able to ratify that we cannot afford

largely shaped in a form proposed by or heavily influenced by British concerns. The limited influence of the Labour party was applied in the same direction as the Conservative Government's ensuring that the Council of Europe's second foray into supranational human rights would again see no domestic debate in Britain. Overall this Chapter has again demonstrated the extensive influence of the UK over the early shape and development of the European rights space.

Having looked at these two key episodes in the exporting of rights norms, both demonstrating an extremely cautious approach by British Governments, rooted in a range of serious objections few would have anticipated that within a handful of years a UK administration would be openly inviting supranational rights scrutiny. In the next chapter I consider this major constitutional policy u-turn.

to give much away at this stage.' NatArch FO 371/137785 – WUC1731/12 *Brief for Ministers Deputies meeting* 4th February 1958

Chapter 4 Accepting Supranational Review

'Total abstinence and a good filing system are not now the right sign-posts to the socialist utopia.'

Anthony Crosland (1956)¹

1. Introduction

Where the last two chapters have examined the UK's influence over the formation of European human rights law, the next three consider the domestic face of the post-war rights revolution. In this chapter I begin this process by looking at the turning of Madsen's rights boomerang, and the journey from complete rejection of the Convention's enforcement mechanisms by Labour in 1950 to their acceptance by Labour in 1966. Contrasting Labour's remarkable efforts to undermine individual petition in 1950 with the decision fifteen years later to voluntarily subject itself to those same systems it had nearly walked away from the Convention to avoid, through this chapter I develop an explanation for movement in Labour attitudes towards this objection over time.

Considering how far acceptance of the optional articles was contributed to by reduced concern in relation to my framework areas, I argue that, to explain Labour acceptance of the optional articles, a principled, socio-political explanation, is required and propose a novel explanation. This argument runs that changing Labour party attitudes towards socialism played a critical role in making rights enforcement palatable, and against a backdrop of growing civil society support for rights and a 'post-materialist' shift in public preferences and thought, Labour's return to power was a crucial trigger for domestic rights

¹ CAR Crosland, *The Future of Socialism* (Jonathan Cape 1956) 254

protection, and not merely incidental to it, as implied by the dominant account in the literature.

i. Outlining the Enquiry

As demonstrated in Chapter 2, the dynamics of the Convention drafting period put much of the substance of the Convention beyond the Attlee Government's control. By the time the Labour Government had found its feet in the Council of Europe as a novel, supranational, political space, much of the opportunity to shape the new regime had already passed. Waning Conservative influence did not precipitate a growth in Labour's clout and late attempts to win substantive concessions regarding the wording of rights were of limited impact.

Despite this slow start and the appearance that the Convention was largely a *fait accompli*, Labour did manage to make its mark in the final stages of the debate. Unable to reach more acceptable forms of the substantive content of the Convention, the party instead targeted the procedural aspects of the Convention and its systems of its enforcement. Here, with the governmental diplomatic machine belatedly firing on all cylinders, extracted substantial concessions. This success in largely neutering the nascent rights framework in the last weeks of drafting would set the tone for a decade and a half of governmental resistance to the Convention's system of supranational rights instruments – first under Labour and then, to the surprise of many European actors, under three successive Conservative Governments.

Acceptance of individual petition started a new era of rights enforcement in the United Kingdom and so the question of why the Labour party would choose in 1965 to reverse this settled policy of both parties, and, freely accept

the same articles that they had so carefully worked to undermine, is one that deserves careful scrutiny. This action came at a time when the ECHR regime was flagging, having failed to build momentum during its early years, and at a point when continued British obstruction would have surprised few and could have helped secure the regime's demise. In this context the decision to actively endorse the Convention regime, supporting it by embracing its authority, and consequently reinvigorating its fortunes, is all the more interesting.

Several authors have written on the acceptance of the optional articles though only one, Brian Simpson,² has claimed to offer a complete explanation for the shift in Government policy towards acceptance. Simpson's examination of the debate, and explanation of the change in heart of British actors, comes as the final act in his thesis regarding the relationship between human rights and British colonial concerns. The essence of this argument is that while, at the time of initial acceptance of the Convention, the optional articles had been intolerable on account of the United Kingdom's substantial empire and potentially adverse interactions between the Convention and colonial rule, by the 1960s this empire was substantially disassembled and the Government were thus free to accept without fear of difficulties. Simpson puts significant emphasis on the Cyprus cases, which had been examined by the Commission, and considers in detail the derogations made by the British Government in connection with the various colonies.

This approach, however, significantly downplays the importance of domestic objections (particularly those of the Home Office and the Lord

² AWB Simpson, *Human Rights and the End of Empire* (OUP 2004)

Chancellor) and does not take into account the growing recognition during the same period that British law was not always compatible with the Convention. Despite noting a number of other concerns, Simpson puts non-acceptance up until 1964 almost exclusively at the door of the Colonial Office and attaches no significance to the distinct aims, principles and motivations of the two main parties, (positing instead an overarching trend that would apply similarly to either). Making use of a broader data set I propose that any complete account of British acceptance must put significant emphasis on Labour's particular concerns in electing to accept rights.

Drawing on Government and party archives, contemporaneous political publications, and related literature on Labour Party history, in this chapter I closely examine the shifting policy of the Labour Party towards the implementation and enforcement of the ECHR from 1950 to 1966. From the Attlee Cabinet's ultimatum on the mechanics of individual petition in the last months of the Convention's negotiation to the acceptance, with minimal fanfare, of the full terms of the Conventions systems of protection in the last days of 1965 the attitudes within each party are examined, the function of Westminster institutional dynamics considered and the importance of developing forms of Labour socialist thought related. After considering contextual factors I argue that the reversal in policy towards the Convention is intimately bound up in the Labour party's fundamental reappraisal of its socialist principles during the crisis brought on by Conservative electoral success.

Through the chapter I also give consideration to accounts of the individual petition issue offered by Lester,³ Bates,⁴ Young⁵ and Buchanan⁶. Of these Lester, like Simpson, bases his work on archive research at the Public Records Office,⁷ Bates's chapter builds upon Simpson's work, and Young's article mentions the issue of acceptance only in passing (the article is about incorporation of human rights in the UK in general) but does provide some interesting, if brief, theoretical analysis of the forms of resistance to the Convention's enforcement around the time of initial acceptance.

Lester's work is the only piece to focus exclusively on the Labour acceptance but it offers little more than a chronology of events and no analysis of potential motivations that could have led to a change in policy direction. Instead he concentrates on the concern with positive and negative publicity that each ministry perceived might come from acceptance or continued rejection, and the balancing acts being undertaken to determine the final decision. While not explicitly stated, Lester's account seems to endorse the Simpson model of pragmatic cost-benefit analysis as the principal process underlying a governmental shift in policy over rights. In this way, like Simpson, Lester's account is insensitive to party political factors and his argument relies on the

³ A Lester, 'U.K. acceptance of the Strasbourg jurisdiction- what really went on in Whitehall in 1965' [1998] PL 237

⁴ E Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) Ch 1

⁵ J Young, 'The Politics of the Human Rights Act' (1999) 26(1) *Journal of Law and Society* 27-37

⁶ Tom Buchanan, 'Human Rights Campaigns in Modern Britain' in Nick Crowson, Matthew Hilton and James McKay (eds), *NGOs in Contemporary Britain: Non-State Actors in Society and Politics* (Macmillan 2009)

⁷ Which are themselves somewhat incomplete due to the loss or destruction of key folders (in particular LCO 2/8167 and LCO 2/8168 from the Lord Chancellors Office files).

implied premise that a tipping point was reached in 1965 as falling perceptions of risk of embarrassment – through adverse effects of acceptance – were outweighed by anticipated positive publicity from it.

Although Lester does not put such an account into words, his heavy emphasis on the delaying of acceptance in connection with the Burmah Oil Company⁸ suggests an extremely pragmatic approach to the competing issues rather than any principled interest in the principle of acceptance. While there is clear attraction to this model, and from looking exclusively at official records the processes in Whitehall in 1964-5 were, in many ways similar, to what had gone on in Whitehall prior to 1964, I argue that this model is suspect for two reasons. Firstly, it would be a remarkable coincidence for a party-neutral trend to reach its tipping point immediately after a new party takes power after more than a decade in opposition. Secondly, restricting one's study to an examination of official records provides a slanted perspective and an insufficiently detailed insight, particularly when dealing with substantial policy u-turns, where a higher political imperative is at play. Such situations are better explained through adoption of a broader, longitudinal, perspective and a wider selection of source materials.

⁸ The Burmah Oil Company had had their oil installations in Burma destroyed on British orders to prevent them falling into the hands of the Japanese forces. After a failed law suit in Burma and a time barring of an application in England the company sewed through the Scottish Courts. This progressed to the House of Lords where, in principle, damages were deemed payable. The potential quantum of the damages ran into nine figures and so the new Labour Government brought in the War Damages Bill 1964 to annul the decision. The potential for the company to petition the European Commission if individual petition was permitted was raised by a Foreign Office official in a letter to the Treasury (letter of 11 March 1965) and subsequently, at the Treasury's request (letter of 9 June 1965) acceptance was delayed until six months after the Act had received Royal Assent.

From the opposite direction Buchanan considers the growth of the civil society rights constituency during the early 1960s, with a particular emphasis on Amnesty international, founded in 1961. Buchanan argues that human rights 'have typically been promoted most forcefully by non-governmental organizations rather than political parties'.⁹ However, while NGOs have been vocal ideological promoters of rights, these views often put them at odds with Government and a shifting popular attitude to rights is perhaps more likely to be the cause of both political and social society shifts. Where civil society influence over elite political action does occur I believe it is liable to be secondary to broader, underlying shifts in sentiment. Buchanan accepts that 'the movement towards a European Convention ... was driven by intellectual and political elites, rather than popular pressures' and that elite 'lawyer-politicians' were the principal actors in this process.¹⁰ While rights-oriented NGOs such as Amnesty were certainly gaining some momentum by the 1960s, alongside the increasing development of post-materialist perspectives, I suggest that the elite decision to accept individual petition was still relatively isolated from this semi-popular movement. While positive press was liable to form part of the pragmatic cost-balancing exercise undertaken by civil servants, this does little to explain the broader political shift that was necessary in the Labour party before acceptance could be countenanced. Over the course of my study I have seen nothing to suggest that NGO action was more than a co-consequence of the

⁹ Tom Buchanan, 'Human Rights, the Memory of War, and the Making of a European Identity, 1945-1975' in ed. Martin Conway and Klaus Patel (eds.), *Europeanization in the Twentieth Century: Historical Approaches* (Palgrave Macmillan, 2010) 157, 159

¹⁰ Ibid, a point cited and endorsed by M Duranti 'Curbing Labour's Totalitarian Temptation: European Human Rights Law and British Postwar Politics' (2012) 3 *Humanity* 361, 364

same post-materialist shift that drove reform in Labour's approach to socialism. At most the development of the NGOs may have provided a minor direct contributory peripheral factor to elite political action but even ten years on, in the 1970s Bill of Rights debate (considered in the next chapter) these groups had little direct sway over politicians and in relation to the individual petition decision I have seen no evidence of strong or direct influence.

Finally, Bates's coverage, which is rather briefer, as the issue at hand is not the direct focus of the work, offers an analysis of the impact of the Cyprus issue and the *Lawless*¹¹ case. These mini-case studies cast light on some of the pragmatic issues that were fuelling resistance during the Conservative years but Bates also follows Simpson's explanation as to why acceptance eventually came about.

Thus the literature offers no account that considers the relationship between the acceptance of the optional articles and Labour's return to power. Instead the arguments presented by the above authors presume acceptance of the optional articles to have resulted from the passing of some tipping point where harm from political embarrassment, or difficulties overseas, ceased to outweigh the benefits from good publicity or other pragmatic factors. Such arguments are somewhat limited in their explanatory power however as they take no account of any of the other principled and substantive obstacles to enforcement of the Convention that were raised in the previous chapter and which are elaborated on below.¹² Given that so much of the rhetoric used against acceptance centred

¹¹ *Lawless v Ireland* (1961) 1 EHRR 15

¹² Namely the problematic codification in the absence of a clearly defined system of law, the ceding of power to unproven supranational bodies, the creation of new layers of judicial review above the House of Lords, the weakening of Parliamentary Supremacy

on domestic obstacles, Simpson's post-colonial thesis, in particular, can only hold together if we are to presume that these other issues were insubstantial and emphasised to distract from the primary embarrassment flowing from colonial issues. Young has argued against such a position and I endorse his view that colonial issues were only of limited concern, along with vexatious 'misuse' of individual petition, and other, more theoretical, concerns.¹³ He applies two possible theories to explain resistance to the optional articles: 'conservative normativism' and 'an empirical variant of functionalism'. The first of these models suggests that the protections for individual liberty afforded by the established traditions and experience of the UK common law system were considered superior to those granted by the novel Convention systems despite the latter have been designed specifically to achieve those ends. The second supposes that British politicians simply considered the protection of liberty to be within the domain of Parliament rather than the Courts. Neither of these accounts, however, explains how acceptance came about and while I agree that principled objections, whichever form of constitutional inertia they may be grounded in, are of significance to the Labour resistance to the optional articles, there is still a gap in the literature to explain how these theoretical objections were overcome. In this chapter I seek to partially fill that gap.

ii. Chapter Structure

Challenging pragmatic, tipping-point type, explanation in the first part of this chapter I seek to clearly map out the broad range of objections to the optional

and, more pragmatically, the potential for exploitation of the Convention by domestic activists and agitators.

¹³ (n 5)

articles that existed at the time of the Convention's passage. Where competing accounts paint the progression towards acceptance as independent of party policy, ideology or outlook I identify a range of both practical and principled objections. Practically speaking, beyond colonial issues there were several areas of domestic concern that were just as significant, and arguably sufficient, in precluding acceptance. Looking at the 1950s Attlee Government, I demonstrate that judicialisation was fundamentally incompatible with existing socialist policy ideas. This is an additional, and fundamental, area in which major change would be required before acceptance was possible and an area unvisited in existing theories. Given Conservative resistance had lasted right up to the end of their third term, and Labour acceptance came very shortly after its return to power, this failure to consider a potential connection between the acceptance of the enforcement provisions and the return of a socialist government is particularly surprising. Whether or not one attributes any particular significance to the fact of returning to power after a prolonged period in opposition,¹⁴ the potential relevance of differences in political principles, attitude and outlook to the shaping of a new departure in constitutional protection for individual rights is deserving of careful attention.

In pursuing this issue I argue that change of governing party is not just an issue for substantive consideration but also an important factor in assessing the adequacy of the primary sources employed in these existing works. The decision to undertake even mild constitutional reform does not generally appear out of the air and thus the thinking of the new administration in the

¹⁴ A connection which has been made by Erdos in connection with the subsequent passage of the Human Rights Act. D Erdos, *Delegating Rights Protection: the rise of bills of rights in the Westminster world* (OUP 2010) ch 7

years preceding their decision are of great significance. A method limited to official sources is a method limited to the views of the party in power and in this case this is obviously inadequate. The decision to accept individual petition by Labour in late 1965 is not explained by the thirteen years of official records documenting Conservative attitudes on the topic and only a few months of Labour ones. To fill out this picture we must also look to the changing patterns of Labour thinking during their years in opposition. In the fourth section of this chapter, I provide an account of the changing emphases in Labour policy from the Fabian socialism of the 40s, characterised by centralisation and bureaucratic nationalisation, to the New Left thinking developed during the fifties, as Labour attempted to come to terms with growing public affluence. Connecting Labour's shifting policy emphasis towards equality and limited state intervention with a growing openness to individual rights, I point to this ideological dimension as a potent and under looked driver behind the decision to accept individual petition.

2. Labour's Rejection and Opting Out in 1950

To appreciate the significance of Labour's later acceptance, in this section I elaborate on the depth and range of resistance to the optional articles on individual petition and the European Court that were present in the Labour Cabinet of 1950, showing that it arose from a number of concerns amongst which Colonial matters were only a small component. In the first sub-section I look at the Attlee ultimatum on the right of individual petition, in the second I detail a range of practical concerns held by Cabinet members that stood in the way of acceptance, in the third I explain how the colonial objections are best

seen not as a separate set of concerns unique to Britain's colonial status but instead as acute instances of a range of concerns that also exist in the domestic context, and in the fourth I explore the theoretical incompatibility between the Convention's enforcement provisions and 1940s Labour socialism. While this last concern manifested more as a general air of antipathy, the records suggest that this underlying aversion was as important to Labour resistance as any of the more specific concerns. I finish by considering the aggravating factor of the Conservative party's public positioning.

i. Ultimatum on Individual Petition

Against the backdrop of limited Labour input and amongst the broader categories of concern, detailed in my analytical framework, the most objectionable element of the final draft ECHR was its provision for individual petition. Granting individual members of the public the opportunity to challenge states before an international organisation was an unwelcome innovation and along with the provisions for the creation of the European Court of Human Rights, threatened to add an extra jurisdictional layer both on top of what was already, to Labour eyes, an unsatisfactory statement of principles, and on top of what was already, to Labour eyes, an unsatisfactory domestic court system. For these reasons Labour representatives had attempted to resist the inclusion of the articles on individual petition and the Court at the Assembly stage, albeit with little success. However, by the time the Cabinet had come to terms with the growing stature of the Council of Europe the Convention had gained significant momentum. Opportunities to amend the Convention were limited and came

against a problematic backdrop of scrutiny and adverse comment by the increasingly aggravated Consultative Assembly.

While alarmed by the Convention, there was also concern in Whitehall that the UK might alienate itself from the other member states if it were to turn its back on this central symbolic component of the new European space. Reports from Strasbourg were not encouraging and the British representative warned the Foreign Office that the UK's minority opposition to the enforcement articles was becoming increasingly divisive.¹⁵ As in the subsequent Social Charter debates, the Foreign Office counselled tactics of compromise fearing that sticking to a hard-line in the later stages of debate risked leaving the UK marginalised and unable to meaningfully influence the generation of concessions.¹⁶ Foreign Office minutes express the severity with which the situation was seen, stating that forcing itself into the margins: 'would put H.M.G. in about as awkward and invidious a position as it is possible to imagine on this issue'.¹⁷

There were some signs that the UK was not alone in its concerns over the scope of the new regime. Other states had expressed reticence over the creation of a Court (capable of passing binding judgments) in addition to the, less controversial, investigatory Commission (capable only of producing descriptive reports). Such dissent focussed on the Court however rather than individual petition and thus while the article outlining the Court's function had been reworded to make acceptance of the Court's jurisdiction optional, no such

¹⁵ Gladwyn Jebb minute to file US17311/28, endorsed by Le Quesne (NatArch FO 371/88752, 31 May 1950)

¹⁶ *ibid*

¹⁷ *ibid*

alterations had been made to the article on individual petition. Unlike the court, individual petition possessed a natural appeal given the desire amongst most that the Convention play a functional rather than a merely symbolic role. The substance of the British delegate's main argument against individual petition (that it was open to abuse by radical minorities) had been openly contested, with the French, in particular, adopting a diametrically opposed view.¹⁸ Despite this openly hostile atmosphere to the British argument, in the absence of any more forceful objection, the British representatives stuck with the point. Stopping short of a singular stand against the whole system of petition, the Foreign Office proposed various 'safeguards' to the Council (such as time bars and limitations on standing), some of which were successfully incorporated into the text. Such compromises were viewed as a success by the Foreign Office but were not satisfactory to the Prime Minister. Attlee's opposition was categorical, he would not sign up to either petition or the Court and, even with the Court's jurisdiction having been made optional, allowing individual petition to the Commission was still quite unthinkable. Minutes of a conversation between a Foreign Office official and the Prime Minister makes clear that, unless further, significant, concessions on individual petition were achieved, Attlee 'thought it would be the wish of the Cabinet that the Secretary of State should stand out against adoption of the Convention even if it meant him being in a minority of

¹⁸ The British complained that the right of individual petition would be abused by subversive elements to undermine democracy while the French insisted that the same circumstances demonstrated the pressing need to create a channel through which individuals could make complaints against states. *Further cover minute* to file US17311/28 (NatArch, FO 371/88752)

one.’¹⁹ Attlee added that ‘if the Secretary of State felt this to be unacceptable he had better ring direct from Strasbourg to Chequers’.²⁰

That the Prime Minister was advocating walking away from the Convention entirely, notwithstanding the inevitable backlash this would cause, put the Foreign Office delegation in a tough spot. The Labour position was pressed twice more in the closing stages of the Convention negotiations. A cipher telegram sent to the UK’s delegation to the drafting committee in August availed upon them to express the UK’s firm opposition to individual petition and if, as the Foreign Secretary anticipated, it proved impossible for them to secure the article’s deletion, they were to insist on an opt-in rather than an opt-out. This stipulation was explained to the representative on the basis that ‘[t]hough in practice it may come to the same thing, this arrangement perhaps makes it harder to show up in a bad light a refusal by a State’.²¹

This hard line, proposed in the very closing stages of the Convention negotiations is notable not only for its firmness but also for being the first direction to the negotiators to be passed down from Cabinet level. Much to the surprise of the Foreign Office, the proposal prevailed. As the final stages of the negotiation dragged on a rift was beginning to develop between the delegates on the drafting committee.²² Though the British formulation was a substantial

¹⁹ Foreign Office Minute in file US17311/76 (NatArch FO 371/88764, August 4th 1950)

²⁰ *ibid*

²¹ Cypher telegram from UK Delegation to Strasbourg to Foreign Office (NatArch US17311/7, FO 371/88754, 4 August 1950)

²² The Greek, Turkish and Netherlands delegates were pushing for the removal of Article 23 altogether while the French, Italian and Irish Republic delegates were resisting this and stating that they would not accept any Convention which did not contain provision for individuals to bring their grievances before some authority. A third group composed of the Swedish, Norwegian, Danish and Icelandic delegations were floating in the middle and would support either approach even though it was

irritant to both the French and the Irish it was the only version upon which unanimity could be reached (again portending the UK's subsequent strategy in the governmental stages of the Charter drafting) and consequently it was adopted largely as a means to prevent the progress of the Convention being further, and potentially terminally, arrested.

The story was not quite over however as further lobbying by individual petition's backers brought the issue back to the table when the completed draft was considered by the Council's Committee of Ministers. Having won the concession on opting in, the Government was not about to tolerate back-tracking. Pressure was applied to switch the formulation back into an opt-out but the British representative, Ernest Davies, had been briefed that 'contracting out rather than contracting in would increase the embarrassment of our refusal to accept the competence of the Commission to deal with individual petitions'.²³ Further, with an element of gamesmanship it was euphemistically hoped that, 'in view of the unanimity rule observed in the Committee, a very firm attitude by the United Kingdom representative will persuade the representatives of other Governments'.²⁴ Further leverage was afforded by the observation that the Ministers were very keen to have the Convention signed during the Rome session and so Davies was instructed that 'every advantage should be taken of this eagerness to ensure a return to the text agreed by Ministers.'²⁵

their preference that the right be retained. As such the UK's proposal of an opt-in system provided a potential route out of the impasse and a compromise that was potentially acceptable to all. Report on Strasbourg discussions in Drafting Committee (NatArch US 17311/77, FO 371/88754, 6 August 1980)

²³ Confidential "Draft Brief" from Foreign Office for UK representative to the Committee of Ministers (NatArch US 17311/103, FO 371/88755, 11 Nov 1950)

²⁴ *ibid*

²⁵ *ibid*

This strategy was a winning one and the unanimity rule allowed the UK to capture the initiative, insisting that it was the Irish, (who as staunch supporters of individual petition attempted to hold out for a stronger formulation), that were in a minority of one in attempting to hold up acceptance. As a result the Irish representative (Mr Sean McBride) was forced to abstain from the final vote, decrying the undemocratic nature of the process (a legitimate complaint given a $2/3^{\text{rds}}$ majority preferred the right's inclusion and the floating voters made clear that they were voting for the UK approach only so that the whole process did not fall at the last hurdle).²⁶

The concession was viewed as something of a coup by the Foreign Office delegates who described the final text as being 'very much more satisfactory than we had at times had reason to fear it would be.'²⁷ The adverse publicity that would likely have followed an opting-out from the system of individual petition had been avoided and the threat of walking away from the negotiations had not had to be raised. In fact, far from alienating the UK within the Committee of Ministers, diplomatic timing had turned Attlee's ultimatum into a compromise proposal and cast the British delegates as ersatz peace makers between the Greeks and the Turks on the one hand and the French and Irish on the other.

Despite having managed to achieve as substantial a concession as could reasonably have been hoped, this was still not enough to mollify dissent at home where ministers continued to demonstrate, in the words of one Foreign

²⁶ *ibid*

²⁷ US 17311/77 (n 22)

Office legal officer, 'a violent if ill-defined dislike of the Convention'.²⁸ Some were unconvinced that the threat of the Convention had been adequately ameliorated, even with the opt-in model for individual petition, while others simply seemed unhappy with the way negotiations had panned out in general. Through the rest of this section I pick apart the substantive concerns as well as this 'ill-defined dislike', surveying the residual objections raised and demonstrating that resistance existed as a complex of issues within which potentially adverse colonial interactions existed as just one significant, potentially sufficient, but certainly not necessary component of Labour's rejection of the optional articles.

ii. 'Colonial' Objections

It would be wrong to suggest that the Colonial Office were anything other than a vocal source of criticism for individual petition (though not as vocal as the Lord Chancellor, Lord Jowitt) and presented a substantial obstacle to the Foreign Office's attempts to obtain permission from the Cabinet to accept the Convention.²⁹ So strong was their resistance that they stated they would only accept the Convention if compelled to do so by Cabinet.³⁰ Looking for support in their resistance, the Permanent Private Secretary in the Colonial Office wrote to the Lord Chancellor on the 29th September 1950 stating that: '[t]his Convention, if applied to the Colonies, cannot be other than an embarrassment to Colonial Governments and if it were possible for the United Kingdom to decline to accept

²⁸ Cover minutes to file US17311/88 by Le Quesne (NatArch FO 371/88755, 11 September 1950)

²⁹ Opening minutes to file US17311/28 and Foreign Office letter to Colonial Office of 1st June 1950 (NatArch FO 371/88752)

³⁰ Colonial Office letter to Foreign Office (NatArch US 17311/49)

it, so that the question of its applications to the Colonies would not arise, the Colonial Office would be very glad.’³¹ The strength of the Colonial Office’s feeling was not matched by the strength of its arguments, however, and it was left to the Lord Chancellor to give clear expression to the ‘colonial objections’.

For the Colonial Office concerns about the substance of the Convention were entirely eclipsed by alarm over the enforcement provisions and their potential uses.³² The substance of these concerns appears to have been three-fold. Firstly that activists could abuse the system, secondly that the Convention would undermine the influence of the colonial authorities (judicial and executive) and thirdly that the Convention would undermine the perceived authority of the colonial authorities. While all three of these are relevant to the colonial context, only the third is really distinct to it.

On the issue of abuse the Colonial Office complained that individual petition would provide a tool that would be exploited by movements for constitutional change (i.e. independence) and, in some cases, could facilitate those working towards insurrection against the British authorities. In a memorandum circulated amongst the interested departments the CO outlined the implications they perceived.

Individual petition would offer great opportunity for abuse and could become more a weapon of political warfare than a method of ventilating the genuine grievances of individuals. In the present delicate stage of constitutional experiment in some Colonies (e.g., West Africa), in the incipient difficulties of race relations in others (e.g., East Africa), in the struggle against the terrorism in Malaya and in the precarious position of Hong Kong it is important that no unnecessary

³¹ Letter of 29th September to the Lord Chancellors Department from the Permanent Private Secretary in the Colonial Office (NatArch US 17311/9, FO 371/88755)

³² Colonial Office Letter (NatArch FO371/88754)

handle should be offered to troublemakers within or without the territories.³³

This objection could, however, be easily confused for the domestic abuse objection, detailed in chapter 2, used by Labour representatives in the Consultative Assembly and also raised by the Foreign Office when discussing possible procedural safeguards. This earlier, domestic, complaint concerned the perceived risk of abusive use of the Convention in Britain by political agitators, (in particular communists but also those on the far rights). These two concerns clearly involve the same problem arising in two distinct contexts. The erosion of colonial possessions certainly would alleviate the colonial instance of this concern but it would not remove the underlying issue as it applied at home.

A similar relationship can be observed with the second Colonial Office argument in relation to the issue of maintaining authority. The Colonial Office felt that the Convention should only apply to executive decision-making and that, in the interests of public order, there would need to be specific exceptions to prevent review of colonial court decisions.³⁴ The belief that the current court hierarchies should not be trumped by a new, non-Colonial, court is again extremely similar to the Lord Chancellor's concern, detailed below, regarding preserving the ultimate authority of the House of Lords in respect of the UK. The Colonial issue here is again merely an additional instantiation of an objection that was already strongly held in relation to the UK domestic context.

The third objection raised by the Colonial Office is slightly different. In discussing the pragmatics of maintaining functional control over order in the overseas territories the Colonial Office emphasised, in addition to questions of

³³ Colonial Office Memorandum (NatArch US17311/59 in FO 371/88754)

³⁴ *ibid*

actual authority, a separate issue of maintaining the prestige of the UK's representatives (i.e. their perceived authority).

The right of individual petition is a kind of system of appeal to an international authority which would be misunderstood in the Colonies. The essence of good government, particularly among primitive peoples, is that there should be a single undivided authority. The right of petition to an international authority would suggest to the populations of the Colonies, either that the ultimate authority in the affairs of their territory is not the Crown, or, perhaps even more disturbing, that there is more than one ultimate authority. The confusion thus caused in the minds of primitive peoples would make administration more difficult and the work of agitation more easy.³⁵

This issue with perceived authority applied as much to the Commission as it did the Court. The investigatory powers of the Commission raised concerns as the presence of Council of Europe officials, on the ground, during an investigation would be 'particularly embarrassing' and 'bound to have an unsettling effect on the inhabitants.'³⁶ Permitting international observers to function in an official capacity in the colonies threatened undermining the perception of the UK's ultimate sovereignty in a way that would be unlikely to arise in the UK.

The potential difficulties generated by creating a document to share political theoretical principles between advanced nations and then applying that document also to some of the least politically developed were at the forefront of the Colonial Office's mind. However, while this third objection does carry some distinctive substance as a Colonial argument against acceptance it was a relatively minor component of the overall picture. The Colonial Office had raised its concerns that the Colonies were of insufficient political maturity for the Convention earlier in the drafting but received a cool response. The Lord

³⁵ *ibid*

³⁶ *ibid*

Chancellor did not pick up on the objection, as he did with the other two, and it was openly dismissed by the Foreign Office who was less concerned with potential loss of prestige internally (between the UK, as colonial authority, and colonial subjects) than with the inevitable loss of prestige externally (between the UK as a responsible international citizen and other states) if it refused to accept the Convention on colonial grounds. The Foreign Office, betraying the tension between ministries, stated that '[e]ven from the narrow point of view of the Colonial Office' non-acceptance would ensure the 'conclusion that we had things to hide in our Colonies would be inescapable.'³⁷

Thus the three major parts of the colonial objection consist of two objections that were not distinct to the colonial case and one objection which was openly dismissed within Whitehall as being of low importance. While the first two can be cast as potentially aggravated examples of their domestic analogues objections, (the risks of insurrection or revolution attendant on any successful abuse being greater in the volatile political environment of some of the UK's territories), there is no compelling reason to hive off a separate and, uniquely colonial, class of objection.

As such, the argument that Colonial issues were the only or even the main component for rejection of individual petition appears weak. Even to claim that it was a sufficient element of the picture is not clearly supported. Concrete objections outside of the Colonial domain are clearly identifiable and those within the Colonial domain are principally reflections of broader issues with acceptance of supranational Courts and further rights of appeal. In the rest of

³⁷ NatArch Memo of 5th July 1950 in FO 17311/54

this section I explore the basis for the rest of Labour's acute resistance to the optional articles.

iii. Non-Colonial Bases for Resistance

Despite the most problematic of the Convention's enforcement procedures having been reduced to optional extras, significant disquiet still permeated the Cabinet. While the Colonial Office protested behind the scenes, by far the most outspoken objector was the Lord Chancellor who felt so strongly about the residual threat posed by the court and individual petition that he drafted a long Cabinet paper explaining why the UK should not accept the Convention.³⁸ The heart of his criticisms (combining judicialising and drafting form objections) revolved around the potential implications of letting a Court loose on a Convention 'which concerns itself with both the procedural and substantive law' while also being 'so vague and woolly that it may mean almost anything.'³⁹ As mentioned above, Jowitt was also concerned that the creation of a European court of appeal would undermine the status of the House of Lords, which he believed should remain the ultimate judicial authority in the UK.⁴⁰ Arguing that the UK system already provided ample review processes he resented 'a still further appeal to a secret court, composed of persons with no legal training, possessing the unfettered right to expound the meaning of 17 Articles which

³⁸ The contents of Lord Jowitt's paper can be found in US17311/96. These contents have previously been given an airing in Marston's general account of UK involvement with the Convention's drafting (G Marston, 'The United Kingdom's part in the preparation of the European Convention on Human Rights, 1950' (1993) 42 ICLQ 796), discussed above in Chapter 2). They are however sufficiently important to my point that other, strong, non-colonial, arguments existed, that they merit repetition here.

³⁹ NatArch US17311/96, FO 371/88755

⁴⁰ *ibid*

may mean anything, or – as I hope – nothing’.⁴¹ Opening the door to European rights jurisprudence risked ‘contaminating’ and ‘undermining’ the painstakingly developed common law (the possibility that the Convention and the court’s influences might enrich the common law was not cogniscanced).⁴² Even if the Court were taken out of the picture, the risk of the Commission taking on a quasi-judicial role and drawing adverse observations based on its own interpretations remained a sufficient concern to reject individual petition. Appealing again to a drafting critique, he argued that many of the carefully crafted and hard won compromises, such as the insertion of the qualifying formula ‘necessary in a democratic society’,⁴³ were something of an own goal. This work of the Home Office’s delegates to the Committee of Legal Experts, Jowitt believed, served to merely invite further detailed supranational scrutiny of the very fundament of domestic decision-making processes.⁴⁴

The Foreign Office did their best to placate Jowitt and emphasised the enforcement role of the Council of Ministers as a safety net that would nullify any interpretational excesses. They pointed out that the findings of the Commission would be mediated back through an entirely political process and any penalty or censure from the Council would required a $\frac{2}{3}$ ^{rds} majority vote amongst the ministers. This did little to appease the Lord Chancellor, who already held particularly strong, adverse, feelings about judicial review of executive action,⁴⁵ and he told the Cabinet that the Convention, even in its weakened form, left Britain open to significant interference and that any

⁴¹ *ibid*

⁴² *ibid*

⁴³ Into arts 8-11 ECHR.

⁴⁴ (n 39)

⁴⁵ Lord Jowitt’s Cabinet paper (NatArch US17311/96)

adverse interpretations were likely to demand 'drastic modification of our existing law or practice'.⁴⁶

Only upon receiving assurances that there was no suggestion that the UK would ever opt-in to either of the optional articles did the Lord Chancellor agree to British accession to the Convention. He made clear however that he did so only with the most severe of reservations. To Cabinet he expressed his fears 'that the political pressure which has induced us to accept the Convention in part may in the future be directed to induce us to accept the right of individual petition.' While he did recognize that 'we must – in some form or other – accept this draft Convention.' He also made clear that '[a]t the same time I feel bound to state that from the point of view of administration of the law I regard this necessity as an unqualified misfortune.'⁴⁷ His words to the Foreign Office legal advisor were even more cataclysmic, claiming that acceptance of the Convention held the potential for 'a disaster which would undermine the whole of English law and the system of administering it.'⁴⁸

This warning was heeded by other Ministers and the Cabinet conclusions adopted Jowitt's analysis stating: 'Ministers agreed that, if individuals had a right to take alleged infractions of the Convention from the courts of this country to a European Court of Human Rights, the effect on the judicial system of this country might be very serious' and, further that '[i]t was intolerable that the code of common law and statute law which had been built up in this country over many years should be made subject to review by an International Court

⁴⁶ Cover minutes by Le Quesne to file US17311/96 (NatArch FO 371/88755, 11 September 1950)

⁴⁷ *ibid*

⁴⁸ *ibid*

administering no defined system of law.’⁴⁹ It further raised the International Public Law convention that individuals were not proper subjects of international law’ (noting, by way of comparison, UN efforts).⁵⁰

Beyond the Lord Chancellor’s concerns of European judicial interference another troubling implication of acceptance was the impact it could have on the contemporaneous work of the UN on the International Covenants. Objecting to the acceptance of individual petition in Europe was seen as essential so as to avoid setting any precedent that would court further pressure for the inclusion of similar provisions in the draft UN instruments. The contemporaneous UN process raised the stakes significantly both through the greater breadth of those envisioned texts and also as a result of the much lesser influence of the UK delegation within those negotiations. A Colonial Office memorandum worried that: ‘[a]cceptance of the right of individual petition in this Convention will prejudice our position in relation to the United Nations draft Covenant of Human Rights where all the objections to individual petitions noted above exist in magnified form plus others, and where we, together with the United States, have so far successfully resisted the admission of petitions.’⁵¹ Communist elements were again of particular concern, with the UN negotiating space significantly more hostile than the Council. Additionally the greater salience of the UN amongst the British public made Government obstinacy much more likely to be picked up by the media and, harder to defend at home.

⁴⁹ Conclusions of a Meeting of the Cabinet held at 10 Downing Street on Tuesday, 1st August 1950 (NatArch Cabinet Minute C.M. (50) 52, 1950) note 4, 191

⁵⁰ *ibid*

⁵¹ Colonial Office memorandum (NatArch US17311/59, FO 371/88754)

While not exhaustive, the above subsection shows that there were significant practical obstacles to accepting the Convention's enforcement that existed outside of the colonial context. That said all of the specific and concrete arguments mentioned above do come from only a limited portion of Whitehall while the breadth of resistance, as reported by the Foreign Office and evidenced in Cabinet minutes was broader and spanned the Cabinet. In the next subsection I turn to consider a principled explanation for the more diffuse and general resistance seen amongst the post-war Labour administration.

iv. Compatibility with 1950s Labour Socialism

When the Foreign Minister first asked the Cabinet, in September 1950, to authorise the Foreign Secretary to accept the convention the Cabinet rejected the suggestion, irrespective of any amendments secured.⁵² Given many of the Cabinet members did not express any clearly discernible objections, the 'violent if ill-defined dislike of the Convention' mentioned above must also be considered as a significant, if more illusive, factor in explaining Labour resistance to the Convention regime. Looking at contemporaneous Labour party publications and considering the Attlee administration's agenda, there are good reasons to believe that broader ideological incompatibilities between the Convention system and the Labour socialist program may have made a significant contribution to the Cabinet's resistance.

A general indication of the thinking of the party at the time can be found in the pamphlet *Labour and the New Society*⁵³, published by the Labour National

⁵² (n 28)

⁵³ Labour Party National Executive Committee, *Labour and the New Society* (Labour Party 1950)

Executive Committee in August 1950, for consideration at the Labour Party Conference held in October 1950 (i.e. exactly coinciding with the period of CoE debate over the Convention's enforcement). This leaflet begins '[t]he Labour Party declares the true purpose of society is to promote and protect the dignity and well-being of the individual.' and continues '[w]e proclaim the rights of man because we believe that people will increasingly recognise their responsibilities to each other if their rights as individuals are honoured.' Clearly it cannot then be levelled that Labour were anti-rights per se, however in the detail of the leaflet it becomes clear that the conception of rights espoused is a distinct, traditionally socialist, conception, emphasising the rights 'of all people to the full fruits of their industry' and 'the right to work' alongside the right to democracy and the right to live in peace.⁵⁴ Unlike the Convention's human rights, the realisation of these rights was not to be achieved through a system of legally enforceable articles, capable of being wielded against the state, but rather through a set of policies developing the state and enhancing its input into and control over business and society more generally.

Labour had come to power in 1945 on a ticket of socialist national renewal. Their manifesto stated '[t]he Labour Party is a Socialist Party, and proud of it. Its ultimate purpose at home is the establishment of the Socialist Commonwealth of Great Britain - free, democratic, efficient, progressive, public-spirited, its material resources organised in the service of the British people.'⁵⁵ While this socialism was not as ferocious as that which had been preached during the inter-war years by central figures in the Attlee administration such

⁵⁴ *ibid*

⁵⁵ Labour Party, *Let Us Face the Future: A Declaration of Labour Policy for the Consideration of the Nation* (Labour Party 1945)

as Dalton and Cripps⁵⁶ the party was still confident in its, largely delivered, programme of nationalisation of key industries.⁵⁷ The building of socialised institutions and the centralisation of control as well as ownership had deep roots in the Labour movement but the crucial aim of the Labour Government was to prevent a return of 'the great inter-war slumps' which were 'the sure and certain result of the concentration of too much economic power in the hands of too few men.'⁵⁸ The divestment of such control, power and profit from elites would certainly not be facilitated by a new kind of law that bound the hands of Government and a new form of judicialisation that would enable numerous challenges to progressive socialist reforms.

Defending the Labour approach to individual liberty (as opposed to a more libertarian model) leading Fabian thinker G.D.H. Cole put forward this argument in another Labour Party pamphlet:

Opponents of Socialism often argue that Socialism will destroy personal liberty and subject everyone to the tyranny of the bureaucratic State. Capitalist economists argue that liberty can exist only with a 'free market' which leaves private persons to choose what to produce. This system no doubt assures great freedom (a) to capitalists big enough to control, rather than be controlled by, firms and combines which seriously restrict the independence even of the middle-sized employers; and (b) to persons with enough unearned income to live more or less as they please without working. It allows very little real liberty either to the small employer or trader who finds himself compelled to comply with the conditions forced upon him by great firms or

⁵⁶ In Cripps's 1933 pamphlet *Can Socialism Come by Constitutional Means?* (to which the answer given is: barely), Cripps stated that a socialist government would have to immediately bring in an emergency powers act, dissolve the House of Lords and risk having to take up arms in its fight to overcome the deeply embedded institutions of capitalism. S Cripps, *Can Socialism Come by Constitutional Means?* (Socialist League 1933)

⁵⁷ Most notably the coal, gas, power and steel industries; the Bank of England; and much of the inland transport network.

⁵⁸ (n 55)

combines, or the mass of workers, subject to a capitalist discipline which denies them all share in the control of production, and, as consumers, at the mercy of a host of monopolists and advertisers who control the market in the interests of profit-making.⁵⁹

The individualistic discourse of the European human rights negotiations is clearly at odds with the 'struggle for social-justice'⁶⁰ that underlay contemporary Labour thinking. The two approaches clash as the one attempts to protect the individual by diverting power away from central government (up to the supranational level of oversight and down to the autonomous individual) while the other attempts to concentrate power at the state level as it seeks to improve co-ordination, enhance planning and manage distribution.

Thus, returning to the Government records, where the Chancellor of the Exchequer complained 'that a Government committed to the policy of a planned economy could not ratify this Convention on Human Rights'⁶¹ and that the draft Convention was inconsistent with the powers of economic control, essential to such an economy⁶² we can see the complaint as an expression of a broad incompatibility between the Convention and the principles and objects of the Labour Socialist Government and not just as a mistaken reading of the terms of the Convention (as Foreign Office civil servants suggested⁶³). The Lord Chancellor's complaint that 'the draftsman, whoever he may be, starts with the

⁵⁹ GDH Cole, *A Guide to the Elements of Socialism* (Labour Party 1947) 35

⁶⁰ Labour Party National Executive Committee *Labour and the New Society* (Labour Party 1950) 39

⁶¹ (n 49) note 3, 191

⁶² Foreign Office Minute to file US 17311/76 (NatArch FO 371/88764, 4 August 1950)

⁶³ *ibid*

stand-point of a laissez faire economy and has never realised that we are now living in the age of planned economy'⁶⁴ underlines this point.

Anxiety over whether the Convention may pose a genuine barrier to the broad, and ongoing program of Fabian-type reform being pursued by the Labour Government (potentially protecting the interests of major capital holders, prohibiting certain forms of reform or providing extra channels for review and delay of reformative action) can only have been further magnified by the lack of clarity over the Conservative party's intentions. The potential scope of the European international space was far from clear – with even the Foreign Office complaining of a 'Council of Europe mystique' – and so on top of all the issues above we must also factor in a certain amount of 'erring on the side of caution'.

Overall pinning Britain's non-acceptance of the Convention's optional articles on colonial issues alone, or in large part, is not credible. Not only were there important constitutional concerns arising out of the Court, Commission and Petition that span both domestic and colonial politics, practical concerns for the impact of the Convention in the UK, and potential broader ramifications for Britain's international relations via the UN, there was also a fundamental clash between acceptance of the optional articles and the contemporaneous Labour approach to socialism. Any convincing explanation of acceptance of the optional articles cannot simply rest on the amelioration of one of these factors. Even in the absence of any concrete factors, the complete absence of political will resulting from the fundamental conflict between Labour's political strategy and

⁶⁴ NatArch LCO 2/6274

supranational rights would seem to be sufficient to prevent acceptance and a full account of Labour's acceptance must provide some explanation for the shift in atmosphere from general resistance to general tolerance.

3. Labour's Reorientation and Acceptance in 1966

After thirteen years of Conservative rejection of the optional articles, it would have been perfectly straightforward for the new Labour Government in 1964 to continue the former Governments' policy indefinitely. The Conservatives' ability to criticise rejection had been largely undermined, applications were beginning to be lodged against the UK before the Commission and there was no pressing international circumstance that would give particular impetus to opting in. That the Wilson administration decided to accept both articles within a year of their return to power, with extension of their remit to the remnants of the empire soon thereafter, is thus even more remarkable than the decision of the Attlee Government to accept the Convention at all in 1950. Following on from the previous section's profiling of different forms of objection, in this section I argue that the major motivator for acceptance cannot be the mere subsiding of particular practical obstacles but also the growing influence of a new approach in Labour policy that arose between their periods in power, and which created a growing influence for rights within party thinking.

The chronology of the first year of the Wilson Government, and the machinations leading up to acceptance, are well recounted already by Lester, and Simpson so I do not rehearse their terms. In this section I do, however, continue my rejection of these authors accounts privileging colonial decline as

the key motivator of acceptance and their view that acceptance was principally governed by a pure, rational choice, balancing act.

i. Accounting for Acceptance

After the election, and Labour's return to power after thirteen years in opposition, the Conservative back benches were soon asking questions regarding the new Government's attitude on the optional articles. On 22nd December 1964, Harold Wilson announced that policy towards the optional articles was under review. While not overly remarkable, this was the first explicit public sign that the new Labour Government might present anything other than a continued rejection.

Behind the scenes a more significant shift in mood in Whitehall had occurred with much more support for the optional articles than under the previous Conservative or Labour administrations. Was this new Government convinced that the reduced risk from the Colonies made acceptance acceptable, or even, prudent? A minute from the Colonial Secretary, Anthony Greenwood, suggests emphatically not. In it he expresses his concern that accepting individual petition 'in the widely varying circumstances of the remaining dependencies' still 'could be a potent weapon for mischief in the hands of those who might wish to make use of it for political or racial ends.'⁶⁵ The Secretary agreed to reserve the Colonial Office's position but only on the basis that the Government had at least some degree of confidence that the Convention's operations would have little public impact.⁶⁶

⁶⁵ Colonial Office Response to FO minute (NatArch WUC1753/44, 15 Feb 1965)

⁶⁶ Greenwood commented that 'We know how the procedure works under the European Convention and it is generally satisfactory.' *ibid*

Elsewhere in Government larger shifts had occurred. The new Lord Chancellor, Gerald Gardiner, was strongly in favour of acceptance and in a letter to the Foreign Secretary enthused that 'the pot was coming to boil' on the issue.⁶⁷ He proffered support for the Foreign Secretary who had circulated a memorandum calling for acceptance saying, 'I am sure we ought to do this' and if concerns about the colonies remain that: 'limiting [application] to Britain, the Channel Islands and the Isle of Man [was] a possible answer to any objection to its wider acceptance.'⁶⁸ The Foreign Office memorandum expressed clear confidence in the Council's filtering mechanisms, noting the relative lack of Commission action and, cast doubt on the ongoing relevance of the abuse argument against proposed acceptance (stating it to have been over exaggerated in a domestic context and of diminishing relevance in a colonial one).⁶⁹

The new Labour Home Office was not entirely positive but acceptance of individual petition was still considered acceptable on condition that it was only undertaken for a fixed term and with the possibility of subsequent non-renewal should the effects be deemed undesirable.⁷⁰ The jurisdiction of the Court was still opposed however on a drafting form basis, familiar from 1950, with the document stating 'the terms in which the Convention is expressed represent a

⁶⁷ Letter from Lord Chancellor to Foreign Secretary (NatArch WUC1735/13, 9 Feb 1965)

⁶⁸ Letter of 24th Feb 1965 to Foreign Secretary (NatArch WUC1735/13, 9 Feb 1965)

⁶⁹ Foreign Office paper from EJW Barnes to Lord Hood and UN dept.'s Mr Evans (NatArch WUC1735/13, 12 Feb 1965)

⁷⁰ Reply to memorandum in letter from Home Sec (NatArch WUC1735/49, 2 August 1965)

compromise between differing views and different legal systems and are not susceptible of strict legal interpretation.’⁷¹

Overall, amongst the core departments there was a general movement in opinion towards accepting the Convention. While the Foreign Office noted that the degree of risk of undesirable outcomes had shrunk as the British Empire has dwindled, there was still substantial noise coming from the Colonial Office about what remained. As regards domestic arguments the apparent movement was more significant. Considering what concrete external factors could explain this shift in Labour ideas I do not believe that colonial decline plays no role, but I do suggest that it cannot account for the majority of the amelioration of domestic concern, or for the general change in mood. The only other factor raised in the records is growing confidence that the Strasbourg organs were unlikely to embarrass the UK. While these two practical issues appear to have assisted the move to acceptance, they also seem insufficient to explain the complete reversal of the emphatically held Labour policy against individual petition.

ii. A Positive Labour Move

While Simpson and Lester’s accounts suggest a calculated acceptance as positive outcomes came to outweigh negative ones, on the evidence from when Labour was last in power one would have expected Labour to be less receptive to acceptance than the Conservatives rather than more. Putting to one side that it would be a fairly remarkable coincidence that such a shift should so closely coincide with the return of the Labour party to power, the attitudes expressed

⁷¹ *ibid*

suggest a shift from the general mistrust noted in subsection 2 to a general presumption that acceptance was worth at least a trial run. As such I suggest that Labour's acceptance can be fruitfully considered alongside the broader ideological developments that occurred within Labour during their years in opposition. While the acceptance was delayed until the start of 1966 the Labour administration's decision to accept individual petition came even sooner and was only delayed as a result of the Burma Oil case.⁷² This prompt and unequivocal acceptance stands in such marked contrast to the ferocious rejection of the optional articles by the Attlee administration in 1950 that something more than a pragmatic shift appears to be in play.

If we follow through with the reasoning of the tipping point model it would suggest that had the Conservative party continued in power that, under a similar rational balancing of costs and benefits, acceptance of the optional articles would still have occurred in roughly the same time frame. Simpson suggests that this might well have been the case, noting in particular: '[it] is clear from the papers that Edward Heath, amongst leading Conservatives was personally sympathetic to a change in policy.'⁷³ The different parties may, of course, weight different outcomes differently and the third commentator to have examined these issues in the literature, Bates, is more open to acknowledging that change of Government may have played a part in bringing forward acceptance. Bates, however, still follows explicitly in Simpson's footsteps for much of his pre-1970s account⁷⁴ and so explores the Labour

⁷² With Treasury lawyers mistakenly advising the government that they should delay acceptance so as to time bar a large war damages claim.

⁷³ Simpson (n 2) 1088

⁷⁴ Bates (n 4) 179

position only with respect to reduced Colonial concerns and, referencing Lester, as a piece of perceived-harmless European appeasement.⁷⁵ This last component does appear to have played a part and the Labour party did also have further reducing colonial possessions as part of its proposed program. However we have also seen that 'colonial concerns' remained not just in the Colonial Office but elsewhere within Whitehall, and the fundamentals underlying these concerns were no less tangible than ten years earlier when the Labour party had dismissed the optional articles out of hand. How far the Labour party wished to appease the Continental Governments is also not clear.

While Wilson did submit a second British application for membership of the EEC during his first term it was not without hesitation as Wilson had also been a vociferous opponent of the Macmillan application. The first years of the Wilson Government saw him exploring other policy options, in particular the development of Commonwealth interests, alongside rebuilding the UK's 'special relationship' with the US, and it was only after the sterling crisis in July of 1966 that the party machinery was reoriented towards a second run in 1967.⁷⁶ Such hesitancy was not evident in relation to the optional articles and as the decision to accept was made on these in 1965 it is not obvious that the two are intimately connected, (though I cannot rule out that the interest play a contributory role).

Finally, before leaving the rational choice approach, it is important to acknowledge that a certain amount of cost-benefit analysis is always going to be an intrinsic part of Whitehall decision-making. Evidence of such thinking can be

⁷⁵ *ibid* 186-7

⁷⁶ J Toomey, *Harold Wilson's EEC Application: Inside the Foreign Office, 1964-7* (University College Dublin Press 2007)

seen in the Foreign Office's request for a complete breakdown of all available data on the operation of the Convention in the days following Wilson's announcement of a policy review. However the visibility of such steps within the written records can lead to an overstatement of their importance within the decision making process. The Labour party were not walking into acceptance blindly and such checks smack more of due diligence than of a balancing act.

iii. Shifting Priorities and the New Socialism

Bates's move towards connecting Labour's new policy agenda and the acceptance seems a potentially more fruitful avenue, albeit one that needs to be carried some way further. The first Wilson Government was a reforming government and policies such as the abolition of capital punishment and the development of the race relations agenda evidence both development in Labour thought and policy as well as greater openness to liberal, individualised, human rights. This shift in attitudes runs deep and evidence that principled arguments were increasingly being mixed in with purely pragmatic consideration can be seen in the words of the new Labour Lord Chancellor. In his 'pot coming to boil' letter to the Foreign Secretary in February 1964 he also stated that acceptance would be well received by 'all those who want to see as many disputes as possible settled by some form of independent tribunal'.⁷⁷ He also believed it would demonstrate that 'a Labour Government is not anti-Europe as such' and that both of these benefits 'would cost us nothing'.⁷⁸ Such a position is a very great distance away from Jowitt's concern with contaminating the common law and subjecting British courts to a questionable court. This shift was, however,

⁷⁷ Lester (n 3)

⁷⁸ NatArch WUC1735/17

symptomatic of a broader shift in attitudes and Labour itself was a very different party than it had been in 1950.

Labour's loss of majority in 1950 and departure from power in 1951 set up an inevitable crisis in party thought. The party had achieved a fair measure of success in prosecuting its Fabian agenda, with significant moves towards progressive taxation, nationalisation of publically important industries and the tackling of poverty. Delivery of their promised agenda and steadily growing affluence did not, however, lead to the development of popular momentum behind Labour and instead, much to the surprise of the Labour elite saw the return of the Conservatives to power in 1951. This defeat led to much despondency, collective political soul searching, and intense questioning of Labour's core socialist principles and platform.

Later Labour writers would conclude that the years of affluence 'were years of disaster for the Labour Party.'⁷⁹ Affluence undermined a party who's short term aims had largely been based on alleviation of poverty and who's long term aims were not clearly formulated. As Black puts it '[a]ffluence animated the traditional ethical elements of socialism, but also created pressure to update.'⁸⁰ These tensions flourished as despite the urgent need for a floundering opposition to adapt to changing circumstances and find its feet '[m]odernization of party organisation, policy and presentation, where it seemed to involve a complicity with affluence, met stern resistance (even where

⁷⁹ V Bogdanor and R Skidelsky (eds.), *The Age of Affluence 1951-1964* (Macmillan 1970) 78

⁸⁰ L Black, *The Political Culture of the Left in Britain, 1951-64: Old Labour, New Britain?* (Palgrave Macmillan 2003) 12

proposed in quite traditional terms).⁸¹ Bound up in its own legacy principles, the years after 1951 witnessed a Labour party culture that was 'complacent, conservative, almost old-fashioned' and its administration 'decrepit, amateurish, disorganised and with an often dormant internal life'.⁸²

The potential for stagnation was quickly recognised by some reformers in the party, such as Richard Crossman, who considered the Fabian task largely completed but bemoaned the enduring absence of socialist values in British public life after the Attlee Government's term.⁸³ However, despite such realisations, the early years in opposition were dominated by Labour's enduring commitments to unions, co-operatives and socialism as a morally superior (rather than necessarily practically superior) economic system.⁸⁴ This moral element also underlay the common attitude of the 1950s left, identified by Black, that under conditions of affluence the problem for Labour was 'less that Labour had betrayed the people, than that the people had betrayed socialism or fallen short of the potential of 1945'.⁸⁵

A new generation of Labour thinkers were garnering attention as the fifties progressed – particularly as the old guard began to retire (Attlee stepping down in 1955). However the 'New Left' was not quite as new as it might have been and was 'apt to cast itself more as socialism *redivivus*, recovered from Stalinism and Fabianism'.⁸⁶ That said, while the left of Labour was considering

⁸¹ *ibid*

⁸² *ibid*

⁸³ R Crossman, *Socialist Values in a Changing Civilisation* (Fabian Society 1951) 7 cited in Black, *ibid* 18

⁸⁴ *ibid*

⁸⁵ Black (n 80) 3

⁸⁶ *ibid* 35

what could be salvaged of Labour's old socialist programme⁸⁷ the reformist right of the party was constructing a new agenda for socialism that would fit better with a new public sense of entitlement.

At the heart of these reformers was Anthony Crosland whose book *The Future of Socialism*⁸⁸ would come to set the ideological agenda for a centrist Labour party. While the analysis applied by those on the left of the party remained rooted in tradition, Crosland's call was for the revival of a 'popular socialism' that put the left in tune with the relaxation of traditional social values that accompanied affluence.⁸⁹ In breaking from the policies of the 1945 administration he stated 'socialism is not an exact descriptive term, connoting a particular social structure, past, present, or even immanent in some sage's mind which can be empirically observed or analysed. It simply describes a set of values, or aspirations, which socialists wish to see embodied in the organisation of society.'⁹⁰ In his book he suggests, that the Britain of 1956 was no longer capitalist,⁹¹ and having 'observed the Party since 1951, furiously searching for its lost soul' considered what socialism in the mid twentieth century could aim to do so as to regain focus. Identifying appropriation of property incomes, co-operation, workers' control, social welfare and full employment as the broad central themes that make up the common denominator of socialist doctrine

⁸⁷See for instance the party published: J Connell, *Death on the left: the moral decline of the Labour Party* (Pall Mall Press 1958)

⁸⁸ Crosland (n 1)

⁸⁹ Black (n 80) 37

⁹⁰ Crosland (n 1) 148

⁹¹ His somewhat narrow and atheoretical definition of capitalism being 'a society with the essential social, economic, and ideological characteristics of Great Britain from the 1820s to the 1930s' *ibid* 42

throughout its various incarnations⁹² his model turns away from nationalisation (deeming it 'impossible to reconcile with what the early socialists had in mind')⁹³ and embraces two new guiding principles, one economic the other more general. The economic principle was a shift away from both state ownership and state management⁹⁴ and towards competition, the general principle was a new central tenet for socialism: equality.⁹⁵

This principle of egalitarianism held far reaching implications for Labour policies. For example, in the provision of services, Crosland believed that to create a classless society one did not require universality, only social equality:

[s]ocial equality mainly requires the creation of standards of public health, education and housing so high that no marked qualitative gap remains between public and private provisions. It will then matter little whether or not occasional charges are imposed, [...] 'universality' must follow *from* social equality, and cannot itself create it.⁹⁶

While equal opportunities was not a new idea to Labour – it had been mentioned in *Labour and the New Society*⁹⁷ in 1950, though without elaboration – it was new for it to take such a focal position within the socialist agenda as it was essentially a secondary social rather than a primary economic issue. However, Crosland argued that the post-Attlee state of the UK was no longer

⁹² ibid 52 (These being the philosophy of natural law, Owenism, the Labour Theory of Value, Christian Socialism, Marxism, Mill's theory of rent as unearned increment, Morris's anti-commercialism, Fabianism, the Independent Labour Party tradition, paternalism, syndicalism/guild socialism, and the doctrine of planning.)

⁹³ ibid 67

⁹⁴ Noting the failure of public ownership to live up to expectations Crosland argued that 'the antithesis of competition might be not co-operation, but economic stagnation'. ibid 74-5 and chapter XVIII

⁹⁵ Though in another sense equality 'marked a return to a more explicitly ethical socialism' Ben Jackson, *Equality and the British Left: a study of progressive political thought, 1900-64* (Manchester University Press 2007) 152

⁹⁶ ibid 88

⁹⁷ (n 53)

suitable for consideration in terms of an economic politics of socialism and a new social politics of socialism was demanded. Crosland explained that while economic politics were relevant in 'any country or situation to which a Marxist analysis might plausibly be applied' these being those typified by 'periods of growing pauperisation, depression and mass unemployment, falling real wages, and a sharp polarisation of classes', that in periods of 'prosperity, rising incomes, full employment, and inflation' 'attention is diverted from economic to social issues, not only for the obvious reason that as living standards rise, and the problems of subsistence fades away, people have more time and mental energy to spare for non-economic discontents, but also [because in period of rapid economic change] the income hierarchy gets out of alignment with the class or social hierarchy.'⁹⁸

This view was not immediately accepted and the party would continue to flounder through the rest of the 1950s as the traditionalist left and the reformist right of the party argued on. The old guard staunchly resisted embracing affluence with Nye Bevan telling the 1959 party conference that 'this so-called affluent society is an ugly society still. It is a vulgar society. It is a meretricious society. It is a society in which priorities have gone all wrong.'⁹⁹ That Labour would have to adapt to the new status quo, rather than waiting for the public to come back to it, became harder to ignore after a third successive defeat at the polls in 1959. A Labour Party Discussion Note¹⁰⁰ on 'Private Enterprise' forwarded to party education officers in 1960 casts private enterprise as flawed

⁹⁸ Crosland (n 1) 128-129

⁹⁹ Cited by Black (n 80) 127

¹⁰⁰ Labour Party, *Private Enterprise* (Labour Party, Labour Party Political Education Series, 1960)

but inevitable and stating nationalisation's usefulness as limited in scope.¹⁰¹ In his 1963 Bill Thomas memorial lecture on the subject Crosland re-emphasised the importance of middle class psychology and avoiding the Conservatives becoming the default vote of the aspirational, upwardly mobile. This view would be reiterated in his pamphlet '*Can Labour win?*' where he declared that the 'anti-prosperity image of the party' was allowing the Conservatives 'to appropriate the sole kudos of being the party of prosperity' even though it was Labour policy that had first helped bring about the economic recovery.¹⁰²

Against this growing scepticism towards centralisation, the principle of equality had taken up a central position within the Labour agenda by the time of the 1964 election. The manifesto described 'the creation of real equality of opportunity' as an 'immediate [target] of political action', including both gender equality through a commitment to equal pay for work as part of 'a charter of rights for all employees' and work on racial discrimination through promised positive action rather than endless abstention in UN discussion 'on vital issues of freedom and racial equality'.¹⁰³ It also proposed a socio-economic 'Charter of rights for all employees'¹⁰⁴ including (redundancy compensation, sick leave, training, transferability of pensions, protection for shop stewards and 'the right of equal pay for equal work').

While the Labour party still contained division and Labour leader Harold Wilson was on the left of the party – away from Crosland and the reforming

¹⁰¹ Public ownership is proposed only where an industry or firm is failing and public ownership is "necessary". *ibid* 30

¹⁰² A Crosland, *Can Labour win?* (Fabian Society 1960) 15-16, also cited at Black (n 80) 139-140

¹⁰³ Labour Party, *Labour Party Manifesto: The New Britain* (Labour Party 1964)

¹⁰⁴ In itself a remarkable departure from the resistance to the Social Charter detailed in Chapter 3.

centrist ideologues – differences between the groups centred on the role of the concept of community in egalitarian thinking rather than on the value of equality itself.¹⁰⁵ The influence of the developing revisionist ideas on the right of the party can also be seen to have found a footing in Wilson's thought and while he did not directly address the question of human rights, the new socialism's impact on labour policy can be seen in Wilson's speeches of the period on legal issues and law reform. In 1963 he pledged at an anti-apartheid rally that he would pass legislation against racial incitement and discrimination¹⁰⁶ as soon as Labour had a majority in Parliament.¹⁰⁷ In the run up to the election he went further and in an address to the Society of Labour Lawyers, entitled 'Liberty and the Law', emphasised the rule of law as a central means for ensuring greater security for members of society. Wilson stated that the Labour party, were considering with 'all possible dispatch the machinery of law reform' and situated this work at the heart of its prospective policy.¹⁰⁸ Wilson placed such importance on the issue that he declared: 'whatever our achievements in terms of economic or social policy, in housing, health, pensions, education, in foreign and Commonwealth affairs, in the machinery of our national Government, or the creation of a new system of regional planning, it is our determination that the next Labour Government will go down in history as one of the great liberal reforming administrations of this century, challenging any comparison with any

¹⁰⁵ Jackson (n 95) 222

¹⁰⁶ Sponsoring Mr Fenner Brockway MP's private members bill which had been submitted nine times over the preceding decade without ever reaching a second reading.

¹⁰⁷ P Dorey, *The Labour Governments, 1964-1970* (Routledge 2006)

¹⁰⁸ H Wilson, *Liberty and Law* – Speech to the Society of Labour Lawyers by Harold Wilson on 20 April 1964 (LabArch SLL/7/30, Labour Party/Conference 64-68)

of the past.¹⁰⁹ Beyond merely combating discrimination, or promoting equality, Wilson now supported substantive protection of the citizen against the state ('We entirely accept the contention that the function of judges is to stand between the citizens and the Executive.') and even went into some specifics in relation to international law (stating that the UK should ratify the Genocide Convention and that insufficient progress had been made in relation to the rights of women and minorities). In closing Wilson stated '[t]his is a propitious moment for a British Government to take a fresh and vigorous initiative in the Human Rights Commission.'¹¹⁰

Overall this speech professes a significant appetite for new measures combining elements of codification, judicial review of executive action and supranational development. While some of this can be written down to electioneering and catering to a specialist legal audience, this developed approach and some of the detail suggested fits nicely within the broader theme of a developing Labour agenda that is far more open to human rights supervision. Beyond the principled approach underlying the substantive change in policy towards equality, the move away from state management and ownership also had the effect of significantly reducing the degree to which the Convention might interfere with the Labour program for government. More importantly the weakening of the discourse of bringing about individual protection through extensive socialisation also left room for a different approach to protecting individual autonomy. Shifting from socialised structures of collective protection to a greater openness towards the use of legal channels

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

by individuals, is evidenced in both Wilson's speech and the words of the Lord Chancellor, as quoted at the beginning of this section. A greater openness to international bodies also shows some eroding of the supranational obstacle.

With Labour moving towards a new way of thinking about individuals and their rights, as well as liberality and the role of the courts, the powerful ideological objection profiled in section 2 above can be seen to have lost a lot of its sting. The 1964 election marked a break point in Labour attitudes to equality¹¹¹ and alongside the amelioration of practical objections, this change must be seen as a crucial element in Labour's move towards acceptance of the optional articles.¹¹²

4. Conclusion

In this chapter I have considered Labour's acceptance of individual petition and the jurisdiction of the Strasbourg court, and criticised the limitations of the existing literature on the topic. This crucial episode in Britain's domestic engagement with Euro-mediated human rights norms has been presented as a decision reached on the basis of pragmatic assessment of shifting external factors, and in particular, the loss of Britain's empire. It has also been presented

¹¹¹ Jackson (n 95) 224

¹¹² I have not assessed here how far the mere fact of returning to power after a prolonged period in opposition may have been a contributing factor to acceptance. Theoretical work on the postmaterialist trigger thesis (see D Erdos, *Delegating Rights Protection: the rise of bills of rights in the Westminster world* (OUP 2010)) suggests that enactment of binding constitutional rights instruments tend to develop from the marriage of underlying trends of growing prosperity, social development and more open thinking about legal protection with a catalysing spark of elite political motivation that often occurs closely before departure from power or shortly after arrival to it. More prolonged periods of opposition produce a greater triggering impetus and such a model might further contribute to explaining the relative swiftness of acceptance or the creeping reticence that began to develop towards the end of the first Wilson government.

as the fruit of domestic campaigns for rights recognition by an emergent coterie of civil society rights organisation.

While I do not dismiss the potential contribution that these factors may have played to convince some in Whitehall that acceptance was no longer as risky as it had once seemed, (particularly as the period was still marked by uncertainty while the Strasbourg authorities began to handle their first few inter-state petitions), I have argued that these accounts alone lack the explanatory weight to overcome what had previously been a powerful and broad ranging aversion to the optional articles in the Labour party.

A major shift in Labour thinking was required to reverse the 1950s position and in the third section of this chapter I have identified just such a shift. The new socialism emerging in the 1960s ameliorated past concerns with judicialisation and with the codification of individual rights. This development, partnered with the above factors was enough not just to open the door to a reconsideration of Labour policy on the optional articles but also to bring a surprise acceptance despite the extremely modest public and parliamentary interest in the issue. Acceptance can thus be seen not as a negative decision whose time had come but as a positive policy decision rooted in new party ideology. While we cannot know whether the Conservatives would have adopted the same course had they remained in power, the absence of interest in doing so during the thirteen years preceding suggest that the move to protect rights came here again from a place of political division rather than unity. Such a dynamic is seen again in chapter 6 with the neo-revisionist shift in Labour policy during the 90s an important precursor to the HRA. Before looking at that, however, I examine the 1970s domestic Bill of Rights debate, an important

bridging episode between the acceptance of individual petition and incorporation of the ECHR.

Chapter 5 The Burgeoning Bill of Rights Debate

"It is vitally important that we do not over-estimate or exaggerate what such a Bill could achieve. It must be limited in scope and cannot prevent a future Labour Government from doing many things which we regard as utterly objectionable."

Sir Michael Havers MP,¹ 16th July 1976²

1. Introduction

Leading on from the acceptance of the optional articles I now consider the 1970s Bill of Rights debate, the next stage in the gradual process of repatriating Europeanised rights norms into the British domestic system. While the 1970s debate failed to precipitate any concrete measures, it did provide important groundwork for the later HRA – both by driving significant examination of the constitutional implications of numerous different strategies for rights protection and by advancing the European Convention to the forefront of proposals for a domestic rights instrument. Starting from the point of Labour's acceptance of the ECHR enforcement mechanisms in 1966 and continuing through to Thatcher's rise to power, this Chapter analyses the period where human rights finally grew from a niche concern, principally of those with existing international interests, and became firmly established as an issue in the mainstream of domestic political debate.

Drawing again on party and national archives, along with contemporaneous publications and Hansard in this chapter I consider three important questions. The first is why human rights entered the mainstream at

¹ Former Conservative Solicitor General, under Edward Heath, and subsequent Attorney General and Lord Chancellor under Margaret Thatcher.

² 'Bill of Rights', Report of the Conservative Party's Leader's Consultative Committee (ConArch LCC/76/131, 16 July 1976)

this stage, considering whether this resulted from endogenous domestic factors or external European developments. The second is to ask why the ECHR approach to human rights became the dominant proposal for a domestic Bill of Rights, beating out both proposals for a newly drafted 'British' rights instrument, and Commonwealth precedent in the form of Canada's Bill of Rights.³ The third is to identify what practical obstacles, endogenous concerns or external factors prevented a Bill of Rights at the time despite apparently significant support for such a measure from actors across the political spectrum. All three questions cast further light on the ongoing issue of how domestic elite politics has interacted with rights issues and precipitated constitutional change.

i. Existing Literature

While the failed 1970s debate has received relatively little attention⁴ and has principally been examined only in counterpoint to the latter development of the HRA, two authors have directly considered this debate in more detail, and with particular attention to the issues surrounding rights judicialisation. The first, Nicol, considers the adoption of the Convention into domestic law as a comparison case for his work on the UK's accession to the European Community.⁵ The second, Erdos, considers the 1970s debate in contrast to the events of the 1990s as part of an examination of the political science underlying

³ Canadian Bill of Rights Act 1960

⁴ Erdos (2010) (n 112) 117

⁵ Danny Nicol, *EC Membership and the Judicialization of British Politics* (OUP 2001) ch 7

the dynamics of bills of rights adoption across time and in various Westminster democracies.⁶

Nicol's core contention in relation to the 70s debate is that '[i]n contrast to the debates over EEC membership, from the very start parliamentarians clearly understood that a Bill of Rights/ECHR incorporation would elevate the British judiciary to Supreme Court status.'⁷ He identifies that this judicialisation was viewed as both a strength for those endorsing a bill and as a weakness for those rejecting it.⁸ He also argues that the teleological approach, invited by the Convention's vague drafting terms and the Strasbourg Court's continental judicial style, invoked the same concerns of expansive interpretation raised by those Eurosceptics who fought against the Maastricht Treaty⁹. This led to conflicting arguments (along similar dividing lines) regarding an ECHR based Bill's impact on the rule of law, with some claiming that greater separation of powers would enhance it while others argued that the Convention's loose terms precluded any certainty of what the law actually was.¹⁰

Erdoş's work examines the processes underlying Bill of Rights adoption and seeks to explain the differing circumstances between the failure to pass a Bill of Rights in the 70s and the success in doing so twenty years later. From his empirical work Erdoş suggests two factors as key components of committed,

⁶ D Erdoş, 'Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate' (2009) 44(1) Government and Opposition 20-41 and Erdoş (2010) (n 112)

⁷ Nicol (n 5) 230

⁸ *ibid* 231

⁹ Treaty of Maastricht [1992] OJ C325/5

¹⁰ Or, in other words, an argument between thick and thin conceptions of the rule of law *ibid* 232

elite political support for a Bill of Rights: an ideological commitment to social liberalism, and a non-executive power orientation.¹¹

Against a tradition of distrusting positive rights instruments and resistance to judicial ‘policy making’ within the British constitutional tradition Erdos thus explains the development of the debate in the 1960s in terms of growing social liberalism amongst ruling elites but its failure to bear fruit in terms of insufficient non-executive power orientation. Erdos presents growth in ‘post-materialist preferences’ and more diverse immigration during the 60s as underlying factors that served to develop, or reinforce, social liberalist sentiments during this period (tying in with the growing public affluence considered in chapter 4). However, despite a constancy of Liberal support Conservative and Labour restraint and changeability in commitment is explained by reference to the frequent exchange of power between them.^{12, 13} As such Erdos concludes that the developments of the late 70s ‘were prompted by the weakness of the two main parties and concomitantly the strategic position of the Liberals [and Scottish and Welsh nationalists] within politics at the time.’¹⁴

Below I offer an account that dovetails with and builds upon Nicol’s and Erdos’s accounts. By examining the questions of why the debate occurred, why Convention incorporation became the dominant proposal, and why the debate

¹¹ Erdos (2009) (n 6) 1

¹² *ibid* 21-2

¹³ By contrast, Erdos argues that the prolonged period of Labour opposition prior to the 1997 elections created an ‘aversive trigger’ of pent up objection to unfettered executive rule and thus the necessary non-executive power orientation to carry sovereignty-restricting rights legislation. This point will be considered in chapter 6. *ibid* 31-4 and Erdos (2010) (n 6) 117-124

¹⁴ Erdos (n 6) 117

failed to yield an instrument I provide an additional aspect on the 1970s debate, linking it back to the earlier episodes examined in this thesis, and profiling the changes that led up to this debate. In doing so I cast further light on the 70s debate's role as an important bridge facilitating the merging of domestic and European rights discourses and as an important precursor to the 'bringing home' of rights at the turn of the millennium. I also draw further detail into the picture presented by the literature and identify, alongside the major party posturing and the practical restrictions on progress applied by their internal divisions and collective pragmatism, the important role that idealistic individuals have played in shaping the rights debate.

ii. Chapter Structure

In this first section I outline the key events in the development of the debate, consider existing work in the literature, and identify two waves of popular interest, the first at the end of the 1960s and through the turn of the decade and the second from the middle of the 1970s to the end of that decade. I examine the emergence of support for a domestic rights instrument in the work of each of the main parties and show the contributions both of the collegiate parties and of pioneering individuals to the development of the debate. Considering Liberal concerns with administrative oversight, Labour's shifting attitudes to rights after their fall from power in 1964 and the Conservative softening towards Europe during the 1970s, in this section I profile a political landscape shifting across several dimensions. Considering these shifts, along with the input of external civil society organisations, and developments on the continent, I propose to answer the first of my three questions by emphasising the

importance of individuals, and the marginal Liberal party, in lobbying for greater public attention for rights issues. Through the promotion of these individuals up the party ranks and through the Liberal party's growing Parliamentary significance (as a result of successive indecisive general elections), I argue that human rights was driven much further into the spotlight of public discourse than would have otherwise been the case, again profiling inter-party conflict as a driver of rights related progress.

In the next section I build upon this overview of the rise of the debate as a whole, and consider the emergence of the Convention as front-runner to become the substance of a domestic Bill of Rights. First examining the history of Liberal advocacy for a Bill of Rights I demonstrate how a long string of proposals for a British bill of civil liberties elided into support for a Europeanised human rights debate. From the first wave of interest to the second I show how proposals based on the concurrent Canadian Bill of Rights emerged, and receded, as that instrument was feted and then abandoned by Conservative commentators. I then consider four drivers for the Convention – two negative: the rising status of Europe within the domestic politico-legal space (and reduction of supranational concern), and growing familiarity with the Convention amongst key lawyer politicians (and reduction of judicialising concern); and two positive: the greater viability of the Convention in a period of fierce inter-party tensions, and the perceived advantages of the Convention in relation to Northern Ireland.

In the final section I move on to my third question and examine the twilight of the debate. In explaining the failure of the various proposals made during the debate I focus in particular on the relative balance of the parties, the

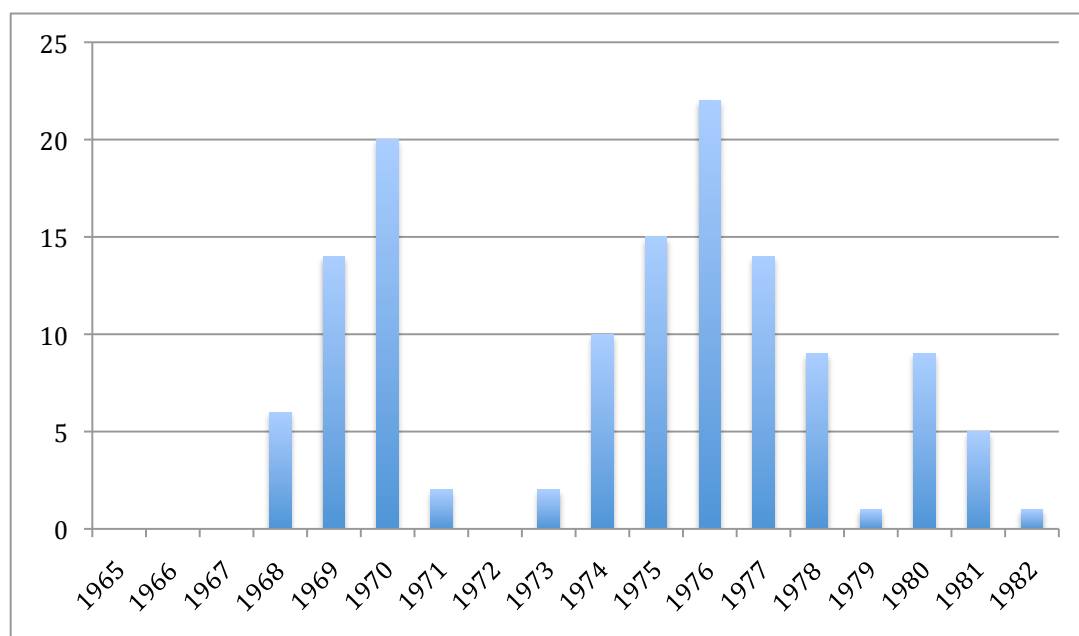
competition of other constitutional issues, and the degrading situation in Northern Ireland. In relation to each I apply my analytical framework, highlighting strong concerns over judicialisation from Labour, desire to minimise supranationalism from the Conservatives, and commitment to curbing the power of Parliament and the executive by any means possible for the Liberals. These divergent concerns made consensus impossible and the pursuit of consensus was ultimately the undoing of any possible plans. In conclusion, as with previous chapters, this case study of the Bill of Rights debate shows that while individual politicians play a major part in generating rights proposals, party support for these ideas stems from political conflict and success for rights initiatives involving the United Kingdom emerge from positions of party dominance rather than from attempts to reach consensus.

2. Emergence of the Debate

While the 1970s Bill of Rights debate has not benefitted from the same expansive enquiry as has been bestowed on the incorporation of the Convention since the passing of the HRA, its importance to this later development should not be underestimated. While the Bill of Rights issue fell out of the political foreground by the early 80s the 70s saw the possible adoption of a Bill of Rights receive serious, sustained and detailed scrutiny. The debate is also notable for having been both greater in depth and very much broader in its consultation than that preceding the HRA two decades later. Much of the intellectual legwork, considering the implications of a British Bill of Rights, was undertaken during this earlier period and, while short lived, the 70s saw for the first time the emergence of some degree of consensus regarding the value of pursuing

incorporation of the European Convention. While the political climate was not conducive to action, the 70s debate laid much of the groundwork for the eventual Convention incorporation.

Serious proposals for a Bill of Rights first began to appear in significant number in the late 60s, were modified and fleshed out through the 70s before disappearing again in the early 80s. During this period, which we consider as the 70s Bill of Rights debate, political turbulence meant that elite political interest in passing a Bill of Rights was ‘sporadic’¹⁵ and support ‘episodic’.¹⁶ One of the breakthrough qualities of the 70s Bill of Rights debate was its significant public exposure and, as a result, it is easy to broadly gauge the varying momentum of high level public debate through the media coverage the issue received. Using the number of articles mentioning the possibility of a domestic Bill of Rights in *The Times* as a crude metric, one can map the volume of commentary over time revealing two clear stages to the debate



¹⁵ Erdos (2010) (n 6) 106

¹⁶ *ibid* 110

Fig. 2 - Articles in the Times discussing a domestic Bill of Rights 1965 - 82

This graph also broadly maps onto changes in Government. Emerging in the final years of the first Wilson Government, the Bill of Rights issue fell out of the public gaze during the Conservative Heath premiership before reappearing concurrently with Labour's return to power in 1974. A second wind for the debate built through the second Wilson administration, peaking in 1976 around the time of Wilson's retirement before starting to decline again during the Callaghan years. A drop in 1979 coincides with a shift in attention to the general election that year (in which a Bill of Rights failed to become a major issue) and the resumed attention during the start of the Thatcher years did not arrest the pre-election decline. Through the rest of the section I explore how, and propose potential explanations for why the debate emerged and developed in this way.

i. How and Why the Debate Emerged

Seeking to explain the emergence of the domestic rights debate in 1968 requires attention to a range of factors. One of the most visible external drivers came in the form of the UN labelling of 1968's as International Year for Human Rights.¹⁷ In a talk arranged by the International Commission of Jurists¹⁸ to mark the year, Professor Norman Dorsen, the vice-chair of the American Civil Liberties Union, addressed the topic of Bills of Rights.¹⁹ In his speech Dorsen drew parallels between the UK and US situations and, noting what he perceived as a greater willingness of the British people to accept encroachments on their individual

¹⁷ UN General Assembly resolution 1981 (XVIII) of 12 December 1963, also A/RES/2081 (XX)

¹⁸ The organisation now known as 'Justice'.

¹⁹ In London on 1st July

liberty. Citing long-standing policies of theatre censorship and immigration restrictions amongst other more recent issues, Dorsen suggested that the UK could benefit from a Bill of Rights and a written constitution.

While this contribution is principally noteworthy for being the first public call for such an instrument during the period under investigation, of greater note is Professor Dorsen's introduction, which was enthusiastically provided by the Labour peer, former Attorney General, and co-founder and Chair of the International Commission of Jurists, Lord Shawcross (who is also notable in connection with this rights story for having led Maxwell-Fyfe as the lead prosecutor at Nuremburg). Shawcross's endorsement of Professor Dorsen's conclusion was accompanied by a short speech in which he complained that '[a] growing authoritarianism characterizes Government politics and because of the stress of the party battle, MPs have become, as a rule, quite unable to fulfil their task of protecting the rights and freedoms of the individual citizen.'²⁰ Labelling the contemporary British situation as 'dictatorship in disguised form' he added that 'Parliament is becoming more and more a machine to give effect, often without any discussion at all, to the decision of the leader of the party in power.'²¹

A second high-profile event on 20th November 1968, this time organised by the Fabian Society, saw fellow Labour party lawyer, and moderate, Anthony Lester further fuel media attention for the issue.²² In his talk, subsequently

²⁰ Times Reporter, 'Call for Bill of Rights' *The Times* (London, 2 July 1968) 3

²¹ *ibid*

²² Times Reporter, 'Bill of Rights is urged to guard the citizen' *The Times* (London, 21 November 1968) 3

issued as a Fabian tract pamphlet,²³ Lester argued that supranational 'human rights' could not yet be considered rights under English law as they were insufficiently protected against populist government.²⁴ To deal with this democratic threat to minority interests Lester also advocated a Bill of Rights suggesting that one could hold the potential to inhibit governments from attacking civil liberties.

Considering the problems with existing tribunal systems and gaps in protection for citizens, Lester envisioned an instrument that would both significantly enhance judicial oversight over administrative acts and also provide some restraint of legislative ones. Lester was certainly circumspect about the potential for legal coercion any Bill could inflict on Parliament (accepting that entrenchment of a Bill was impossible without very significant constitutional upheaval), and that a Bill without entrenchment would create a principally political restraint on an authoritarian Government. He also noted that the US had still suffered from 'alarming epidemics of populist intolerance' notwithstanding its apparently robust and legally forceful Bill of Rights. However, despite recognising 'the limited value of such an instrument',²⁵ he averred that the risk of a Bill being undermined, or even repealed, in the face of a hostile majority, was a 'a risk worth taking, for the Government of the day would surely feel the same inhibition about emasculating a Bill of Rights based on the ECHR as it would about creating ten-year Parliaments' before adding,

²³ Anthony Lester, *Democracy and Individual Rights* (Fabian Society, Fabian Tract 390, 1969)

²⁴ *ibid* 3-12

²⁵ *ibid* 13

tellingly ‘... at any rate in peacetime’.²⁶ A sticky, political, effect, constraining Governments from infringing rights, was thus seen as a critical complement to the instrument’s legal effect.

Alongside these efforts from backbench Labour moderates, the opposition backbenches were also beginning to explore the Bill of Rights idea. A few weeks before the Lester speech, on 23rd September 1968, Conservative member Viscount Lambton publicly announced his intention to propose a Bill of Rights in the next Parliament. Noting predominantly local ills (town and county planning laws, finance laws, retrospective legislation and overbearing use of regulation) his idea of a Bill of Rights was intended to redress perceived imbalances between private individuals and local authorities, and to ensure full compensation for those deprived of property.²⁷ While Lambton’s concerns are clearly not entirely aligned with those of Lester and Shawcross the nascent public discourse surrounding human rights at this time lacked the clarity to clearly distinguish such related proposals and, in common with the two Labour rights advocates above, Lambton was closely affiliated to a civil society organisation concerned with civil liberties (Lambton being the sitting Chairman of the ‘Society for Individual Freedom’).

To Lambton’s call was added the prominent Conservative voice of Quentin Hogg MP, soon to be Lord Chancellor. In a speech to Conservative supporters, the future Lord Hailsham prescribed a Bill of Rights, judicial review of the constitutionality of law, fixed term elections and regionalism as the

²⁶ *ibid* 14

²⁷ Times Reporter, ‘Bill of rights planned’ *The Times* (London, 24 September 1968) 3

medicine for, what he described as, the ‘tyranny of Whitehall’.²⁸ Again, as with the above three contributors, this call was made by Hogg as a result of his patronage of a rights oriented civil society group²⁹ and as with Lester’s speech, Hogg’s proposal was issued as a pamphlet shortly afterwards,³⁰ garnering further press attention to the issue.³¹

Completing the set of the major parties, John MacDonald QC, a Liberal lawyer – who later made his professional name through high-profile cases involving state action against minority groups (including the Ocean Island case,³² the Canadian Indian case,³³ and Diego Garcia compensation claims³⁴) – provided a Liberal party proposal for a Bill of Rights a few months later (published by the Liberal Research Department).³⁵ Macdonald’s bill covered all of the Convention’s key articles, albeit with a different drafting form, but also extended the scope of its codification by including rules on personal data, free time, citizenship/travel, trade unions and excessive punishment. He argued that ‘[a] Bill of Rights should confer rights which can be readily enforced in the ordinary Courts’ and was less tentative in his prognosis than Lester. Unlike the

²⁸ Times Reporter, ‘Mr Hogg’s way to end the tyranny of Whitehall’ *The Times* (London, 12 October 1968) 10

²⁹ In this case ‘P.E.S.T.’ (Pressure for Economic and Social Toryism) group, who had arranged the ‘constitutional conference’ at which the speech was given..

³⁰ Quentin Hogg, Baron Hailsham *New Charter: some proposals for constitutional Reform* (Conservative Political Centre 1969)

³¹ Times Reporter, ‘Hogg fears for British constitution’ *The Times* (London, 16 April 1969) 6

³² *Tito v Waddell and Tito v Attorney General* [1977] Ch 106, which concerned British relocation of a small indigenous group after the Second World War, on ostensibly humanitarian grounds, making way for extensive phosphate mining operations.

³³ *Manuel and others v Attorney General* [1982] 3 All ER 822, which considered whether Canada had the necessary sovereignty to sever links with the UK’s parliament without the consent of Canada’s indigenous Indian tribes.

³⁴ Securing compensation of £5m for residents removed from the British Indian Ocean Territories between 1968 and 1973.

³⁵ John Macdonald QC, *A Bill of Rights* (Liberal Research Department 1969)

above calls from Labour and Conservative actors, which were clearly identified as the views of the individuals, the MacDonald draft stemmed from a broader party initiative, with MacDonald producing his domestic Bill in concert with other Liberal lawyers. This proposal was then used as the focus of Liberal efforts to fuel debate in the House of Lords (particularly by Liberal peer Lord Wade)³⁶ as well as being submitted by Liberal MP Emlyn Hooson QC as a Private Members Bill in the Commons.³⁷ This was the second bill of its kind considered in the Commons. The following table³⁸ lists these and other Bills of Rights proposed up to the early 1980s:

<i>Year(s)</i>	<i>Sponsor</i>	<i>Party</i>	<i>House</i>	<i>Title</i>
1969	Vis' Lambton	Conservative	Cmns	Bill of Rights
1969	E Hooson	Liberal	Cmns	Bill of Rights (No.2)
1970/1	Earl of Arran	Liberal	Lords	Bill of Rights [HL]
1970/1 ³⁹	Sam Silkin	Labour	Cmns	Protection of Human Rights Bill
1974/5	Alan Beith	Liberal	Cmns	Bill of Rights
1974/5	J Kilfedder	Dem'Unionist	Cmns	United Kingdom Bill of Rights
1975/6	Lord Wade	Liberal	Lords	Bill of Rights [HL]
1976/8	Lord Wade	Liberal	Lords	Bill of Rights [HL]
1978/9	Sir F Bennett	Conservative	Cmns	Bill of Rights
1979/80	Lord Wade	Liberal	Lords	Bill of Rights [HL]
1980/1	Lord Wade	Liberal	Lords	Bill of Rights [HL]
1981	Alan Beith	Liberal	Cmns	... continuation of Wade 80/1
1983/4	R MacLennan	Social Dem'	Cmns	European H'R' Convention Bill

³⁶ HL Deb 18 June 1969, vol 302, cols 1026-96

³⁷ Bill of Rights (No.2) Bill 199 1968/9

³⁸ A fusion of those in Erdos (2010) (n 13) 113 and House of Commons Library – Home Affairs Section, *Research Paper 98/24 – The Human Rights Bill [HL]* (House of Commons Library 1998) Appendix 3

³⁹ The Silkin bill was not a detailed Bill of Rights proposal but is included as a relevant part of the developing legislative agenda regarding the enforcement of human rights domestically.

Fig. 3 - Bill of Rights bills proposed 1969 - 83⁴⁰

While the list is dominated by Liberal submissions, the first concrete proposal came in April 1969 from Conservative MP Viscount Lambton. Bemoaning the slow attrition of civil liberties, Lambton highlighted problems with the Race Relations and Town and County Planning Acts⁴¹ and proposed a Bill drafted by his Society for Individual Freedom. This document reflected the anti-collectivist, low-tax and limited State ideals that underlay that organisation⁴² and, unlike MacDonald's Liberal draft, was based on an adapted version of the Canadian Bill of Rights rather than any attempt at drafting a distinctive new British text. Leaving to one side the Earl of Arran's Lords Bill (which also used the Canadian precedent as its basis) the third Commons bill came from Samuel Silkin QC, Chair of the Society of Labour Lawyers and future Attorney General (during Wilson's first term).

Silkin's proposal, which came shortly after the Conservative victory in 1970, and on the tail end of the first peak of Bill of Rights interest, took a third tack. In his private member's bill⁴³ Silkin made no attempt to codify new rights and concerned himself instead with domestic enforcement of the Convention, proposing the creation of a domestic 'National Tribunal of Human Rights', supported by a domestic Human Rights Commission along the lines of the

⁴⁰ In addition to these UK wide proposals the Liberal peer Lord Brockway proposed a specific Northern Ireland Bill of Rights four times between 1970 and 1977 (HL Bill 157 1970/71, HL Bill 128 1971/72, HL Bill 102 1975/76, and HL Bill 80 1976/77) and the Conservatives proposed a Bill of Rights for Scotland in an, unsuccessful, amendment to the 1978 Scotland Act (HC Deb 1 February 1978, vol. 943, cols 492-583)

⁴¹ In 1965 and 1968; and 1947 and 1954, respectively

⁴² Erdos (2010) (n 13) 114

⁴³ Protection of Human Rights Bill, given its second reading at HC Deb 2 April 1971, vol 814, cols 1854-64

European Commission on Human Rights. This tribunal would have had power over both public authorities and private organisations and, Silkin argued, would provide the ‘effective remedy’ required under Article 13 ECHR but as yet absent from the British, domestic, legal space. Silkin’s proposal effectively provided for a form of weak incorporation of the Convention.⁴⁴ While not pitched as a higher law or as an instrument to fetter the legislature, Silkin envisaged a system that would at least provide for rigorous, rights-based, review of the executive by a domestic judicial or quasi-judicial authority. While this instrument was not a fully-fledged Bill of Rights (and has thus been omitted from other accounts), its proposals are clearly relevant to a broader consideration of the growing momentum behind the Bill of Rights question.

These three bills, from three parties, adopted three very different approaches. While Conservative and centrist Labour commentators were making private calls for a Bill only the Liberal party officially supported attempts at bringing any form of Bill of Rights into being. It is important to note that this initial, elite, agitation for a Convention did not exist in a vacuum. As noted in chapter 4 a groundswell of civil society human rights advocacy was occurring. This was principally outward looking, with greater international unease about cases of domestic political oppression leading, towards the end of the decade at least, to some adverse and concrete implications for states with negative human rights records. Spain’s failed application to join the EEC in 1962 was closely linked to the Franco regime’s widespread abuses and Greece’s exit the Council of Europe in December 1969, after its membership was suspended

⁴⁴ *ibid* col 1855

under Art.15 ECHR, came as a direct result of its own poor record.⁴⁵ Notwithstanding this, many of the key actors in this early stage of the domestic Bill of Rights debate seem to have been more concerned with responding to their own, more targeted, and overwhelmingly domestic agendas. Besides the Liberal party, whose history of engagement with Bill of Rights ideas put it at the centre of early advocacy, the first wave of the domestic Bill of Rights debate consisted only of the bubbling to the surface of idealistic individual backbenchers, acting in their private capacities as patrons of liberty minded organisations and not a broad engagement with human rights principles.

The growing attention rights were receiving was not lost on the central authorities of the Labour and Conservative parties and all three of the main parties' 1970 manifestos attempted to claim human rights as their own. However the lack of engagement in the central Conservative and Labour party machines can be seen in the divergence between the concrete proposals made by the motivated individuals and the vague terms of commitment offered by official Labour and Conservative sources. Labour's manifesto asserted, 'today as often in the past the extension of human rights has had to wait for a Labour Government.'⁴⁶ However, the party offered no substantive commitment to future action. The Conservatives argued that 'Parliament during recent years has often passed government legislation which has infringed individual rights

⁴⁵ Tom Buchanan, 'Human Rights, the Memory of War and the Making of 'European' Identity 1945-75' in Martin Conway and Kiran Klaus Patel (eds.), *Europeanization in the Twentieth Century* (Palgrave Macmillan 2010) 166-7

⁴⁶ Labour Party, *1970 Labour Party Manifesto: Now Britain's Strong - Let's Make it Great to Live In* (Labour Party 1970)

and given wide discretionary powers to Ministers and their civil servants.⁴⁷ To combat this supposed decline their manifesto claimed that a Conservative Government would 'closely examine ways of safeguarding more effectively and equitably the rights and freedom of the individual citizen.' Again only the Liberal manifesto provided a concrete commitment to specific action on rights. Under the heading 'The Citizen against the Bureaucrat' the Liberals put their case somewhat more succinctly, noting the Hooson bill and committing the party to continued pressure to passing a similar instrument.⁴⁸

With the debate falling off into the Heath term, the first peak can be seen as the product of agitation on the part of peripheral elite actors from all three main parties and a concerted effort from the Liberal party. While external interests were shifting towards human rights, the first surge of the domestic debate made relatively little contact with the supranational dimension and, at odds with the general statements of the party manifestos, saw a more traditional concern with domestic constitutional development as its focus. With the partial exception of Silkin's effort, the debate appears to have been motivated principally by home grown concerns rather than external forces and, despite civil society making connections between domestic and international rights failings, for the time being this kind of thinking remained restricted to the periphery.

⁴⁷ Conservative Party, *1970 Conservative Party General Election Manifesto: A Better Tomorrow* (Conservative Party 1970)

⁴⁸ Times Reporter, 'Liberals hit at big battalions.' *The Times* (London, 29 May 1970) 4

ii. The Heath Dip

The decline of the debate during the Heath Government demonstrates that the proposals for a broad constitutional bill were yet to attain the breadth of support or the pressing significance required to capture central attention and further demonstrates the lack of conviction underlying the Conservatives' manifesto sentiments. Constitutional reformers' attentions were engaged by the ongoing Royal Commission on the Constitution (which ran from 1969 to 1973) and more discrete exercises, such as the assembling of the Younger Commission in January 1970 to investigate reform to the law on privacy.⁴⁹ However, through this lull a number of key appointments were made bringing the diverse community of individual rights advocates closer to the party core. Heath's Government saw Bill of Rights supporters sweeping the key legal appointments in the new Conservative cabinet. Quentin Hogg was made Lord Chancellor, Sir Peter Rawlinson QC (author of a Society of Conservative Lawyers report supporting Bill of Rights adoption) was made Attorney General, and Geoffrey Howe QC (another member of the council of the ICJ) was made Solicitor General. With these key individuals in place and the Earl of Arran's Bill of Rights in the Lords,⁵⁰ the new Cabinet discussed the substance of the Conservative manifesto commitment in November 1970.⁵¹ Amongst mixed opinions it was concluded that the Arran Bill should be blocked pending further consideration of its implications. Notwithstanding a significant constituency of support for some

⁴⁹ Itself the culmination of a small number of Parliamentarians' efforts to pass a right to privacy through private members bills (in the Lords in 1961 and in the Commons in 1967 and 1969). The creation of the Commission received some limited coverage in connection with the broader debate: 'Committee to investigate law on right of privacy - Parliament January 23 1970.' *The Times* (London, 24 January 1970) 11

⁵⁰ Bill of Rights [HL], HL Deb 27 October 1970, vol 312, col 17

⁵¹ NatArch CAB 128/47

form of reform, restraint prevailed and a range of other related measures (specifically attention to data protection, limitation on official powers of entry, and NHS complaints mechanisms) all of which were already under consideration, were highlighted as useful talking points to indicate commitment to rights without conceding any ground of the idea of a general bill.

The defeat of the Arran bill knocked the wind out of the Bill of Rights lobby with the lack of enthusiasm on the Conservative front benches making it clear that little significant progress was likely to be possible during the course of that Parliament. The peak of interest in 1970 had come to nothing and rapidly the Northern Irish situation and devolution, still under consideration by the Royal Commission, took over the constitutional limelight. No further bills or significant press coverage of the issue was seen until the Royal Commission on the Constitution reported in 1973. In its report the Commission noted the growing perception 'that the law relating to civil liberties and the right to redress leaves scope for the unchecked abuse of administrative discretion; and that where there is provision for the remedy of individual grievances it is often not effective in ensuring that justice is done.'⁵² Suggesting that 'a substantial minority have at some time had specific grievances which have not been dealt with satisfactorily' it formally considered the potential efficacy of measures including a Bill of Rights, administrative courts, and further empowerment of specialist ombudsmen like the Parliamentary Commissioner for Administration.⁵³ On the implementation of such policies, however, it ventured that society faced an ongoing challenge in fine-tuning the balance between

⁵² Royal Commission on the Constitution, *Report of Royal Commission on the Constitution* (Her Majesty's Stationery Office 1969) 99 para 321

⁵³ *ibid* para 322

freedoms and order. The Commission's report concluded: '[t]he translation of abstract ideals taken from international declarations and conventions into domestic laws which are capable of being enforced thus presents great difficulty.'⁵⁴

While the Commission's terms of reference did not extend to considering the creation of a Bill of Rights for the UK as a whole, its assessment of the viability and usefulness of incorporating the Convention as a regional Bill of Rights, in a devolution context, is still informative. Incorporating the Convention wholesale and without amendment was certainly liable to prove problematic but, in perseverance, two options were presented. The first was a domestic Bill of Rights that would elaborate the Convention's protections, setting out in further detail the terms under which they were to be enjoyed – i.e. a Convention adjusted for drafting form objections. The second was that the general terms of the Convention be preserved and incorporated without alteration, but with the recognition that a very much more complicated enforcement procedure would be implied – i.e. a Convention adjusted for judicialising objections.

In considering the 'better' approach the Committee identified that 'the balance between freedom and order is a delicate one, requiring to be redressed as circumstances change', that the 'correct balance at any particular time is a matter of political judgement' and that 'political judgement may be, or may be thought to be, tainted with bias of precisely the kind that it is the purpose of a Bill of Rights to prevent.'⁵⁵ On this basis, the Commission favoured a dynamic of judicial exploration of general terms through actual cases, arguing (like the EM

⁵⁴ *ibid* para 750-751, 229

⁵⁵ *ibid* para 751

during the Convention drafting) that this would be ‘more likely to produce an apt and workable body of law than any attempt at initial comprehensive definition’.⁵⁶ This enthusiasm for judicialisation was tempered however by more pragmatic considerations and, after detailing their preferred approach, the Commissioners went on to reject the model as unacceptably flawed. Referencing the experience of other, unnamed countries, the Commission highlighted two major disadvantages. Firstly they worried that incorporating the Convention’s vague terms would lead to a protracted period of uncertainty while precedent was being developed and, secondly, they feared the potential damage to public perceptions of the state of judicial impartiality when political controversies became the substance of Court decisions.⁵⁷ In the view of the Commission ‘these objections should suffice to rule out the inclusion of a Bill of Rights in any statute establishing a regional legislature.’⁵⁸

Moving back to the broader question of a UK wide instrument, the report suggested that if a need for rights based review was perceived in the granting of subordinate legislative powers, it must follow that ‘there must also be a need to curb the sovereign power of the supreme legislature, as is done, for example, in the United States’.⁵⁹ Dismissing such an approach, the report concluded, ‘there is no evidence that the public conscience, as made effective through our existing democratic institutions, is not adequate to provide the protection called for.’⁶⁰ This conclusion is somewhat confusing in light of the report’s overall concerns about perceived ‘weakening of democracy’ and later in the report it notes

⁵⁶ *ibid* para 752

⁵⁷ *ibid* para 753

⁵⁸ *ibid* para 754, 229-230

⁵⁹ *ibid* para 755, 230-231

⁶⁰ *ibid*

growing perceptions that '[t]he right to vote for a Parliamentary candidate every five years or so is said to be no longer an adequate expression of the democratic will'⁶¹, that 'government has developed a momentum of its own which seems to leave the people out of account'⁶² and that the executive appeared 'to have enlarged its activities at the expense of individual freedom without providing adequate machinery for appeals and for the redress of grievances'.⁶³

The Commission's (small-c) conservative approach to British constitutional rights protection mirrored the (large-C) Conservative administration's recalcitrance in the face of growing public interest and this collective inactivity drew some public criticism. The Times said of the Commission's report: '[i]t is sometimes said that a royal commission is a device for the avoidance of action. If that is so, this is a royal commission *par excellence*.' Once again it fell to motivated elite individuals to re-energise the issue. In this instance it was a judge rather than an academic who got the ball rolling. In a 1972 speech Scarman LJ⁶⁴ claimed that 'without realizing it Britain could be on the brink of her first constitutional change since the seventeenth century'. This speech caused few ripples with the clear Conservative majority, ongoing Commission examining devolution and processes of joining the European Communities all marginalising Bill of Rights debate. However,

⁶¹ *ibid* para 1098, 330

⁶² *ibid* para 1099, 330

⁶³ *ibid*

⁶⁴ At the Royal Institute of Public Administration and reported in 'Changes that could affect Parliament's sovereignty' *The Times* (London, 6 June 1972)

reprising the theme in his December 1974 Hamlyn lectures⁶⁵ Scarman's further calls for a 'new constitutional settlement' – including an entrenched Bill of Rights and extensive powers of judicial review – created a much greater buzz. Coming at the end of a year that had seen two general elections, a hung Parliament, a rapidly degrading security situation in Northern Ireland, and widespread economic unrest (marked by continuing miner strikes and the implementation of the commercial three-day week) – this time Scarman's words made waves.⁶⁶

iii. The Second Phase

Having been narrowly squeezed into opposition, the second Wilson term proved fertile for thinking and advocacy regarding rights within the Conservative party. After the electoral battering of 1974 the Conservatives' election of Margaret Thatcher in February 1975 saw 'freedom' become the party's mantra. A month later the party spokesman on policy and research, Sir Keith Joseph, announced that the Conservatives were contemplating introducing a Bill of Rights as government legislation when they next returned to power.⁶⁷ This led to a major program of study with a 'Leader's Consultative Committee' bringing together experts including three QC MPs (Sir Michael Havers, Ian Percival and Mark Carlisle), Professor Owen Hood Phillips QC, Leon

⁶⁵ Reported in 'Lord Justice Scarman calls for Bill of rights' *The Times* (London, 6 December 1974) 4 Subsequently published as L Scarman *English Law – The New Dimension* (Hamlyn Lecture 1974)

⁶⁶ See, for instance, 'American guidance for a new Bill of Rights' *The Times* (London, 10 December 1974) 14 and 'Lord Justice Scarman says law is failing us' *The Times* (London, 13 December 1974) 6

⁶⁷ 'Tories may introduce Bill of Rights when they are next in power' *The Times* (London, 18 March 1975) 3

Brittan, Professor Daniel O'Connell,⁶⁸ and the head of the Conservative Research Department to examine the issue.

The fruits of their labours were summarised in an internal 1976 report by Havers.⁶⁹ The headline finding was that the committee members 'were unanimously agreed that a Bill of Rights is now essential and that the Party should undertake to enact such a Bill.'⁷⁰ While they did not believe that this Bill could be entrenched, they mirrored Lester's reasoning that a bill would afford protection through its political significance. They also suggested that by following the model of s.2(4) of the European Communities Act, obliging the judiciary to interpret all law in light of the Convention, the Bill would create a 'powerful canon of construction' in the application of future legislation. They also suggested that the Bill should be immune from implied repeal, and that conflicting new law would thus require explicit derogation. It also went so far as to suggest a proto-Constitutional court with any instance of dispute or controversy being justiciable before the Judicial Committee of the Privy Council.⁷¹

However, despite these progressive overtones, outlining many recognisable features of modern rights review, the shift from individual advocacy to party policy was also a shift away from idealistic advocacy and towards a political motivation rooted in inter-party conflict. The proposed Bill of Rights was framed as a means of conserving the status quo against Labour and as part of a strategy aimed at restricting Labour policy options. This

⁶⁸ Then Chichele Professor of International Law at All Soul's, Oxford

⁶⁹ Havers (n 2)

⁷⁰ *ibid* 1

⁷¹ *ibid* 1-2

response to Labour's leftward movement during the 1970s is highly evocative of the anti-socialist concerns expressed by Maxwell-Fyfe during the Convention's original drafting.⁷² While these later Conservatives acknowledged that the scope of any bill should not be overestimated and that it 'cannot prevent a future Labour Government from doing many things which we regard as utterly objectionable' the Committee did believe such a Bill would be 'a useful tool at least to hold the present position and make it more difficult, but not impossible, for a government to attack basic rights'.⁷³ The anticipated Bill seems to have been seen in almost entirely political terms with the report adding 'that a commitment to a Bill of Rights should be coupled with a commitment to reform the present system of administration law so as to provide a clear, simple and straight-forward remedy for maladministration' which would be both 'electorally attractive' and liable to 'remedy more actual injustice than a Bill of Rights'.⁷⁴ While these opinions were not directly those of the shadow cabinet, this report again shows Conservative interest for human rights building off the back of party-political conflict and, as with the Convention drafting itself, aversion to socialist policies amongst Conservative lawyer politicians who were seeking to guide the process.

By 1976, alongside Conservative proposals, Labour too was publishing discussion documents actively advocating a move towards a Bill.⁷⁵ Labour interest was expressed both internally, in the form of a report from the Labour

⁷² As per ch 2

⁷³ Havers (n 2) 2

⁷⁴ *ibid*

⁷⁵ Society of Conservative Lawyers, *Another Bill of Rights?* (Conservative Political Centre, CPC no 595, 1976); Labour Party, *United Kingdom Charter of Human Rights: A Discussion Document for the Labour Movement* (Labour Party 1976)

Party NEC's Human Rights Sub-Committee urging the creation of a 'Charter of Rights' and externally, in the Home Office's publication of a Governmental discussion document exploring Bill of Rights possibilities and, in particular, the scope for incorporation of the European Convention.⁷⁶ However, despite these positive steps, the party was heavily divided over the issue of rights. As with previous episodes Minkin shows that it was the right of the Labour party that was far more concerned with rights, individual freedom from the state, and, increasingly, the threat posed by overbearing union practices (such as the closed shop).⁷⁷ Like Lester and Shawcross, advocates for the Bill of Rights issue emerged from the centre leaning part of the Labour party (such as Roy Jenkins and Shirley Williams).⁷⁸ The Human Rights sub-committee stood at odds with the union controlled NEC and others on the right of the party (such as Roy Hattersley), and is notable for containing a majority of members who would join in the party split to form the Social Democratic Party in 1981.⁷⁹ While the NEC permitted the sub-committee's report to be published there were strong, enduring, concerns over the implications of shifting power from Parliament to a class distorted judiciary and consequently any future actions were pegged on grass-roots support that was not immediately forthcoming.⁸⁰

In this uncertain milieu Lord Wade's Bill of Rights, submitted for the first time in 1976,⁸¹ received similar treatment under the new Callaghan

⁷⁶ Home Office, *Legislation on Human Rights - With particular reference to the European Convention - A discussion document* (HMSO 1976)

⁷⁷ L Minkin, *The Contentious Alliance: Trade Unions and the Labour Party* (Edinburgh University Press 1992) 214

⁷⁸ *ibid* 214-5

⁷⁹ *ibid* 215

⁸⁰ *ibid*

⁸¹ HL Bill 92 1975/76

administration to that dealt out to the Earl of Arran's Bill under Heath. Labour attempted to dispatch the bill while the Conservatives resisted. The most important development of this process was a proposal by Quentin Hogg to refer the bill to a select Committee – a course also advocated by the Conservative opposition in the Lords. The Government headed off this move – arguing that further public debate was demanded and offering the publication of the Home Office's internal consultation paper as a compromise (suggesting that it would form the basis of further debate). Little was made out of the cautious Home Office document, however, and when Lord Wade reintroduced his Bill the following year⁸² Hogg was able to successfully move his motion at the second time of asking. Notably, no whip was placed by Labour and no formal line was taken against the reference to a select committee, suggesting that while the Labour leadership were not supportive of the Bill, they were not sufficiently opposed to make a scene.⁸³

The consideration of the Bill of Rights issue by the House of Lords Select Committee can be seen, in retrospect, as the last hurrah of the 70s Bill of Rights Debate. After a broad consultation exercise, with written evidence received from all the key political parties, various civil society groups and a number of civil servants, a final report was published in 1979.⁸⁴ In broad terms it was agreed that 'there was unanimity of view on the need to protect and advance human rights and unanimous recognition that both sides [Labour and

⁸² HL Bill 11 1976/77

⁸³ Cabinet Minutes (NatArch CAB/128/61/3, 27th January 1977)

⁸⁴ House of Lords Select Committee on a Bill of Rights, *Report of the Select Committee on a Bill of Rights: Together with the minutes of proceedings* (HMSO, House of Lords Paper 176, 1976); two preliminary Special Reports were also published in March and July 1977.

Conservative] were wholly committed to the promotion of human rights'.⁸⁵ This general commitment did not, however, amount to unanimity regarding the desirability of a Bill of Rights. On this point the Lords split down the middle with the three Conservatives voting in favour; three Labour voting against and one for; one Liberal for and one against; and one for and one against in the unaffiliated peers – results reflective of the conflicts outlined above.

While the Committee's examination of the Wade bill had been launched with the momentum of a growing public debate, the two years spent on this Report stage allowed much of that momentum to drain away. Despite the support of the Conservatives for the Bill of Rights – including their attempted amendment of the 1978 Scotland Act that would have incorporated the Convention as a regional Bill of Rights for Scotland⁸⁶ – electoral success in the 1979 general election did not see a government sponsored bill being put forward (again reminiscent of the Conservative return to power in 1951). Similarly, despite Lord Wade's bill, on the third time of asking,⁸⁷ being the first of the Bills of Rights to be passed by the Lords it was not even afforded time in the Commons for debate. Showing great persistence Lord Wade introduced his Bill a fourth time in the following session⁸⁸ but despite again passing through all three readings in the Lords and being snuck into the Commons timetable through the Private Members ballot⁸⁹ the Bill did not have sufficient support to survive through a second reading. A final attempt to introduce a Bill of Rights in

⁸⁵ Minute of 24th May 1978 (n 83)

⁸⁶ HC Deb 1 Feb 1978, vol 943, cols 491-584 (the motion was defeated by 251 votes to 227)

⁸⁷ HL Bill 54 1979/80

⁸⁸ HL Bill 4 1980/1

⁸⁹ HC Deb 8 May 1981, vol 4, cols 419-57

the Commons later in 1981, by Robert Maclennan MP (another former Labour minister who had defected in 1979 to found the Social Democratic Party), was similarly short lived.

Over the course of the debate the two distinct phases identified above can be seen to possess some similarities but also significant differences. Both see the importance of individual actors pushing concrete proposals on the basis of ideological motivations, but the nature of these ideological motivations partly shifts as the Bill of Rights debate moves from the civil society 'space' to the party political realm. While the first wave of elite suggestions flowed largely from patronage of rights oriented civil society organisations, the second wave saw growing recognition of the political value of a perceived close association between a party and human rights. However, while this second set of motivations created a second wind for the Bill of Rights debate, it also altered its direction and, ultimately, fed into its collapse (explored in section 4 below). Overall the rights issue was raised by progressives within the parties and was incubated by a period of political instability into a high profile issue disproportionate to any shift in political fundamentals or growth in public interest. Instead the seeds of this human rights debate, were planted by idealistic individuals and cultured by party conflict. In the next two sections I consider how the Convention came to the fore and why, despite the combination of idealistic individuals and party conflict, this debate did not produce legislative results.

3. Bringing European Rights Home

One of the most important developments of the 70s debate, and probably the most significant in terms of laying the groundwork for the HRA, was the identification of the Convention as the most viable option for a domestic rights instrument. This determination was the first substantive finding around which any cross-party consensus was achieved (albeit, as we see below, somewhat superficial). The Convention's rise to the top during the second wave of the debate followed on from resistance to the two options explored during the first wave, (i.e. a new and uniquely British domestic instrument, or the replication of an instrument from another common law jurisdiction). Erdos has shown that the transition from other proposals to a direct ECHR incorporation endured after the end of the 70s debate and the Convention was the basis for every Bill of Rights bill put before Parliament from 1975 up to the passing of the HRA in 1998.⁹⁰ While elite political actors have since turned back to the idea of a 'British Bill of Rights' (as explored in chapter 6 section 4) the adoption of the Convention model in the second phase of the 1970s debate built a critical connection between ongoing domestic constitutional problems and a possible solution in the form of European supranational human rights.

In this section I explore how the two proposals of the first wave fell from favour and identify a number of factors that helped the Convention take their place. Looking first at the history of Liberal efforts to promote a bespoke domestic instrument, drawing upon 'traditional', British, civil liberties ideas, I

⁹⁰ Erdos (2010) (n 112) 113, with the notable exception of Tony Benn's Commonwealth of Britain Bill (introduced on multiple occasions from 1991 onwards), which included a bespoke bill of rights as part of his grand plan to convert the UK into a republic - reproduced in Robert Blackburn ed., *Towards a constitutional Bill of Rights for the United Kingdom: commentary and documents* (Pinter 1998) 586-9

show how a merging of discourses occurred, conflating arguments for European human rights with broader advocacy for domestic liberalism. Following this I briefly consider the Conservative preference for adopting a Canadian approach and the collapse of such proposals in the face of criticism of that instrument at home. Finally I identifying four key factors (Europe's status in the UK, legal familiarity with the Convention, the need for consensus in a divided parliament, and dealing with Northern Ireland) that propelled the debate towards Convention-based proposals.

i. Liberal Tradition and a Home Grown Bill

The Liberal Party's submission to the House of Lords committee in July 1977 claimed that: '[s]ince the Liberal party was formed its leaders have sought to advance the cause of personal liberty and oppose all threats to individual freedom.'⁹¹ This claim was not merely rhetorical, Liberal members had spearheaded attempts to enact rights legislation for many years before the 1970s debate. While the Liberal party had the strongest pedigree as constant champions of traditional civil liberties, willingness to consider new approaches to rights protection had not led to a rapid adoption of human rights ideas in the years after the Convention's passage and, as with Labour and Conservatives, it was not until some years later that supranational rights instruments would become a focus of party policy on individual freedom. To understand the Liberal approach and its contribution to the Bill of Rights debate one must look back at the history of Liberal civil rights advocacy.

⁹¹ Liberal submission to the House of Lords Select Committee in July 1977

The first 'Bill of Rights' to be introduced by the Liberals was during the 1947 session, contemporaneous with the drafting of the Universal Declaration of Human Rights, and narrowly predating the founding of the Council of Europe and the European Convention. 'The Preservation of the Rights of the Subject Bill'⁹² introduced by Lord Reading, on behalf of the Party, and described in Liberal publications as 'A New Bill of Rights'⁹³ contained a shopping list of specific reforms: limiting ministerial powers to issue statutory instruments, reducing Ministers' quasi-judicial functions, preventing the use of the war time Supplies and Services Acts to suppress publication, banning employment discrimination, outlawing the closed shop and so on.⁹⁴ While this instrument differs significantly from the broader instruments that more commonly bear a 'Bill of Rights' label, the instrument's aim of curtailing executive power over individuals demonstrates the development of ideas essential to the Liberals' subsequent engagement with the 70's debate.

With the Convention's passage as an example, and spurred by Conservative support for the bill's previous outing, a second outing for the Liberal bill in 1952 fell as flat as proposals for acceptance of individual petition.⁹⁵ Instead, through the early years of the Conservative Government

⁹² The Preservation of the Rights of the Subject Bill [H.L.], HL BILL 6 1947

⁹³ Liberal Party, *The Party of Freedom* (Liberal Publishing Department 1946)

⁹⁴ Despite government resistance the Bill passed its first reading with the support of the Conservatives before being deprived of time by the Government. The bill was trimmed of the closed-shop sections, in an attempt to increase the likelihood of cross bench support, and reintroduced in 1950 by Lord Samuel as the Liberties of the Subject Bill [H.L.]. This bill managed to pass a second reading by 66 votes to 24, still against Labour resistance, but was dispatched in the same manner to its predecessor, with no time allocated for completion of subsequent stages. (LibArch folder Liberal Party/16/13)

⁹⁵ LibArch folder Liberal Party/16/12-3

Liberal frustrations were left to grow. A 1955 Liberal Assembly text expressed the party's grievances.

Despotism takes many forms. In this country it is not a simple question of more or less State intervention, but the ever-increasing process of Government by regulations and orders, instead of by Acts of Parliament. More law is now made by Ministers and Departments than by Parliament. This flood of Rules and Orders – vitally affecting the lives and happiness of the ordinary man and woman – nearly always comes into force without Parliamentary approval. Ministers are above the law and some Orders cannot be challenged in the Courts.⁹⁶

Another attempt was made to introduce a Liberal text in 1957⁹⁷ with this text extending beyond the previous bills with further, specific, liberalist measures such as decreasing the power of Ministers to withhold evidence from the Courts, removing Agricultural Marketing Boards' powers to impose fines, and widening the need for search warrants in connection with existing powers of entry. However, rather more significantly, it also contained a developed plan for a system of appeals against administrative decisions. Effectively proposing what we would now recognise as our modern system of judicial review of administrative actions by any actor or organisation carrying out a public function (including ministers, local authorities and nationalised industry), the bill would also have created a new administrative court within the High Court, staffed by a High Court Judge, an experienced administrator and a public affairs expert, with rights of appeal from the new admin court to the Court of Appeal and House of Lords. This last reform was both the most revolutionary and also the most important in the Liberals eyes. Party minutes assert that: '[a]n

⁹⁶ Liberal Assembly, *Liberty of the Subject* (LibArch folder Liberal Party/16/13)

⁹⁷ Rights and Liberties of the Subject Bill [H.L.] 1957

administrative Court of Appeal as proposed in the Liberal Bill is the only satisfactory safeguard for the individual.’⁹⁸

This strong move towards judicialisation was likely inspired to some degree by the Crichton Down affair.⁹⁹ However, against the backdrop of the ongoing Franks inquiry into administrative tribunals and enquiries (also triggered by the affair) it was hard for the Liberals to push Lord Reading’s Bill without being accused of pre-empting the independent exercise. When Sir Oliver Franks’s report was published later that year it also proposed a raft of specific reforms to the handling of complaints against public bodies – shifting tribunal functions from administrative to adjudicating, formalising procedures, and enhancing impartiality – but did not propose the kind of sweeping reforms envisaged by the Liberals. While the Franks report was welcomed, Liberal Peer, Lord Rea (leader of the Liberals in the Lords) expressed the party view that reform had to go further and urged the pursuit of further goals taken from the Liberal draft bills. The 1958 Tribunal and Inquiries Act,¹⁰⁰ which implemented the findings of the report was similarly described in party documentation as going ‘only a small way to meeting Liberal requirements’ and while it did bring in appeals from the tribunal to the High Court it annoyed Liberals that ‘it [did] not even go as far as the Franks report in safeguarding individual rights’.¹⁰¹

⁹⁸ n 95

⁹⁹ *ibid.* The Crichton Down Affair arose over the failure to return a sizable estate, compulsorily purchased for war time use, to its former owners on reasonable terms after the end of the war (as had been previously been promised by Churchill).

¹⁰⁰ Tribunal and Inquiries Act 1958

¹⁰¹ Particularly in limiting the obligation for ministers and tribunals to give reasons for their decisions. The patchy coverage left by the specific tribunals system was thought, by the Liberal elite, to leave ‘a wide area where bureaucracy is rampant and the citizen is not safeguarded either by public enquiry or other statutory protection’ that only a general administrative court competent to examine ‘questions of law, fact and

While the end of the 50s did not see rights protection becoming a focal component of the Liberal platform (it received no mention in the 1959 manifesto) it occupied an increasing amount of party attention and effort. The Liberals congratulated themselves in 1959 on having 'continued to play their traditional role of guardians of individual liberty during the lifetime of this Parliament.'¹⁰² In addition to their work on compulsory purchase compensation and tribunals they had also provided forceful opposition to the use of phone tapping and chalked up a small but significant victory for the freedom of the press in driving out the '14 day ban' on press reporting of proceedings in Parliament.¹⁰³ While, as the 60s began, there was still no parliamentary interest in general rights legislation or reform, the party's governing Council called upon the party to continue its 'attention to the absence of machinery for addressing grievances against officialdom'. This led to greater commitment of resources including the creation of a Civil Liberties Sub-Committee to the Party's National Executive Committee.¹⁰⁴

Over the coming years alternative calls for the creation of a 'Scandinavian style Ombudsman', alongside ongoing pressure for administrative courts, finally bore fruit in the form of the 1966 Parliamentary Commissioner Bill. During its debate the future Liberal Party leader, Jeremy Thorpe MP stated that he welcomed 'any Measure which will extend the citizen's right to obtain redress against the executive' and that it was 'a far more important

maladministration' could overcome. Liberal Party Information Department document 'Liberty of the Subject' dated May 1959 (LibArch Liberal Party/16/13)

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ National Executive Committee Minutes 19 July 1963 (LibArch folder Liberal Party/16/13)

constitutional gain than increasing the effectiveness of a Member of Parliament'.¹⁰⁵ Reflecting further he suggested that the need for such legislation grew from two developments. The first was that 'the extent of Government control over the affairs of the citizen ... has tremendously increased during the last 60 years'. The second 'that the job of the Member of Parliament has changed dramatically'¹⁰⁶ with constituency casework eclipsing their parliamentary duties and far greater executive control over the legislature. These long term processes of change, bringing the Liberal party's fundamental concern with individual freedom into increasing conflict with the developing machinery of the state and the shift in the balance of power between legislature and executive post-war were fuelling anti-executive sentiment within the party through the 1960s.

Developing out of a traditional concern with civil liberties the Liberals adopted a number of policies that were important precursors to our current domestic human rights regime. The shift to seeking positive, rather than negative, protection for civil liberties was one important element; the proposal that independent actors, and ideally judges, should be given the authority to review administrative actions not just by local bureaucrats or civil servants but also by quasi-public organisations and even Government ministers is an even more important one. The most significant dynamic however, was ever greater loss of confidence in the Westminster system. In the Liberal case the final straw appears to have been the passing of the Commonwealth Immigrants Acts¹⁰⁷. Majoritarian measures against minority groupings were anathema to the

¹⁰⁵ HC Deb 18 October 1966, vol 734, col 125

¹⁰⁶ *ibid* cols 125-127

¹⁰⁷ Commonwealth Immigrants Act 1962 and Commonwealth Immigrants Act 1968

Liberal party who had voted against the main parties as they rushed the Commonwealth Immigrants Bill from first reading to Royal assent in three days. This trigger can be seen in Macdonald's Bill of Rights where, alongside the core themes of earlier Liberal instruments (bureaucratic controls, judicial oversight and constraint of powerful, coercive, bodies such as dominant unions) came criticism of intolerance and racial discrimination in government (and further specific measures to repeal of the Acts).¹⁰⁸

The Macdonald proposal was, however, more than an elaborated version of the earlier Liberal instruments and envisaged not just specific administrative legal tweaks but also a general constitutional legal codification. It proposed constraint not just of ministerial and administrative action but also restricted the scope of primary legislation. In 1969 the main Liberal conference resolution, drafted by Macdonald, consisted of a call for endorsement of the Bill by the party membership. The resolution noted that while the UK was 'in the main, an unfettered society' there was 'always the danger that the unwritten rule will be broken or discarded completely' and so proposed to 'set out the principles which should govern any legislation framed by Parliament'.¹⁰⁹ While the traditional concerns, particularly with growing executive power, clearly remained¹¹⁰ the Liberal platform was growing beyond an anti-executive power orientation. The pro-judicial attitude developing, as faith in Parliament decayed,

¹⁰⁸ Macdonald (n 35) 6-7

¹⁰⁹ The party Research Department issued a background brief explaining the bill before conference and the message was reiterated, albeit somewhat clumsily, in a party press release on the 12th June 1969.

¹¹⁰ Lester followed discussion of the East African issue with a coruscating attack on the Race Relations Act 1968 s 10 (which enabled Government departments and private companies employed on Government contracts to refuse to discriminate on grounds of race or colour 'for the purpose of safeguarding national security'). *ibid* 6

was extending from an endorsement of judicial oversight of the executive into an endorsement of judicial engagement with political decision-making. Growing out of a tradition of civil liberty legislative proposals, the Liberal approach continued to pursue a bespoke British instrument but the direction of motion was towards a more general human rights constitutionalisation.

Through this examination of the development of Liberal attempts to constrain the power of government we can see both the legacy of traditional Liberal thinking carrying through into the 1970s Bill of Rights debate and also a clear evolution of the Liberal approach to civil liberties through increasing exposure to external human rights norms. Where the old answer to threats to civil liberties had been a redistribution of power from the executive back to the legislature, so that MPs could scrutinise and dismantle illiberal policies, now Parliament too was seen to be compromised and flawed. With Parliament no longer trustworthy as a bastion for defending fundamental freedoms, the new generation of bills of rights would have to follow the human rights model and pass authority and oversight to the judiciary. While the step to lobbying for the Convention as the basis for a Bill of Rights was yet to be taken, this Liberal development is instructive in showing how the British liberties discourse came to be increasingly aligned with some elements of the conceptual framework surrounding the Convention.

ii. The Canadian Model

While the first Liberal proposal adopted a bespoke domestic model, the first Conservative one followed a common law precedent in the Canadian Bill of

Rights.¹¹¹ That Bill, passed by a Progressive Conservative party Government, provided a restrained, quasi-constitutional,¹¹² rights instrument provided Viscount Lambton with the substance of his proposed 'British Bill of Rights' in April 1969.¹¹³ The bill replicated an existing instrument not just as a shortcut (though Lambton did praise its innovations, such as obliging the Canadian Minister of Justice to scrutinise draft legislation for compatibility) but as a counter to rights sceptics. As Lambton put it: '[t]hose who doubt that [this] Bill could become a reality should accept that a similar law has been enacted in Canada, that it has been operating for the last nine years, that it has ensured individual rights and that legislation conflicting with those rights has been checked without any constitutional upset.'¹¹⁴

While Lambton's Bill of Rights did not progress through the Commons, the Canadian model received a warmer welcome than the ambitious Macdonald proposals.¹¹⁵ Part of this preference for a foreign instrument can be attributed to the criticism of Parliament inherent in the Liberal proposals, while part can be attributed to its attempts to overturn immigration restrictions. On this latter point the Liberals were still in the margins and whilst the issue remained a major central party concern, flagged for further action during the new Heath Conservative Government of 1970–1974,¹¹⁶ campaigning on the issue met with

¹¹¹ S.C. 1960, c. 44 Not to be confused with the subsequent Canadian Charter of Rights and Freedoms, passed as part of the Constitution Act, 1982, Schedule B of the Canada Act 1982

¹¹² Being susceptible to repeal by normal statute but with explicit protection against implied repeal.

¹¹³ HC Deb 23 April 1969, vol 782, cols 474-81

¹¹⁴ *ibid* col 475

¹¹⁵ As aired in Hooson's Bill of Rights (No.2) two months later. HC Deb 22 July 1969, vol 787, cols 1519-22

¹¹⁶ LibArch National Executive Committee Minutes, 24 April 1971

public indifference on the ground.¹¹⁷ The Canadian approach by contrast was less controversial and while the Lambton bill acknowledged that ‘in an age of continuous legislation’ proper public scrutiny of every enactment was impossible, his proposal was phrased as a pragmatic response rather than as an attack on Parliament. Recognising Parliament’s limited appetite for the Macdonald draft it was the Canadian approach that was adopted by Liberal peer, the Earl of Arran, in his Bill of Rights during the 1970-1 session. Ulster Unionist James Kilfedder also employed the Canadian approach at the start of the second wave of the Bill of Rights debate in 1975.¹¹⁸ As such it can be seen that already by the close of the first wave of the debate, the Canadian model was the leading proposal.

During the lull between the two phases of the UK debate, however, the Canadian model came under increasing scrutiny. Like the Convention, the Canadian Bill of Rights Act was used relatively little at first and it was only in the early 1970s that the Canadian judiciary began to engage with the Act. This engagement proved to be somewhat disappointing for liberal observers and, in particular, the 1973 decision of the Supreme Court in the case of *Lavell*¹¹⁹ cast light on the Canadian bill’s sensitivity to the perspectives of the senior judiciary. In *Lavell* two women challenged the compatibility of a controversial section of the Indian Act 1951 (regulating the rights of native aboriginal peoples) with the Bill of Rights protection against sex discrimination. The relevant section meant that while a native-Indian man who married a non-Indian woman retained his protected status under the Act, an Indian woman marrying a non-Indian man

¹¹⁷ LibArch National Executive Committee Minutes, 23 July 1971

¹¹⁸ Erdos (2010) (n 112) 113

¹¹⁹ *Attorney General of Canada v Lavell* [1974] SCR 1349

lost hers. The decision of the Court that the section was not in breach of the Bill of Rights disabused many who had considered the Bill of Rights to offer robust protection for individuals and drew withering criticism in the academic literature.¹²⁰ In particular the lead judgment's originalist insistence on applying 1960s concepts when considering the Canadian Bill was labelled a 'drastic and unjustifiable limitation on the effectiveness of the Bill of Rights.'¹²¹ Others criticised the 1960s drafters for having failed to produce an instrument that kept up with 'the "modern" Bills of Rights in which some expertise had been achieved by draftsmen in the United Kingdom, as well as in Europe and in the United Nations.'¹²²

In debate over the Earl of Arran's bill the Lord Chancellor expressed a similar sentiment, asserting that 'the European Convention is much better than the Bill, as anyone who compares the texts of the two will see'.¹²³ Civil Society actors were reaching the same conclusion, with NCCL archive records stating in response to the failure of the Arran debate that '[t]actically it must now be considered whether translation of the European Human Rights Convention into English Law might not be a more acceptable starting point.'¹²⁴ In the next sub-

¹²⁰ PW Hogg, 'The Canadian Bill of Rights — Equality before the Law — AG Can v Lavell' (1974) 52 Canadian Bar Review 263-280; WS Tarnopolsky, 'The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: A Retreat from Drybones to Dicey?' (1975) 7 Ottawa Law Review 1; PH Russell, 'The Political Role of the Supreme Court of Canada in its First Century' (1975) 53 Canadian Bar Review 576; and BM Dickens, 'A Canadian Development Non-Party Intervention' MLR (1977) 40, 666-676

¹²¹ *ibid* Tarnopolsky 4

¹²² *ibid* 5

¹²³ HL Deb 26 November 1970, vol 313, cols 265-266

¹²⁴ NCCL, 'Report of a Sub-Committee appointed by the Executive Committee on 10th October 1968 to consider the draft Bill of Rights proposed by the Society for Individual Freedom' (NCCL archive file DCL/675/1, 1968)

section I consider why the Convention approach came to be adopted before moving on to consider why it still fell flat.

iii. Coalescing on the ECHR

The absence of concrete ECHR based proposals during the first stage of the Bill of Rights debate demonstrates that any linkage between domestic constitutional shortcomings and the, still under-developed, European rights system, was still weak. While the Liberals increasingly adopted international perspectives on domestic constitutional issues – one policy document likening the ‘legitimate needs and wishes of the Scottish and Welsh peoples for a fuller measure of self-government’ to those of ‘Palestine and Jewish minorities in the Middle Eastern Arab States’¹²⁵ – a more traditional civil liberties discourse was still stronger in Liberal minds than broader human rights ideas. The first years of individual petition had begun to cast domestic administrative failings in the light of European rights but progress was slow and engagement came first through lawyers rather than parliamentarians. With the first judgments of the Court yet to indicate the coming impact of the Convention regime, the issue of European Community membership dominated the supranational agenda, again crowding human rights out of domestic coverage of European issues.

Since Lester’s original mention of Convention incorporation as a bare minimum for a domestic bill, the only mention of the Convention as an inspiration for domestic rights reform had come through Sam Silkin¹²⁶ in his Protection of Human Rights Bill, the last formal proposition of the first wave of

¹²⁵ Liberal Party Standing Committee document (LibArch 4/2, 1977)

¹²⁶ Later Baron Silkin and Attorney General from 1974-9 under Wilson and Callaghan.

the debate.¹²⁷ Silkin's 'National Tribunal of Human Rights' was intended to better discharge the UK's responsibility under Art.13 ECHR, moving beyond piecemeal measures for the supervision of certain classes of executive officer and providing a single institution 'to which the citizen or the visitor can turn and say, "My fundamental freedoms as set out in the European Convention have been violated. I seek your aid."' ¹²⁸ The Silkin bill was modest in other respects with no implications for infringing statute, no role for the conventional court system and no powers of enforcement. The domestic tribunal would, instead, simply hear complaints, consider compatibility of actions with the Convention and issue recommendations for the Government, and Parliament, for reforms that would avoid repeat infringements.

While this light form of review fell far short of the broad quasi-constitutional bills being proposed by the Liberals and select Conservatives, it does point to an awareness of the Convention's potential use in addressing some of the problems with executive overreaching about which the opposition parties were complaining. While the Liberals were attacking these issues from the civil liberties angle, Silkin was homing in from a rights perspective (continuing the shift away from the belief that the Convention was comprised of high level basic rights that the UK was unlikely to breach). In this way the civil liberties and human rights discourses were being drawn towards one another.

The Silkin Bill did not progress beyond second reading, but in the second wave of the debate, with the Canadian option falling away, Liberal MP Alan Beith's 1975 Bill of Rights proposed instead the incorporation of the

¹²⁷ HC Deb 25 November 1970, vol 807, col 458

¹²⁸ HC Deb 2 April 1971, vol 814, col 1857

Convention. While no more successful in the Commons than its predecessors, Beith's bill set the precedent that would be adopted in every future Bill right through to the eventual passing of the HRA in 1998. Understanding this quiet shift to Convention incorporation as a solution to domestic constitutional malaise is thus of critical importance to understanding the integration of domestic civil rights and European human rights discourses.

Analysing the broad contextual factors outlined above, I discern four positive drivers that contributed to the move to a Convention model. The first is the growing relevance of Europe in domestic politics. The second is growing engagement with the Convention by English lawyers who then communicated the merits of the Convention system back into elite political discussion. The third is recognition of the political expediency of adopting an instrument based on an existing standard that existed beyond the reach of domestic politics (attempting to circumvent inevitable, intractable, disagreements between the parties over the drafting of any new rights language). The fourth is the need for any Bill to be compatible with, or at least not to aggravate, the concurrent challenge of regional devolution (particularly with growing tensions in Northern Ireland). I explore each of these again below, considering the positions of each party (again noting the disproportionate influence of the Liberal parliamentary party in a period of perilously slight electoral margins).

a. Importance of Europe

The 60s were a period in which the importance of Europe to UK prosperity became starkly apparent. Two vetoed EEC accession attempts, in 1963 and 1967, were finally followed by acceptance at the third time of asking in 1972.

With this accession came a new acceptance of and role for supranational law in the domestic system. At the bottom of the dip in the Bill of Rights debate, the domestic legal implementation of the UK accession via the European Communities Act 1972 marked out a new paradigm in the UK's relationship with European legal norms. The EC Act granted unprecedented authority, bordering on supremacy, to European law and the judgements of European Courts; and permitted far reaching review of domestic statute. This new constitutional direction showed that domestic enforcement of supranational rights was no longer verboten and meant that objections to developing Convention influence over national law, on the basis that this offended against Parliamentary Supremacy, would now ring hollow.

This much was recognised by the Labour Government of 1975. In a letter to the Leader of the Commons, Junior Minister to the Home Office, Shirley Summerskill, wrote that while a Bill of Rights posed a 'threat to the sovereignty of the Queen in Parliament, which has always been regarded as the chief safeguard for the liberties of the subject' the 'recent constitutional developments in this country [such as] our accession to the EEC ... may be seen as tending to move us towards some elements of a written constitution' and, as such, while 'the traditional arguments against a Bill of Rights continue to have a great deal of strength ... constitutional developments may ultimately have effects which would alter the balance of advantage'.¹²⁹

Liberals were also increasingly cognisant of the potential opportunities offered by the European institutions. Like the Conservatives of the late-40s, they

¹²⁹ Letter from Shirley Summerskill, Junior Minister in Home Office to Edward Shot MP, Leader of the House of Commons (NatArch HO 342/275/1, 1 July 1975)

viewed Europe as an alternative institutional space through which to gain political influence while their electoral position at home remained unfavourable. The prospect of direct European Parliamentary elections under proportional representation¹³⁰ were, in particular, seen as a means to overcome the disadvantage that the domestic first-past-the-post system placed upon Liberal's elected representation. Aiming to become clearly associated with Europe the Liberal executive had been taking positive steps at home and abroad. Overseas the party was actively building relationships with international elements,¹³¹ while at home, during the tumultuous electoral year of 1974, the party executive was anxious to present its campaign strategies 'in terms of the distinct Liberal view of Europe'.¹³² To do this – further highlighting the connections between the Liberal strategy of the mid-seventies and Conservative strategy from the late forties – the Head of the Liberal Party Policy Division even went so far as to circulate around party and constituency groups, to provide further detail of the party's European political strategy, briefing materials that had been prepared by the European Movement.¹³³

This desire to build bridges with Europe can be seen to have directly interacted with party support for human rights in the background to Lord Wade's 1st Convention based bill in 1976. At the 1977 Liberal party conference the official party motion, which was carried by the assembly, affirmed that human rights 'should play a major part in the formulation of foreign policy both by the U.K. Government and by the European Community.' Furthermore,

¹³⁰ Though it was not until 1979 that they would be held in this format.

¹³¹ After the 1972 'Congress of the Liberal International' the party joined in the formation of a permanent 'European Liberal Parties' organisation.

¹³² LibArch National Executive Committee Minutes, 22 November 1974

¹³³ Ibid.

believing that the UK's international standing would be 'greatly strengthened' by more consistent and diligent action on rights, it called for improved enforcement machinery not just for the ECHR but also for the EC, a sentiment revealing the general pro-European tenor of the arguments.¹³⁴ This positive engagement with supranational oversight shows a continuing softening of attitudes over that seen in earlier chapters. While much of this shift is accounted for in the steps up to acceptance of the optional articles, a further incremental shift helped bring the Convention to the fore.

b. Importance of Lawyers

From the other side of the channel, while British politics became more Euro-engaged, the Convention bodies were also beginning to branch out. Through the early to mid 70s the European Court of Human Rights was also beginning to ramp up its activities, bolstering the Convention's political salience. While there had been some significant cases during the late 60s (such as the Belgian Language case), the 70s saw the Court moving from tentative 'legal diplomacy' towards a more progressive mode of interpretation.¹³⁵ This increased activity both fed off and reinforced the Court's raising profile. Perceptions of the Court's legitimacy were buoyed by the credibility of its high-profile interventions and with this raising profile came increasing attention from British lawyers who were frequently involved in bringing petitions before the court. The Convention was gaining popularity at the Bar and in 1972 the Society of Labour Lawyers lobbied the party's National Executive Committee to include indefinite

¹³⁴ Liberal Party Conference 1977 party motion section 15

¹³⁵ Jonas Christoffersen and Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics* (OUP 2011) ch 3

acceptance of the optional articles in its platform for the next general election. Seeing 'no reason at all why a subsequent acceptance should be limited in time at all' the lawyers demonstrated a bullish attitude towards supranational rights regimes by suggesting the additional acceptance of the Optional articles to the UN Covenants (noting that arguments for 'lengthy consultations about what is entailed' were 'wearing rather thin now').¹³⁶

Amongst the most active of these early rights lawyers were MacDonald who was in the process of developing a prominent human rights practice, and Lester, who by the mid 70s had been involved in many of the most significant petitions to be made against Britain. Most notably he was counsel in the East African Asians case,¹³⁷ appearing on behalf of British Asian passport holders from former colonial territories whose ability to immigrate to the UK had been curtailed by the 1962 and 1968, Commonwealth Immigrants Acts. It was these acts, which Lester described in his 1968 pamphlet as 'blatantly racist'¹³⁸ that had first stimulated Lester to advocate a Bill of Rights during the first wave of the debate.¹³⁹ Having seen no progress on this front it was through his efforts, and the workings of the Convention mechanisms, that the European Commission came to issue a damning report against the UK, in connection with the Acts, in December 1973.¹⁴⁰

¹³⁶ Letter from Peter Archer QC MP, Society of Labour Lawyers, to Sir H Nicholas, General Secretary of the Labour Party (LabArch 28 March 1972)

¹³⁷ *East African Asians v United Kingdom* (1973) 3 EHRR 76

¹³⁸ Lester (1969) (n 23) 3

¹³⁹ Lord Lester 'East African Asians versus the United Kingdom: The Inside Story' (Lecture to the Odysseus Trust 23 October 2003)

<http://www.odysseustrust.org/lectures/221_east_african_asians-sharma.pdf> last accessed 18 January 2013

¹⁴⁰ n 137

On top of the report in *Golder*¹⁴¹ earlier that year – a report which would see the UK in front of the European Court for the first time¹⁴² – the East African Asians case demonstrated that the Convention had established a beachhead in the British domestic political space. Since his 1969 Fabian speech, Lester had been developing his majoritarian critique of the UK's Parliamentary system whose 'hallowed safeguards ... were swiftly swept aside' in the passing of the Immigrant Acts.¹⁴³ His pragmatic concern, that a Bill of Rights could not be effectively entrenched, remained (a point rehearsed in his 1971 book *Race and Law*¹⁴⁴ where he notes that past injurious decisions of the Privy Counsel 'merely reflected the social values of their time, and probably, even if there had been a Bill of Rights to guide the judges, they would not have reached different conclusions'). However despite his belief that-rights judicialisation could never effectively bind or coerce the executive in a strong sense he continued to emphasise the importance of the soft power of courts considering human rights issues. Thus, Lester explains that the real value of a Bill of Rights is as much in compelling a certain kind of judicial consideration as it is in trying to guarantee particular kinds of outcome (namely respect for individuals' rights).¹⁴⁵

While Macdonald led Liberal Bill of Rights proposals, Lester was given significant access to the Government/Labour party elite variously through his membership of the Labour National Executive's Human Rights Sub-Committee,

¹⁴¹ *Golder v The United Kingdom* App no 4451/70 (Commission Decision, 1 June 1973)

¹⁴² *Golder v The United Kingdom* [1975] 1 EHRR 524

¹⁴³ In full he complained that 'constitutional conventions, the sense of fair play of our legislators, the consciences of individual Members of Parliament, the Opposition, the independent judiciary, the Press, and public opinion ... surrendered to the wishes of the majority, or rather to wishes vociferously articulated by an extreme minority in the name of the majority'.

¹⁴⁴ A Lester and G Bindman, *Race and Law* (Penguin 1971)

¹⁴⁵ *ibid*

as one of two expert advisors appointed to examine the need for further statutory protection of human rights law in Northern Ireland, and as special advisor to the Home Secretary, Roy Jenkins.¹⁴⁶ Together these lawyer politicians bridged their spheres of activity and channelled their developing personal experiences from Strasbourg legal practice into pro-Convention advocacy. The effect of this advocacy on others can be seen particularly clearly in Roy Jenkins who was soon arguing 'that this whole area warrants early collective consideration by Ministers.'¹⁴⁷ Overall the internal party momentum the human rights lawyers helped build was so great that the Northern Irish Secretary warned in an internal memorandum that there was a 'danger of the Party running too far ahead of the Government on this delicate matter.'¹⁴⁸ The Government was however keeping up with the shift to Convention models and after the Kilfedder debate, where all of the above proposals were considered,¹⁴⁹ an interdepartmental working group was convened considering exclusively the implications of a Convention based approach. This committee generated twenty detailed, technical, reports, into different aspects of incorporation including:

¹⁴⁶ In a briefing memo for Jenkins, produced at the end of July 1975, Lester added his support for incorporation to that from the Attorney General and the Northern Irish Secretary and offered the reassuring prospect that incorporation would reduce complaints to Strasbourg. He complained that the Convention was 'in legal limbo' in the UK 'neither properly incorporated, so as to provide effective remedies nor wholly irrelevant, so as to enable complaints to go straight to Strasbourg without first exhausting their domestic remedies' and suggested that the Home Office needed to take the lead on rights reform. Lester Minute for Home Secretary (NatArch HO 342/275/1, 30 July 1975)

¹⁴⁷ Letter from Home Secretary to Attorney General (NatArch HO 342/275/1, 1 August 1975)

¹⁴⁸ Letter from Sec State NI to Home Sec (NatArch HO 342/275/1, 23rd July 1975)

¹⁴⁹ A new Bill of Rights, adoption of the Canadian model, further legislation to give effect to the European Convention or making no special provision and continuing merely to pass normal, specific, legislative measures in respect of issues as they arise. HC Deb 7 July 1975, vol 895, col 32-87

techniques for incorporation,¹⁵⁰ existing use of the Convention by the domestic courts,¹⁵¹ the possible creation of a domestic human rights commission,¹⁵² jurisprudence considering the Convention rights from the ECJ,¹⁵³ change in the precedence of law,¹⁵⁴ potential for the ECHR to acquire horizontal effect,¹⁵⁵ the relationship between the Convention and domestic discrimination legislation,¹⁵⁶ Privy Council consideration of rights terms in Commonwealth constitutions,¹⁵⁷ ‘problems of the Courts in interpreting the Convention’,¹⁵⁸ and the potential impact of incorporation on the UK’s relationship with the ECHR Court and Commission¹⁵⁹. The group’s final report, published as a Home Office discussion document, concluded that the ECHR was the most viable basis for an enacted Bill of Rights.¹⁶⁰ While this was not quite a clean bill of health, it did mark official recognition of the Convention’s front-runner status.

Conservative legal elites were even more forceful. In November 1976 a group of senior Conservative lawyers, consisting of seven QCs, two juniors and – keeping the issue in the family – Douglas Hogg (Lord Hailsham’s son) concluded that while imperfect, ‘the European Convention should be given statutory force as overriding domestic law where the two codes conflict’,¹⁶¹ and called for judicial review through the ‘recognition of administrative law as a specific

¹⁵⁰ NatArch WG(HR)5 on scope and WG(HR)6 on impact – drafted by the FCO, HO 342/275/1

¹⁵¹ NatArch WG(HR)2, HO 342/275/1

¹⁵² NatArch WG(HR)4 – drafted by Lester, HO 342/275/1

¹⁵³ NatArch WG(HR)7, HO 342/275/1

¹⁵⁴ NatArch WG(HR)10, HO 342/275/1

¹⁵⁵ NatArch WG(HR)11, HO 342/275/1

¹⁵⁶ NatArch WG(HR)19, HO 342/275/1

¹⁵⁷ NatArch WG(HR)17, HO 342/275/1

¹⁵⁸ NatArch WG(HR)18, HO 342/275/1

¹⁵⁹ NatArch WG(HR)12, HO 342/275/1

¹⁶⁰ Home Office, *Legislation on Human Rights - With particular reference to the European Convention - A discussion document* (HMSO 1976)

¹⁶¹ Society of Conservative Lawyers (n 75)

brand of our law' and the unification of administrative powers of review under a single division of the High Court.¹⁶²

Overall then one can see that, in each of the major parties, the Convention was communicated first by British lawyers, and most forcefully by those working directly with human rights law. Lawyers with feet in both practice and politics brought recognition of human rights' significance to the Bill of Rights debate and helped galvanise elite political attention around the Convention option.

c. Importance of Consensus

A third factor pushing the debate towards the Convention appears to be the realisation that agreement on a solution too closely associated with the work of any particular party would be so contentious as to be unworkable. After the October 1974 elections the press were quick to talk up the prospects for a new Bill of Rights as the, apparently hospitable, Roy Jenkins was appointed as Home Secretary and human rights advocates Sam Silkin QC MP and Peter Archer MP were called into Government as Attorney and Solicitor General respectively.¹⁶³ However, as the Conservative Lawyers report had argued, any Bill of Rights would only carry weight if it was born of broad, cross party, consensus. With Labour sat only four seats ahead of Heath's Conservatives and seventeen short of a majority (only marginal progress over the hung Parliament following the

¹⁶² *ibid* 18

¹⁶³ Forcing them to resign their positions as chairman and treasurer of the Human Rights Trust and both to step down from the board of the British Institute of Human Rights. George Hutchinson, 'Paving the way to a new Bill of Rights' *The Times* (London 13 April 1974) 12

February election) cross-bench consensus was, however, a key pre-requisite of any successful bill.

As the Conservative report proclaimed, such political unanimity was 'patently absent'¹⁶⁴ with the Conservatives still keen to emphasise rights relating to education and healthcare, non-membership of unions, and property (all broadly unacceptable to Labour).¹⁶⁵ In Government Labour ministers had little enthusiasm for fighting over the detail of any new instrument. In 1977 Callaghan asked his Ministers what view they took on the question of human rights.¹⁶⁶ The new Home Secretary, Merlyn Rees, summarised the Cabinet's responses in these terms: 'none of us wants to start from scratch and draw up our own purely domestic Bill of Rights, or to attempt to entrench human rights against ordinary processes of legislation.'¹⁶⁷ The only live debate was 'between those like myself who favour the incorporation into our domestic law of the European Convention on Human Rights and those who favour the status quo.' Having abandoned the latter Rees went on to draft a detailed Cabinet paper on the advantages and disadvantages of Convention incorporation (discussed in section 4, below) with no reference to other possible courses of action.

While the cross party House of Lords select committee in 1978 did consider other options they too reached the same conclusion regarding the Convention. The committee's report stated that the attraction of any form of constitutional rights protection was closely tied to the drafting form of the instrument. While the committee was broadly divided over whether a Bill of

¹⁶⁴ Society of Conservative Lawyers (n 75) 10

¹⁶⁵ *ibid* 12

¹⁶⁶ Home Secretary's Minute on Bill of Rights (NatArch CJ 4/1632 26 November 1976)

¹⁶⁷ Legislation on Human Rights - Memorandum by the Secretary of State for the Home Department (NatArch CP(77)6, CAB 129/194/6, 21 January 1977)

Rights should be adopted, there was unanimous agreement that, if one were to be adopted, it would need to incorporate the Convention, as this was the only approach that could attract sufficient support.¹⁶⁸ Citing the failure of an Austrian Commission in 1966, which had been tasked with formulating a domestic Bill of Rights, the Lords concluded that any ‘attempt to formulate *de novo* a set of rights which would command the necessary general assent would be a fruitless exercise’.¹⁶⁹ Providing a positive complement to the, typically, negative rights under domestic law an ECHR derived instrument, compatible with Parliamentary Sovereignty, was seen as ‘the only feasible way of proceeding’.¹⁷⁰ Any innovation beyond the form of the Convention, which could be claimed but its progenitors as a political victory, would never be acceptable to the other parties.

d. Importance of Northern Ireland

The fourth advantage of using the Convention as the basis for a domestic bill was in relation to that bill’s application to Northern Ireland. As with the acceptance of the right of individual petition considered in the last chapter, it would have been a disaster to create a Bill of Rights, enhancing protection of human rights, but then restrict that bill’s application to Northern Ireland. Particularly problematic was the interaction of a Bill with the Emergency Powers Act (NI) 1926 or the Civil Authorities (Special Powers) Act (NI) 1922.¹⁷¹ The Northern Ireland Office warned, in connection with Lord Arran’s bill that

¹⁶⁸ *ibid* final report para 6

¹⁶⁹ *ibid* para 10

¹⁷⁰ *ibid* para 9

¹⁷¹ J1 Division ‘Briefing on Lord Arran’s Bill of Rights’(NatArch CJ 4/15, 16 November 1970)

‘the existence in Northern Ireland of the Special Powers Act and regulations made under it causes a conflict between the law and practice in Great Britain and in Northern Ireland’.¹⁷² Active lobbying by Northern Irish civil society groups saw the Home Office’s Legislation Committee warning that ‘[i]t must be feared that consideration of Lord Arran’s Bill will provoke amendments aimed at remaining grievances seen to exist in Northern Ireland.’¹⁷³

After the constitutional reforms of 1973¹⁷⁴ drew criticism for their continued vesting of power in Whitehall, the 1974 Wilson administration saw the opportunity to use limited rights judicialisation as a means of putting awkward decisions in relation to Northern Ireland at arms length from London. When James Kilfedder tabled his Ulster Unionist call for a nationwide Bill of Rights, Cabinet minutes noted agreement ‘that the debate ... would need to be handled with some care and sympathy, in particular because of the implications for Northern Ireland.’¹⁷⁵ From this point the Northern Irish situation was at the forefront of Government minds with the Cabinet particularly concerned not to tread on the toes of the newly created Northern Irish Standing Advisory Commission on Human Rights, which had been set up under the 1973 Northern Ireland Constitution Act¹⁷⁶ Despite being given the limited role of reporting on ‘the adequacy and effectiveness of the law for the time being in force in preventing discrimination on the ground of religious belief or political opinion’¹⁷⁷ in Northern Ireland, the SACHR had quickly expanded beyond this

¹⁷² *ibid*

¹⁷³ Legislative Committee: Lord Arran’s Bill of Rights (NatArch L (70) 40, CJ 4/15)

¹⁷⁴ Northern Ireland Constitution Act 1973

¹⁷⁵ Cabinet Minutes 3rd July 1975 (NatArch CAB/128/57/2)

¹⁷⁶ (n 174) s 20

¹⁷⁷ *ibid*

remit. In May 1975, the Commission announced its intended to embark on a major study of the extent to which existing legislation provided sufficient protection for human rights in Northern Ireland, (including whether a Bill of Rights was needed, what form one could take, and how that would fit in with existing legislation). As mentioned above, Lester was one of the two experts appointed to guide this study.

Not wishing to suppress this exercise the Secretary of State considered upgrading the SACHR study to a Royal Enquiry¹⁷⁸ but it was recognised that there was a distinct value in keeping the study autonomous and free of overt British overtones. In this same vein a new and characteristically British Bill of Rights was rather less attractive, politically speaking, than an instrument merely giving force to the external rights content of a Convention also ratified by the Republic of Ireland. This approach would ensure in one direction that Northern Ireland was not singled out for separate treatment from the mainland but in the other, that it was not being subjected to a 'British' definition of fundamental rights.

When the SACHR report, written predominantly by Lester, was completed it contained forceful advocacy for British incorporation.¹⁷⁹ Lester argued in favour of a Bill of Rights for Northern Ireland but also argued that the best Bill of Rights for Northern Ireland was a Bill of Rights covering the whole United Kingdom. Lester wanted such a Bill to go beyond incorporating the Convention but accepted that the best preparation for such a Bill was the urgent incorporation of the Convention. In an additional memo Lester, in his capacity

¹⁷⁸ Letter from Secretary of State for Northern Ireland to Home Secretary (NatArch H0342/275, 23 July 1975)

¹⁷⁹ Memo for the Secretary of State (NatArch CJ 4/1280, 30 January 1976)

as the Secretary of State for Northern Ireland's Special Adviser, pushed for this first step saying: 'some kind of consensus is emerging that some human rights legislation is necessary ... with the most practical method of proceeding being incorporation'.¹⁸⁰ The issue was also considered by the Whitehall working group – with the Northern Irish dimension of incorporation being the subject of one of its working papers.¹⁸¹ Even as the debate was winding down, at the start of Callaghan's tenure as Prime Minister, Cabinet minutes continued to express a strong belief that in the Northern Irish case 'there were strong grounds for making some change', with the only viable change being Convention-based.¹⁸²

Overall the shift to adoption of Convention based proposals can be seen to have flowed from multiple sources. In a period of increasing attention to European norms, with the domestic courts for the first time being entitled to assess compatibility of domestic statute with a higher body of externally mediated law, the idea of incorporating the Convention was no longer an entirely radical proposal. Growing awareness of and engagement with the Strasbourg Court and Commission, particularly amongst a few elite lawyers who also had connections with elite politics, was beginning both to normalise the idea of the Convention's application to British legal practice and also highlighting certain failures in the existing protection of rights domestically. These moves, and the growing acceptance of judicialisation and supranationalisation that underlay them, combined with pragmatic realisations that the Convention provided the only model that all parties might be able to endorse, being the only text whose acceptance could not be clearly interpreted

¹⁸⁰ *ibid*

¹⁸¹ NatArch WG(HR)3, HO 342/275/1

¹⁸² *ibid* 8-9

as a victory for any one party, and the importance of adopting a neutral instrument that could be applied across the UK without appearing to inflict any particularly British flavour of rights norm on Northern Ireland. These four factors appear to have been the principal drivers for the Convention approach over calls for a new domestic instrument (or the increasingly wobbly looking Canadian model).

I have not spoken here of the advocacy of civil society organisations that occurred during this period, which both supported and reflected growing ideological support for human rights. This is both because such advocacy was more general and does not assist greatly in distinguishing a shift towards the Convention, and also because there is little in the records I have examined to suggest that this stage of elite political machinations was significantly guided by such external factors. Another factor considered but rejected is external pressure from the Strasbourg institutions themselves, which also appears to have played no significant role in the shift towards a Convention based instrument. Instead this shift, played out largely during a dip in public debate, reflects the internal machinations of the elite political classes in relation to the four factors described above. These factors each acted on the debate in a different way (to de-stigmatise, show domestic potential, provide a political compromise and to dodge a politically charged issue respectively) and, in combination, set the UK's constitutional rights debate on the course it would follow for decades to come.

So far then I have documented the rise of the debate, its intertwining with domestic civil liberties discourses, and its settling on a Convention model. Much of this work has been shown to be the work of individuals rather than

parties and, as noted in previous chapters, idealistic or principled individual initiatives can direct a debate but not compel action. Thus, despite consensus developing around answers to key issue such as the proper form of a Bill of Rights (Convention incorporation) and whether it could be entrenched (probably impossible) nothing more concrete than proposals came from the 1970s debate. In the remainder of this chapter I explore why the debate ran out of steam.

4. The Debate's Collapse

The decline of the 70s debate can be understood on one level as the failure to solve the problem of crafting a Bill of Rights that would fit around the Northern Irish situation. On another it can be seen as a political impasse with the two, main, parties possessing a different profile of residual objection to a Bill of Rights (Labour still anti-judicialisation, the Conservatives still anti-supranationalisation) leading to impasse in the absence of a clear electoral margin for either. In this section I deal with each of these components in turn, first considering the worsening Northern Irish situation, then examining the distance between the parties, and finally assessing the importance of dominance alongside party conflict in precipitating rights reform.

i. The Northern Irish Challenge

The second wave of the rights debate was played out not just against a precarious Parliamentary balance, and a Labour legislative programme so extensive that the Wilson Cabinet gave serious consideration to lengthening

Parliamentary sessions,¹⁸³ but also alongside Labour aspirations to pass deep constitutional reforms to the relationships between the component nations of the UK. Following the Royal Commission on the Constitution in 1973 various debates, consultations and proposals culminated in the failed Scotland Bill in 1977-8 and the controversial Scottish and Welsh referendums in 1979. Even if these other issues had stood alone they risked crowding out the bill of rights issue as a time-consuming diversion but, in its complex interaction with these other constitutional processes, the task of passing any bill became even harder.

As mentioned above, it was the 1975 Kilfedder debate that forced the Labour Government to form a defensible policy on rights, and which ensured that Labour's perspective on the second wave of the rights debate was through a Northern Irish lens. In preparation for Kilfedder's bill, and a 10 minute motion from Liberal Alan Beith MP, tabled for the following week,¹⁸⁴ Shirley Summerskill, Junior Home Office Minister, suggested 'that the Government should continue to adopt a non-committal approach, and that, while not setting themselves up in clear opposition to these pro-rights actions, the Government 'should seek to prevent the Bill making any further progress on the grounds that a decision would, at this stage, be premature.'¹⁸⁵

As problems in Northern Ireland continued to mount Labour struggled to maintain this policy. After Wilson's resignation in 1976 the Cabinet resolved that 'the special circumstances in Northern Ireland should not be allowed to

¹⁸³ Cabinet Meeting Conclusions CC (75) 32 (NatArch CAB 128/57/2, 3 July 1975)

¹⁸⁴ HC Deb 15 July 1975, vol 895, cols 1270-3

¹⁸⁵ Letter from Shirley Summerskill, Junior Minister in Home Office to Edward Shot MP, Leader of the House of Commons (NatArch HO 342/275/1, 1 July 1975)

influence constitutional decisions elsewhere'.¹⁸⁶ The model for incorporation outlined in a cross departmental discussion document was labelled as 'highly undesirable', liable to 'make no contribution to the creation of a more just society' and carrying 'constitutional implications of a revolutionary character'.¹⁸⁷ The following year a 1977 Cabinet Paper by the Home Secretary again noted the 'considerable pressure in some quarters for a strengthening of the individual citizen's defences against authority'¹⁸⁸ and expressed a determination to show 'that the Labour Party, which has historically stood for the advancement of human rights, is still concerned with the protection and enhancement of individual liberty'. However, while calling for the matter to remain under review, for public debate to be stimulated and for the party 'not to close the door on the possibility of incorporation at a later date' it also concluded that the 'undesirability of starting another major constitutional debate while we are still engaged in devolution' meant 'that no immediate action is possible in this field'.¹⁸⁹

Soon, with the situation on the ground continuing to worsen, even the rights-bullish SACHR¹⁹⁰ were expressing second thoughts. In a confidential memorandum to the Northern Irish Secretary the Chairman of the SACHR, Cyril Plant, warned that 'an immediate Bill of Rights would not necessarily of itself be useful' and '[w]hile it might give impetus and uplift to the citizens of Northern

¹⁸⁶ Meeting of the Cabinet, CM(76)8th Conclusions (NatArch CAB 128/59/8, 10 June 1976)

¹⁸⁷ *ibid*

¹⁸⁸ Legislation on Human Rights - Memorandum by the Secretary of State for the Home Department CP (77) 6 (NatArch CAB 129/194/6, 21 January 1977)

¹⁸⁹ *ibid*

¹⁹⁰ Their having continued to explore the possibilities for both a Northern Irish and a UK wide Bill despite the Government's resistance and had released their own discussion paper on 5 March 1976.

Ireland its practical application would inevitably founder until violence was much reduced.¹⁹¹ With terrorist attacks a part of daily life and the UK having sought derogations from the ECHR in connection with Northern Ireland a Bill of Rights would be little more than a token gesture. Plant warned it would be impossible to 'sweep away the apparatus of the Emergency Provision Acts with violence at current levels'. Any Bill of Rights or incorporation would almost inevitably lead to the Government being found in breach unless derogations were entered and, in Plant's words: 'to introduce a Bill of Rights from which we had immediately to derogate or to put on the long finger would deserve a prize for ineptitude.'¹⁹² Plant also had particular criticism for Lester who he believed had failed to appreciate the 'special problems of Northern Ireland and its divided community'. Having considered the challenges facing the region Plant concluded that a document specifically catering to Northern Irish issues was the only kind liable to have any meaningful impact but that 'if a Bill of Rights were to be introduced in Northern Ireland as a separate step, and in the current situation, the results would be disappointing'. Rather than being perceived as a new start for Northern Ireland Plant suspected the public would be more likely to deride it' and ask '[w]hat good is a Bill of Rights when the gunman stalks the streets?'¹⁹³

After Thatcher came to power in 1979 the Northern Ireland Office took one final look but the prognosis was unchanged:

The Government has little to gain from active promotion of a Bill of Rights. A UK-wide Bill is simply not a practical proposition at the present time. And a Northern Ireland only

¹⁹¹ (n 188) *Main Body of Letter*

¹⁹² *ibid*

¹⁹³ *ibid*

Bill presents formidable problems of form and drafting – with little benefit in the protection of human rights in return, and undoubted embarrassment at having to suspend some of the provisions for as long as the Emergency Provisions legislation is required.¹⁹⁴

It further added that '[an Irish] Bill of Rights is therefore a welcome element in any Constitutional package only if it is supported strongly by both the minority and majority parties'. While there was some support from each of the parties, strong support was manifestly absent. Instead dialogue between the parties had dried up. Political use of the bill of rights issue by the Conservatives, particularly during the Scotland Bill, also made clear that human rights were still considered ammunition for use in inter-party political conflict.¹⁹⁵

ii. Residual Concerns, Inter-Party Tensions

As introduced in section 3, above, common aspirations for human rights within the domestic constitutional legal space did not amount to a shared understanding of what such a system would look like. The different treatments of rights in the major parties manifestos, plans and reports demonstrate that such commonality of purpose was lacking and, applying my analytical framework one can see that the parties each maintained distinct profiles of concern.

For the Conservatives the Bill of Rights debate offered an opportunity to put Labour on the back foot. As such they pressed that a Bill of Rights was necessitated as a result of the Labour Government's 'hidden bureaucracy' and

¹⁹⁴ Bill of Rights for Northern Ireland: Arguments for and against (NatArch CJ 4/2699)

¹⁹⁵ During Commons debate over the Bill the Conservatives unsuccessfully moved an amendment attempting to append the Convention to the text as a 'Scottish Bill of Rights'. HC Deb 1 February 1978, vol 943, col 492-583

its systems of rule by 'ministerial decree'.¹⁹⁶ Labour Lord Chancellor (Lord Gardiner) described these complaints as 'standard Conservative Party propaganda'¹⁹⁷ and claimed that 'nearly all the work in civil liberties has been done by people who are Liberal or Labour'¹⁹⁸ and, in evidence of the Labour party's having 'always been desperately concerned for the individual'¹⁹⁹ cited an array of Labour led statutes and measures²⁰⁰ and the efforts to decentralise that had been undertaken by the Wilson Government.²⁰¹ However, when it came to a Bill of Rights the rejection was unequivocal. Stating that he wished to be constructive and agreed that international rights texts outlined goals 'to which we should all be aiming', he none the less contended that he did not believe that such texts could readily be 'reduced' into the form of domestic legislation.²⁰²

While the 1970 Labour manifesto followed up this message, attempting to ally Labour with rights protection, claiming that 'today, as often in the past, the extension of human rights has had to wait for a Labour Government'²⁰³ it lacked any substantive policies outside of equality and race relations. From opposition the February 1974 manifesto was even less ambitious, mentioning human rights only in relation to foreign policy. By contrast, the Conservative manifesto in February 1974 dedicated several pages to a section on 'Protecting

¹⁹⁶ Times Reporter, "Tory Bill of Rights to defeat "hidden bureaucracy"" *The Times* (London, 30 May 1969) 3

¹⁹⁷ Hansard HL Deb 18 June, vol 302, cols 1040

¹⁹⁸ *ibid* cols 1040-1

¹⁹⁹ *ibid*

²⁰⁰ Namely: the Crown Proceedings Act 1947, the Legal Aid and Advice Act 1949, the Race Relations Act 1965, the Tribunals and Inquiries Act 1966, the Parliamentary Commissioner Act 1967, including the ratification of the ECHR, and the acceptance of its optional articles

²⁰¹ (n 197) col 1044

²⁰² *ibid* col 1045-6

²⁰³ Labour Party, *Now Britain's Strong - Let's Make it Great to Live In* (Labour Party 1970)

the Rights of the Individual'. It proclaimed that rights of the individual citizen need to be protected both against the power of the State and against other large and powerful bodies, and went on to discuss various substantive policy initiative ranging from strengthening socio-economic workers' rights, anti-discrimination regulations, and consumer protection legislation; to exploratory work on a law of privacy and commitments to greater parental freedom of choice over education.²⁰⁴ The Liberal manifesto went even further and in its 'programme for national reconstruction' after fifty years of two party rule²⁰⁵ offered commitments to decentralisation, social rights, a 'new charter for industrial relations', improved race relations and the passing of a Bill of Rights.

The only real victors of the February election were the Liberals (who saw a double-digit swing, almost tripling their popular vote and more than doubling their representation in Westminster). It is thus unsurprising that the Labour October manifesto borrowed heavily from the Liberal policy book in the field of civil liberties. A large section on 'Individual Rights and the Community', supplemented the standard harking back to Labour's past successes, with commitments to gender equality, minority protection, extended legal aid, greater community consultation, reform of the Official Secrets Act, registers of senior official's interests, and greater protection for individual privacy (all policies previously endorsed by the Liberals).²⁰⁶ Anyone expecting Labour to turn over a new leaf were destined to be disappointed however when the narrow Labour victory saw no great warming to a Bill of Rights.

²⁰⁴ Conservative Party, *Firm Action for a Fair Britain* (Conservative Party 1974)

²⁰⁵ Liberal Party, *Change the Face of Britain* (Liberal Party 1974)

²⁰⁶ Labour Party, *Britain Will Win With Labour* (Labour Party 1974)

Following Lord Justice Scarman's Hamlyn Lectures in December 1974, the Solicitor General gave a flavour of the Labour rebuttal in a lecture to the Fabian Society. In it he claimed that, in terms of protecting individual liberties, a fixed written text was no match to the responsiveness of Parliamentary debate.²⁰⁷ In a clear expression of continuing concern centred on judicialisation he went on to state that the core question was whether, in the last resort, the British preferred to commit their liberty to judges or politicians and asserted that most of the public 'have no greater confidence in judges than in politicians'.²⁰⁸ While he accepted that the law retained an important role in protecting liberty he emphasised also its development as a positive tool for those lacking economic power and warned that '[l]aw is not merely a brake on governments. It is an active process. We must beware of persuading ourselves that freedom can be embalmed.'²⁰⁹ In terms similar to those of Professor Tietgen in 1949, Scarman argued that liberty 'cannot be preserved by any institution unless that institution has muscle power deriving from human vigilance and concern.'²¹⁰ In 1975 Home Office minutes had shown Labour's worry that '[m]ost of our judiciary are not trained to interpret social legislation and are constitutionally insensitive to the kind of issues which such legislation

²⁰⁷ Times Correspondent, 'Bill of Rights proposal rejected by law chief' *The Times* (London, 14 December 1974) 3

²⁰⁸ *ibid*

²⁰⁹ *ibid*

²¹⁰ The Home Secretary Roy Jenkins also responded that he had 'read Lord Scarman's recent lectures with much interest, and appreciated the relevance and importance of the issue which he raises' but that while he hoped 'these lectures will stimulate further public discussion of the issue' he 'doubt[ed] whether the time is yet ripe for the appointment of a Royal Commission.' (NatArch HO 342/264)

promotes'.²¹¹ For Labour the institution of choice for ensuring protection of rights was Parliament and the fear was that '[a] British Bill of Rights could inhibit the kind of social reforms which a Labour Government wish to achieve.'²¹² These concerns resonate through party minutes and Cabinet records. In Ministerial discussion of the Government's response to the second Wade bill, the Defence Secretary complained variously that 'our judicial system is total unsuited to deal with matters of administration and Ministerial discretion'; that 'Courts would always be prejudiced against a radical government'; and that 'objectors to Ministerial or local authority decisions have only to show they have a case to argue for the Courts to give an interim injunction'.²¹³ The Trade Secretary was less averse but concluded 'that such legislation would encourage the courts to impede radical action by Labour governments'.²¹⁴ With the courts having gained experience in applying non-domestic law through EEC membership, and the forthcoming devolution legislation liable to give it further opportunities to review legislative action, the Trade Secretary added 'I think we will find in the UK that, whatever we do, the courts will be increasingly interventionist' and 'it will be very difficult to control this, certainly by Governments with small Parliamentary majorities.'²¹⁵ The Lord Chancellor argued, in terms similar to those used in the 50s, that conflicts attendant on incorporation would not be beneficial to good government.²¹⁶ Even the Home Secretary, who was bullish about incorporation, concluded that

²¹¹ Note by Mr Lyon, included in a Minute by JC Maund, Private Secretary in Home Office (NatArch HO 342/264, 30 April 1975)

²¹² *ibid*

²¹³ NatArch CAB 129/194/6

²¹⁴ Secretary of State for Trade's Minute (NatArch CAB 129/194/6, 7 January 1977)

²¹⁵ *ibid*

²¹⁶ Lord Chancellor's Minute (NatArch CAB 129/194/6, 10 January 1977)

‘[t]he attitude of the judiciary in recent cases compounds the fears of those who are apprehensive about possible changes in the Relationship between Parliament and the courts’.²¹⁷

By contrast the Conservatives greatest concern was that a Bill of Rights might *fail* to constrain Labour’s social reforms and, consequently, support for judicialisation was high. The 1976 Conservative Leaders Committee report, which proposed a domestic Bill based upon the European Convention, suggested that such an instrument would not provide any progressive safeguards but was none-the-less desirable because it would give international backing to their attempts to constrain Labour.²¹⁸ While supranational enforcement of Convention rights by Strasbourg was seen as at worst a threat and at best an unwelcome interference in Government, domestic judicial processes to enforce those same rights were hailed as a potential protection against left wing reforms. An additional advantage of following the Convention was seen to be that ‘it would be very difficult for the Labour party to oppose’.²¹⁹ This thinking is reminiscent of Maxwell-Fyfe’s apparent intentions in the original drafting of the Convention, albeit with more concern over supranational influence and greater openness to domestic judicialisation.

The Liberals took a third approach, again at odds with the above two. Unlike those in the Labour Cabinet, such as the Lord Chancellor, who were insistent that Parliament remained the best protection for the individual, to the Liberal elite the main point of a Bill of Rights was its ability to constrain

²¹⁷ Legislation on Human Rights - Memorandum by the Secretary of State for the Home Department (NatArch CP (77) 6, CAB 129/194/6 - 21 January 1977)

²¹⁸ Havers (n 2) 2-3

²¹⁹ *ibid*

Parliament. In their submission to the Lord's Select Committee on the Wade bill, the Liberals suggested that while in the past 'Parliament was seen as the defender of individual rights', as 'the roles of government increased' so too did 'the need for specific legislation on human rights.'²²⁰ There was acknowledgement that the Convention's emphasis on continental style special courts and general phrasing created the potential for 'uncertainties, grievances and bias' but the Liberals insisted that the UK's 'disciplined judiciary, bound by precedent, and case law would soon pin down the European Convention' and would rapidly elaborate 'a Bill of Rights that was certain.'²²¹ Defending the implications of the proposal they stated that while '[one] consequence of this approach would be the development of a politicised judiciary' and conceded 'that judges could come into conflict with Parliament' it was concluded that this would only become a defect of the system if it resulted in the executive appointing judges based on political criteria.²²² This potential glitch was dismissed as being unlikely in the UK on account of a history of inter-party appointments and it was argued that increasing the power of the judiciary was, in any case, preferable to the present position 'of rule of an unrepresentative Parliament by the executive.'²²³

Thus, underneath consensus on the use of the Convention lay division on its purpose. The Liberals saw it as a means of forcibly binding Parliament whilst Labour were split between wishing to insulate Westminster and expose it to some amount of political pressure. The Conservatives had sloughed off

²²⁰ Liberal Party, *The Liberal Approach' Submission to the House of Lords* (LibArch, NEC Working Papers box file, July 1977)

²²¹ *ibid*

²²² *ibid*

²²³ *ibid*

judicialising concerns and were keen to offer the domestic courts the opportunity to scrutinise Labour policy, as the party moved back towards the left, but retained supranational concerns over meddling by the international courts. Labour was far less concerned about the supranational authorities than the domestic ones, maintaining a strong judicialising concern in connection with national courts. The Liberals held neither concern and were happy to embrace both dimensions of oversight but were uninterested in half-measures.

These divisions help explain Liberal and Labour feet-dragging over participation in the cross party talks on incorporation promised in the 1979 Conservative manifesto. While Labour chose not to respond to the Lord Chancellor's invitation to convene talks until terms had been reached on prior talks regarding Scotland, the Liberals made their participation conditional on the Government making time in the Commons for Lord Wade's bill to receive a second reading.²²⁴ At a time when not even Conservative backbenchers bringing non-government drafted Private Members Bills were being allowed time, this concession was not offered and so talks were never held.²²⁵ While the Conservatives continued to consider the issue unilaterally until 1981, the prosecution of Thatcher's vision of economic liberalism, rather than a reinforcement of, what they already considered to be adequately protected, political freedoms, soon dominated the agenda, and the debate quietly fizzled.

²²⁴ Letter from Lord Wade to the Lord Chancellor (NatArch HO 342/273, 23 January 1980)

²²⁵ Letter from Prime Minister's Private Secretary Lord Chancellor's Office (NatArch HO 342/273, 22 April 1980)

5. Conclusion

The 1970s Bill of Rights debate was a crucial episode in the gestation of British domestic rights enforcement. It covers the period during which discourses of British civil liberties and European human rights collided, domestic rights review became a subject of popular debate, ideas for administrative review flourished, and the foundations for the UK's eventual Convention incorporation were laid.

Through the advocacy of a disparate selection of motivated individuals, at a time of growing public interest in rights, the first wave of the debate saw the genesis of an exciting new public conversation on domestic rights protection. While owing more to the long history of Liberal efforts to pass measures to protect the individual against executive excess than to the developing processes of human rights elaboration on the continent, this was a time at which important connections were made between these British historical struggles and the more recent rights norm development. Liberal success at the polls helped raise the profile of this work and promotion of individual supporters within the two major parties helped to create momentum behind the Bill of Rights idea. This brought increasing participation from the main parties, if not in supporting the continued Liberal propositions, then at least in engaging in extensive study of the possibilities for a Bill of Rights.

In this chapter I have mapped out the two phases of the debate, a first phase of individual rights advocacy – dominated by the elite political actors with particular rights interests, raising the need for constitutional reform to address a range of administrative failings – and a second phase – where the central parties took ownership of the debate before running it conclusively into the

ground. While this period saw lessening resistance to a number of the key areas of concern explored in the previous chapters (such as Conservatives inviting judicialisation, with lessened concerns regarding the substance of the text, or Labour increasingly unfazed by supranational oversight) it also saw significant continuities. Labour, for instance, remaining highly anxious in relation to judicialisation, still concerned about the potential impact of an apparently conservative judiciary on their future plans.

While the debate did not precipitate any new law, some of the same dynamics that led to the debate's demise (namely the search for consensus and the desire to sensitively work around the Northern Irish situation) were also major pragmatic factors in pushing the debate towards a European approach. This lack of consensus was not, however, the fatal factor and, as shown throughout this thesis it is conflict rather than consensus that frames domestic rights reform. However, while the debate witnessed difference, and perhaps even conflict, the close electoral margins meant that no party was in a powerful enough position to go it alone and force their preferences on the other parties. The Bill of Rights debate thus surfaced at a time when it was unlikely to succeed. Through it, however, we can see both echoes of the prior episodes examined over the previous chapters, and also a fairly developed outline of the HRA to come. In the next chapter I consider how the coincidence of the key factors identified in previous chapters: inter-party conflict, intra-party ideological development, and landslide electoral dominance, combined with the amelioration of Labour's judicialising concerns to facilitate the HRA's passage. (contrasting this with restraint in connection with the EUCFR and the recent start of a new domestic Bill of Rights debate).

Chapter 6 The Human Rights Act Era

'Only the strange mentality of the modern Tory Bourbons could think it satisfactory to force British citizens to go to France to enforce their rights because their own courts are incapable of doing so.'

Tony Blair, 14th September 1996¹

1. Introduction

In this final substantive chapter I bring my account up to the present day, considering three key rights related processes from the tumultuous last twenty years in British constitutional development: the long anticipated incorporation of the Convention through the Human Rights Act, the UK's restricted engagement with the European Union Charter of Fundamental Rights (herein 'EUCFR', and the return of interest in a 'British Bill of Rights'. Considering the rise and fall of executive support for rights during this period I contrast each of these three episodes with their historical predecessors from the previous chapters.

This chapter falls into three sections, one for each episode. In the first I consider Labour's turn towards human rights, (and then partly away from it again), in the run up to their landslide victory in 1997 and the passing of the HRA in 1998. Considering party materials and individual published accounts alongside secondary literature on the Act's passage, and the rise of New Labour more generally, I consider the value of 'third wave',² Europeanising, and aversive constitutionalising explanations. Contrasting the HRA as an

¹ Tony Blair, 'Democracy's Second Age' *New Statesman* (London, 14 September 1996) 34

² Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000 Penguin)

engagement with the Convention with earlier episodes I identify the decision to incorporate the European Convention in 1997 as arising out of a neo-revisionist turn (like that which underlay the acceptance individual petition in 1965) combined with some of the earlier Conservative interest in exporting 'British' rights norms and reasoning. In the second substantive section I consider UK interaction with the EUCFR and why, against the backdrop of apparent endorsement of human rights through the HRA, Labour appeared to be at pains to resist it. While little documentary material is available on the drafting of the Charter, recent freedom of information requests have elicited new information that provides some insight into Labour's attitude towards the Charter's enforcement.

Comparing the Charter drafting to that of the European Social Charter, I identify several parallels, particularly cross party rejection of socio-economic rights content, lack of public exposure, and divisionary tactics, but also clear departures, with Labour adopting some of the supranational entrepreneurialism and strategy previously demonstrated by Churchill during the Convention drafting.

In the third section I examine the return of debate regarding the creation of a 'British' Bill of Rights. From Labour's abandonment of its pre-1997 policy of following up the Convention with an additional Bill of Rights and Responsibilities, through a Royal Commission examining the topic and up to the present day, I consider how far the current exploration of new constitutional rights reform measures mirrors previous episodes, and, in particular, identify the continued relevance of various features that frustrated the 1970s debate.

2. New Labour, New Rights

Almost half a century after Labour's ratification of the Convention, and more than thirty years since Labour accepted the optional articles on individual petition and the jurisdiction of the European Court, the passing of the HRA finally saw the establishment of a domestically enforceable British human rights framework. As a constitutional innovation the HRA is remarkable and its smooth passage is notable. While the HRA might seem like a natural product of the growing status of human rights in domestic civil society, political, and legal spheres, the close relationship between the act and Labour's return to power and the subsequent rocky road for human rights in UK public discourse point to a more political motivation. The suggestion that the creation of the HRA was not down to individual actors, but emerged from the much broader development of the UK's position in relationship to Europe,³ mirrors the tipping point model criticised in chapter 4. Again, as stated in Chapter 5, Britain's increasing proximity to Europe appears to have been a factor in growing interest in European rights but, as explored below, the aim in 1998 appears to have been more oriented towards a return to exporting British rights norms than a move to further embrace European ones. As has been shown throughout this thesis, party elites are slow to act without a specific object at hand and slow transitions in underlying factors do not provide the necessary impetus that is demanded to drive through major rights reforms.

In this first section then I consider existing accounts of the build up to the HRA and root the events of 1997-8 in the history of the Labour party's

³ James Young, 'The Politics of the Human Rights Act' (1999) 26(1) *Journal of Law and Society* 27

engagement with rights. These explanations – variously characterising the passing of the HRA as an aversive constitutionalising response to Thatcher’s autocratic rule, an effort to build common ground with Europe, and the fruit of the efforts of a few idealistically motivated individuals – are all enriched by a deeper historical awareness of the changing political and economic philosophies of the party leadership. In this section I detail the importance of changing attitudes to the judiciary and the complex attitude of the party towards Europe in making incorporation viable. Comparing the passing of the HRA with the acceptance of individual petition a number of profound similarities emerge which show that Labour’s efforts to develop constitutional rights protection are as much a response to the party’s own internal divisions and reinvention as they are to conflict with the Conservatives. Comparing the passing with the Convention drafting and the 70s rights debate the importance of inter party conflict and party dominance to UK rights constitutionalisation are affirmed.

i. From Thatcher to Blair

After the failure to hold cross party talks on a Bill of Rights in 1979 no further effort was expended on exploring major constitutional reform. This omission was unsurprising with Thatcher preferring the process of governing to reflection upon it.⁴ Constitutional measures that were pursued focussed on centralising power and reducing representation – curtailing local authorities’ political autonomy, capping revenue raising powers, and abolishing the Greater

⁴ D Shell, ‘Labour and the House of Lords- A Case Study in Constitutional Reform’ (2000) 53 Parliamentary Affairs 290

London and metropolitan county councils.⁵ After Thatcher's fall, Major was similarly resistant, responding to vocal calls for constitutional reform with trenchant endorsement of the status quo. While there were backbench attempts from all sides of the Commons to move bills incorporating the Convention, the Conservative Government, (and indeed the Labour shadow cabinet under Michael Foot and Neil Kinnock) remained opposed.⁶ While the period was marked by a growing body of judgments against the UK in Strasbourg, the Conservatives adopted an approach of minimal compliance, reacting to adverse rulings by amending specific laws but taking no proactive measures to head off future issues.

In this climate the domestic rights cause was left to rights-oriented NGOs, activists, and the opposition parties. In a spirit of resistance against the dispassionate and divisive force of Thatcherite rule, numerous initiatives were launched, the most notable of which, both from a rights perspective and as a means of understanding the developing Labour agenda, was the New Statesman backed Charter 88. This document, released in November 1988, sat at the heart of a campaign backed by more than 200 elite academic, political and cultural figures. It contained a statement of constitutional principles and made ten demands for concrete reforms, the first of which was the passing of a Bill of Rights.⁷ The Charter 88 movement reacted primarily to Thatcherite dominance of British politics by attacking centralisation of power in Whitehall (evinced through such actions as the closing of metropolitan authorities), and the

⁵ I Loveland, 'Incorporating the European Convention on Human Rights into UK law' (1999) 52(1) Parliamentary Affairs 113

⁶ Robert Blackburn, *Towards a constitutional Bill of Rights for the United Kingdom: commentary and documents* (Pinter 1998) 8

⁷ Anonymous, 'Charter 88' *New Statesman* (London, 2 December 1988) 10

undermining of civil liberties.⁸ Its emergence in 1988 was closely linked to the 1987 election and dissatisfaction at Parliament's lack of power in resisting an executive that had never enjoyed a majority of the vote.⁹ In the words of Paul Hirst:¹⁰

In Mrs Thatcher Britain has found a politician to expose the nakedness of the constitutional checks and guarantees to public view. She has helped to puncture our insular and incorrigibly ignorant view of ourselves as the premier democracy, and helped to show the need for a break with our political history, with the institutions and traditions that we have celebrated to the point where we have ceased to think about them.¹¹

The aftermath of the 1987 defeat presented the crucible in which the 'New Labour' movement was forged into recognisable shape.¹² After three consecutive losses party leader, Neil Kinnock, was eager to identify a new direction. In a 1988 green paper,¹³ co-authored with Roy Hattersley, Kinnock re-examined Labour's constitutional policy and signalled a significant move away from the party's former collective rights approach and, conventional, emphasis on residual freedom, and towards an individual rights approach. This proposal was incorporated in *Meet the Challenge: Make the Change*,¹⁴ the party's policy review for the 1990s. In it Labour outlined a major reorientation to build engagement with middle class, post-materialist issues. While this did not

⁸ David Erdos, 'Charter 88 and the Constitutional Reform Movement: a Retrospective' (2009) 62(4) Parliamentary Affairs 538

⁹ F Klug, *A People's Charter: Liberty's Bill of Rights: a Consultation Document* (National Council for Civil Liberties 1991) 158, cited in *ibid*

¹⁰ As cited in Erdos's retrospective of the movement

¹¹ (n 8) 159

¹² Steven Fielding, *The Labour Party: continuity and change in the making of New Labour* (Palgrave Macmillan 2003) 6

¹³ Roy Hattersley and Neil Kinnock, *Democratic Socialist Aims and Values* (Labour Party 1988)

¹⁴ Labour Party, *'Meet the Challenge: Make the Change'* (Labour Party 1989)

include a Bill of Rights it did put constitutional modernisation alongside economic reform, equal opportunities, environmental protection, public investment, and European engagement as the priorities for a future Labour Government. Framing this exercise the review complained that 'Britain after ten years of Conservative government is less free and less fair', '[t]he Conservative government thinks that the only freedoms that matter are the ones you can buy', and '[n]o government this century has been more authoritarian or concentrated more power in the hands of a central autocratic bureaucracy'.¹⁵

After 'the secrecy and oppression of a dozen years of Thatcherism' Labour promised to 'open up our society and our institutions to the scrutiny and participation of all the people' and 'to put individual rights back into the centre of political debate'.¹⁶ Amongst the proposals to 'widen democracy' and improve individual liberty were an equality rights framework, a new second chamber, state funding of political parties, devolution, regional government, freedom of information, and an enhanced legal aid system. Still absent, however, were enforceable rights protections. The report concluded that 'a Bill of Rights would need constant and detailed interpretation by the courts, with no certainty that its general provisions would protect the most vulnerable members of the community'.¹⁷

At the centre of this elite-Labour resistance was Roy Hattersley, the Shadow Home Secretary and Deputy Party Leader.¹⁸ While Hattersley was deeply interested in Labour's position on the Constitution his attitudes up to

¹⁵ Labour Party, *Meet the challenge, make the change: a new agenda for Britain: final report of Labour Party* (Labour Party 1989)

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ Klug (n 9) 159

1992 were small-c conservative, and he was particularly opposed to rights incorporation.¹⁹ Amongst more radical proponents of rights reform he was considered to be a central obstacle, with Charter 88 co-founder Stuart Weir stating in the run up to the 1992 election that ‘if Labour lose, Hattersley will retire from politics and the Labour Party will be converted to constitutional issues overnight.’²⁰ This prophesy came true and soon both Labour party’s parliamentary and constituency parties contained wide-constituencies of support for the constitutional rights proposals that had emerged over the previous years from the semi-affiliated Institute for Public Policy Research (an independent think tank founded by Labour in 1988) and Liberty. IPPR’s 1990 *British Bill of Rights* and subsequent commentary on the constitution provided a channel for Anthony Lester to continue his rights activism²¹ with his approach clearly diverging from Hattersley’s non-constitutionalising preferences. Both the IPPR draft Bill and the subsequent, and more extensive, *People’s Charter*²² – developed by Liberty with co-operative input from Labour²³ – marked a clear willingness to engage with a constitutional reform agenda. Labour’s 1992 manifesto followed in this vein by promising House of Lords abolition, freedom of information legislation and a ‘Charter of Rights’, though there was still little clarity over whether this extended to ECHR incorporation.²⁴

¹⁹ Mark Evans, *Constitution-Making and the Labour Party* (Palgrave Macmillan 2003) 178

²⁰ In interview with Mark Evans, *ibid*

²¹ A Lester et al., *A British Bill of Rights* (Institute of Public Policy Research, IPPR Paper 1, 1990); A Lester et al., *The Constitution of the United Kingdom* (IPPR 1991)

²² Liberty, *A People’s Charter* (Liberty 1992)

²³ Klug (n 9) 160

²⁴ Differing accounts were given by a number of party spokespersons.

However, in the context of continuing weak growth, voters rejected Labour's economic plans in favour of a fourth term under the Conservatives, who were still resolved that 'it is for Parliament, rather than the judiciary, to determine how the principles of human rights in the convention are best secured'.²⁵ Spurred on by this continuing exclusion from power Labour concentrated efforts on further developing its constitutional agenda, (increasingly adopting further detail from the Charter 88 model). In a 1993 speech, given at an event hosted by Charter 88, Labour leader John Smith, praised the 'pioneering campaigning' undertaken by the organisation.²⁶ In the speech Smith called for 'a new constitutional settlement, a new deal between the people and the state that puts the citizen centre stage'.²⁷ He also heralded 'a shift away from an overpowering state to a citizen's democracy where people have rights and powers'.²⁸ Noting that '[o]ne of the most significant features of the past fourteen years of Conservative rule has been the relentless centralisation of power' and accusing the Thatcher and Major regimes of 'systematically and cynically' transferring the powers of local government agencies to nation-wide QUANGOs and devastating local government so as to deprive the public of representation in favour of an unaccountable 'magistracy'.²⁹ His proposed solution was a radical reversal, distributing power across four layers of government, creating a new ministry to oversee the administration of justice, passing freedom of information legislation and making

²⁵ Prime Minister written answer HC Deb 15 January 1993 vol 216, col 824W

²⁶ John Smith, *A Citizens' Democracy: Speech to Charter 88 given 1st March 1993* (Labour Party 1993)

²⁷ *ibid* 1

²⁸ *ibid* 2

²⁹ *ibid* 3

the state accountable through the incorporation of the Convention. Concentrating on human rights he stated: '[t]he Convention is not a vague, untested or uncertain code, but a mature statement of rights which has been interpreted and applied over many years by an expert court in Strasbourg. To bring the Convention directly into British law would not be to introduce some new, foreign or alien being.'³⁰The rights were intended to 'pervade the work of all courts', in any case against any branch of the state and against future legislation as well as prior.³¹ In addition to this broad incorporation an all-party commission was proposed to draw together expert evidence and public opinion and help produce a draft text for a constitutionally entrenched Bill of Rights.³²

In 1993 Smith put Tony Blair, then Shadow Home Secretary, in charge of the party's constitutional policy committee.³³ While previously an opponent to bills of rights, Blair was soon responsible for producing proposals to incorporate the Convention.³⁴ On his ascent to party leadership, after Smith's sudden death in 1994, Blair put forward support for a Bill of Rights as one of his few solid policy commitments. However, over the following years, as 'New Labour' took shape, the extent of this policy position dwindled, from a radical reorientation towards the liberty of the individual to a more communitarian appreciation of the individual as a bearer of rights and responsibilities (which in

³⁰ *ibid* 9

³¹ Though interestingly, and contrary to the Strasbourg court's approach, Smith saw the rights to be enjoyed as those of the *citizen* against the state and so asserted that this 'Human Rights Act would therefore provide that its protections could only be relied upon by individuals, not by companies or organisations' warning against the 'confusion and injustice' that can occur where commercial entities resist social legislation on 'human' rights grounds. *ibid* 10

³² Blackburn (n 6) xxx-xxxi

³³ Klug (n 9) 160

³⁴ *ibid*

many ways resembled the one-nation Toryism of Macmillan).³⁵ However, notwithstanding this, by the time of the 1997 election, New Labour's proposals for reform had come to include support for constitutional rights protection, electoral reform, judicial reform, and enhanced judicial oversight alongside freedom of information, decentralisation and modernisation of the House of Lords. Under a section headed 'we will clean up politics' the passage of the HRA was explicitly inserted into Labour's plans³⁶ though the earlier plans for a supplementary Bill of Rights were quietly dropped.

While manifesto commitments are far from guarantees, even more surprising than the breadth of the Labour program was the extent to which its proposals were delivered post-election. Blair described the program as 'the most ambitious and far reaching changes in the British constitution undertaken by any government this century', a strong claim that has none-the-less been accepted by many commentators.³⁷ During New Labour's three terms it presided over seven devolution bills,³⁸ major European measures (implementing the Treaty of Amsterdam and introducing PR for European Parliamentary elections) and, most importantly to this study, considerable efforts at rebalancing the relationships between the branches of government (including Lords reform, creation of the Supreme Court, passing of freedom of information legislation, and, as promised, the HRA).

³⁵ Stuart White, *New Labour: the Progressive Future* (Palgrave Macmillan 2001) 13

³⁶ R Hazell and D Sinclair, 'The British Constitution in 1997-98: Labour's constitutional revolution' (1999) 52 (2) *Parliamentary Affairs* 161

³⁷ *ibid* 177

³⁸ First the referendum bills for Scotland and Wales and later for London; then two main devolution bills for Scotland, Wales and two bills for Northern Ireland; and finally a bill to establish Regional Development Agencies as a possible first step towards regional government in England. *ibid* 161

So far I have broadly mapped out a rather conventional picture of the birth of Labour's constitutional reforming agenda and the transition in political narrative from Thatcherite power concentration to New Labourite redistribution. Blair's early years in Government certainly saw steps taken to distribute some power, make the Government more transparent, and to make public authorities more accountable. However, they also saw profound concentration of power in the office of Prime Minister, greater even than that under Thatcher, with Cabinet influence eroded and most key decisions remaining amongst the very inner circle of the Blair Government.³⁹ Authority ceded to external authorities was marginal in its significance, reform of the Lords was wound back and the HRA was cut in relatively modest terms, particularly by comparison to the promises of the early 90s.

Over the coming years support for human rights proceeded to wane and, particularly in the wake of the September 11th attacks in 2001, serious consideration was given to reforming the instrument. While these facts call into question the motives behind the HRA's passage they do not necessarily undermine the conventional narrative. When considering the subsequent retreat from rights the simple explanation that the party elite had a change of heart has obvious attraction. Shell notes that while '[t]he mere fact of being out of power creates an incentive for [the opposition] to look critically at the arrangements under which power is exercised, ... once back in office such

³⁹ M Foley, *The British Presidency: Tony Blair and the Politics of Public Leadership* (Manchester University Press 2000); Martin Burch and Ian Holliday, 'The Blair Government and the Core Executive' 2004 39(1) *Government and Opposition* 1; Vernon Bogdanor, 'The Politics of Power' *The Guardian* (London, 4 June 1997) 19

concerns can rapidly fade'.⁴⁰ Erdos similarly argues that while a post-materialist mindset and years of futile opposition to an unassailable executive created a deep anti-executive orientation – providing the 'aversive trigger' necessary to drive New Labour support for policies of decentralisation and redistribution – it was only 'policy drag' that saw these plans prosecuted (as they were fundamentally a hindrance to the new Government).⁴¹

However, whilst there is no doubt that politicians can rapidly develop very different perspectives from within Government than those they possessed without, this simple explanation struggles to explain why fuller plans for a Bill of Rights were killed off well before 1997. In the run up to the election John Wadham, then Director of Liberty, bemoaned Labour's turning away from its 1993 commitments. In addition to the abandonment of plans for a full Bill of Rights he also highlighted the omission of a Canadian Charter-style 'notwithstanding clause' from the Human Rights Bill (explicitly blocking implied repeal).⁴² That Labour was already moving away from rights again before the election problematises simple narratives and leads to important questions about how tidily human rights fitted within the New Labour program. Given the significance of the HRA as a departure from the status quo illustrated throughout this study this question is certainly deserving of further attention.

⁴⁰ Shell (n 4) 290

⁴¹ David Erdos, 'Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate' (2009) 44(1) *Government and Opposition* 20

⁴² John Wadham, 'Bringing Rights Half-Way Home' (1997) 2 *European Human Rights Law Review* 141

ii. HRA and the '3rd Way'

In addition to the above general work on Labour's program, the specific politics underlying the HRA has also received focused attention, both contemporaneously with the Act's passage and subsequently. In the previous chapter I briefly introduced Erdos's account of the HRA's passage. Considering the relationship between human rights and the Labour program Klug provides a number of possible explanations for Blair's maintenance of support for the HRA despite its tension with New Labour's subsequent style of government. Possibilities considered include providing 'a veneer of radicalism for a party fast shedding its old Socialist clothes', that New Labour 'never had a vision to drive constitutional reform but felt themselves saddled with a series of unconnected policies by their dead leader', or, as put forward by Peter Mandelson MP,⁴³ to ensure that 'no one will ever be able to accuse Labour of being prepared to sacrifice individual rights on the alter of collectivist ideology'.⁴⁴ Klug does not endorse any of these answers but the question of which is correct goes right to the heart of explaining why the HRA came to be passed. While not directly focussed on the rights angle, much ink has been spent on considering whether New Labour's program of constitutional reforms cohered into a meaningful whole and whether or not alleged tensions between these measures and the '3rd way' ideology more generally are of substance.⁴⁵ These issues are key to getting to the bottom of the rights issue and this broader discussion surrounds the specific question of New Labour's relationship to human rights.

⁴³ Now Baron Mandelson of Foy

⁴⁴ Klug (n 9) 162

⁴⁵ Robert Hazell and David Sinclair, 'The British Constitution in 1997-98: Labour's Constitutional Revolution' (1999) 52(2) Parliamentary Affairs 161

The allegation that New Labour's constitutional plans were a basket of measures lacking any uniting theory or impetus can be found in both lay and specialist accounts. The Economist described the reforms as a 'Heath Robinson constitution ... a series of ad hoc solutions rather than a coherent constitutional strategy'.⁴⁶ In the academic literature Shell argued, contemporaneously, that the process of reform had 'a very piecemeal appearance' and that while 'token gestures are made to what might be called "joined up" constitutional reform' the hope was that links would become clear as the process developed rather than guiding the reforms by reference to such connections'.⁴⁷ Hazell and Sinclair similarly claimed that '[Labour's] proposals have lacked any strong or coherent rationale' noting that 'in the manifesto they were tucked away at the end', casting doubt on their centrality to the New Labour platform.⁴⁸ This complaint has endured in subsequent commentary with Flinders complaining, in 2009, that while Charter 88 provided the Labour Party with a 'clear roadmap', this was not followed and that where 'Charter 88 adopted a *holistic* approach that attempted to achieve systemic change ... in power the Labour Party adopted a *particularistic* approach in which specific reforms were viewed as self-standing instead of as parts of a coherent whole.'⁴⁹

Making the opposite case Loveland argues '[t]he Blair government's commitment to incorporating the Convention into UK law can be seen as an

⁴⁶ *The Economist* (London 18 April 1998) cited in Straw (2010) (n 53)

⁴⁷ Shell (n 4) 290

⁴⁸ Hazell and Sinclair (n 45) 161

⁴⁹ Matthew Flinders, 'Charter 88, New Labour and Constitutional Anomie' (2009) 62(4) Parliamentary Affairs 645

integral part of a much broader restructuring of our constitution.⁵⁰ He takes at face value the Prime Ministers words on the release of the *Rights Brought Home* white paper, where the plan was presented at the centre of the Constitutional reform program and the restriction of its scope and piecemeal delivery were explained in relation to the limitations imposed by Britain's constitutional framework.⁵¹ Against this argument Loveland does acknowledge however that there would have been no constitutional difficulty in permitting courts to quash prior statute, nor was it obvious that a solution akin to that employed in the European Communities Act could not have been adopted.⁵²

From within the party key actors have also vigorously argued that the rights program did exist as a meaningful whole. In 2010 Jack Straw, then Lord Chancellor, defended the integrity of the New Labour reforms in a retrospective assessment of the party's record to date.⁵³ Denying that the reforms were lacking in a guiding principle, and noting the importance of Labour's long period in opposition, Straw supports the 'aversive constitutionalising' account stating that Thatcher's social, economic and industrial policies provided the 'unlikely catalyst for a growing interest in constitutional questions' amongst Labour actors.⁵⁴ Whilst admitting that there was no 'single master plan' for a new constitution, stating that such a 'holistic strategy has always taken seismic, often violent change, through war, occupation or revolution' he contended still that Labour's initiatives were united by a singular intent to 'break up traditional

⁵⁰ Ian Loveland, 'Incorporating the European Convention on Human Rights into UK Law' (1999) 52(1) Parliamentary Affairs 113, 125

⁵¹ *ibid* 115

⁵² *ibid* 116

⁵³ Jack Straw, 'New Labour, Constitutional Change and Representative Democracy' (2010) 63(2) Parliamentary Affairs 356–368

⁵⁴ *ibid* 358

centres of power and make those who hold power on behalf of others more accountable for their actions', while still complying with the principle of representative democracy.⁵⁵

Claiming that New Labour had acted more like a renovator than an architect Straw identified in Labour's singular aim five key objectives (decentralisation of power, enhanced individual rights, a more open society, democratic reform and a rebalancing of the relationship between the executive and the judiciary) and claimed that progress in each of these areas required a series of 'incremental, tailored responses to particular problems, each with complex histories of their own'.⁵⁶

Another internal aspect on the program of reforms comes from Blair's own writing. In the run up to the 1997 election Blair wrote in the *Economist* of his vision for a 'second age of democracy' and making his case for measures of constitutional reform as a basis for 'democratic renewal'.⁵⁷ Rather than accountability, however, Blair puts credibility at the heart of the program suggesting that Thatcher had undermined public trust in central government and that Labour's measures were designed primarily to restore public faith in the executive. Like Straw however Blair notes that the situation is not akin to that following a fundamental shift in the UK's polity. 'Britain' he says 'is not recovering from wartime defeat or social collapse ... [w]e are not faced with the necessity of building a new constitution from scratch'. Instead he framed the task in terms of political renewal with Britain 'struggling to find its way after the

⁵⁵ *ibid* 359-360

⁵⁶ *ibid*

⁵⁷ Tony Blair, 'Democracy's Second Age' *The Economist* (London, 14 September 1996)

collapse of the grand 20th century ideologies of left and right.⁵⁸ To this end the European Convention is depicted as the de facto bill of rights and domestic incorporation is justified on the basis that it was perverse to require individuals to go to Strasbourg to argue for their rights.

This argument, which sat at the heart of the 'bringing rights home' agenda outlined in Boateng and Straw's 1997 article, was on one level a pragmatic criticism of the expense and delays involved in taking a case to Strasbourg, but was also a substantive criticism of the insensitivity of the Strasbourg Court to 'British legal and constitutional traditions'.⁵⁹ Evoking the familiar fiction of the united and neutral 'U.K. draftsmen' that 'drew up the text of the Convention' this article describes the Convention's contents 'as the birthright of the people of this country' and complains that 'for British citizens, justice has been exported'.⁶⁰ Thus we can see that both before and after the passage of the HRA the Convention was presented as 'an important part of Labour's programme for restoring trust in the way we are governed' and as a means to 'redress the dilution of individual rights by an over-centralising government'.⁶¹ However we can also see that the adopting of rights ideas was not unmitigated but existed in the New Labour psyche tempered by other factors, most notably responsibilities. Straw and Boateng conclude their 1998 piece in much the same tone to Straw's 2010 work, hoping that 'by increasing the stake which citizens have in society through a stronger constitutional

⁵⁸ *ibid*

⁵⁹ Paul Boateng and Jack Straw, 'Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into UK law' (1997) 19 *European Human Rights Law Review* 72

⁶⁰ *ibid* 73

⁶¹ *ibid* 80

framework of civil and political rights, we also encourage them to better fulfil their responsibilities'.⁶² Thus, like Professor Teitgen in the Council of Europe in 1949, New Labour looked to use rights judicialisation to help build 'a culture of understanding of rights and responsibilities at all levels in our society'. Such an understanding would then inform 'public discussion of what might be the character of any future U.K. Bill of Rights and Responsibilities.'⁶³

Considering these comments the HRA can be seen as a means rather than an ends and another explanation for its more limited form (at least than might have been expected based on party comments in 1993) is presented. There is nothing obviously disingenuous in the presentation of a package of constitutional reforms aimed at enhancing confidence in government above actually protecting rights, particularly where there is a mind to using what is learnt as the basis for further rights protection in a Bill of Rights.

I would also suggest that it is unduly cynical to conclude that rights provided a radical veneer to a Government that had internalised much of the preceding Conservative administrations' free market ideology. The '3rd way' adopted by New Labour targeted the conventional Labour priority, the improvement of circumstances for the worst-off in society through a redistribution of wealth from the richest to the poorest, even if it did so by abandoning commitments to reducing objective inequality or protecting collective interests. This does not conflict with a commitment to transparency and accountability, even though strong intimations towards dispersion of power were ultimately ignored in favour of greater concentration. Blair's approach

⁶² *ibid*

⁶³ *ibid*

adapted the Labour message for a new political stage and developed the Smith approach rather than abandoning it.

In 1985 Kinnock had told the Fabian Society that Labour needed 'to relate to and draw support from the modern working classes whose upward social mobility, increased expectations and extended horizons are largely the result of opportunities afforded them by our movement in the past'.⁶⁴ The movement this began, a movement which reached its fruition under Blair, is highly evocative of the revisionist move to the centre in the early 1960s that set the scene for the acceptance of the right of individual petition and the jurisdiction of the European Court of Human Rights.⁶⁵ That shift, after a prolonged stay on the opposition benches between 1951 and 1964, saw Labour move away from traditional Keynesian economic policies of market control, and towards accepting some Conservative free market values, embracing the pursuit of rising living standards for the poorest through alternative policy means – particularly legislation to ensure equality. In the rise of New Labour a very similar pattern is clearly present. During a prolonged period out of power Labour had again undergone a fundamental evolution in its policies as internal debates resolved in favour of the right wing of the party. 'New' Labour can be seen as a reaction by those on the right of the party against those on the left who had taken hold of the party during the 1980s (particularly in 1982 when the unions regained control of the party NEC) and who had set the agenda for Labour's string of disappointing electoral showings. New Labour's '3rd way' has profound neo-revisionist overtones: it accepted much of the economic policy of

⁶⁴ Neil Kinnock, *The Future of Socialism* (Fabian Society, Pamphlet no 509, 1985) 2

⁶⁵ As discussed in chapter 4

the preceding Conservative regime (deregulation, privatisation of major services, the central importance of market capitalism to national prosperity) but tempered its consequences by still seeking to build a fairer society for the poorest through other regulatory means.⁶⁶ Whether New Labour offered neo-Thatcherite economic policies, post-Thatcherite, or just a neo-liberalized version of Labour's old policies⁶⁷ the significant continuity in economic approach from Major to Blair was just one half of a whole, the other being the distinctively non-Conservative renovation of government and the relationship of the state and the individual.

The post-97 constitutional reforms are the essential counterpoint to the neo-revisionist (and neo-Thatcherite) economic policies and went to the heart of New Labour's differentiation of itself from its Conservative predecessor. This approach neatly resembles the combination of equality driven social policies with neo-Conservative revisionist economic plans in the post-1964 Labour Government. This is the positive policy driver underlying the adoption of the HRA, just as the previous combination had been the positive policy driver underlying the adoption of individual petition. For this positive driver to yield results however also require a clearing of existing objections and certainly another important aspect of the New Labour mindset was a diminished concern with two of the main obstacles identified in my analytic framework – judicialisation and Europeanisation.

⁶⁶ From modest policies of income redistribution to the broad programme of constitutional reforms aimed at re-enfranchising disaffected voters

⁶⁷ See Stefano Fella, 'New Labour, Same Old Britain? The Blair Government and European Treaty Reform' (2006) 59(4) *Parliamentary Affairs* 621-637, 636 or R Heffernan, *New Labour and Thatcherism: Political Change in Britain* (Palgrave Macmillan 2001)

iii. Changing Attitudes

As introduced above, a key part of the New Labour renovation of the Labour party was to abandon long held policies that had been a turn-off for middle class, centrist, swing voters. Alongside reducing the influence of the unions (through the removal of clause 4 of the party constitution)⁶⁸ and the abandonment of traditional left leaning policies such as nuclear disarmament was a reversal of attitude towards Europe. During the 1990s Labour became 'unmistakably another European social democratic party, committed, like its continental sister parties, to further European integration'.⁶⁹ This is not to say that New Labour embraced supranationalism. The 1996 Labour party document '*New Labour, New Life for Britain*' made clear '[o]ur vision of Europe is not that of a federal superstate, but an alliance of Independent nations choosing to co-operate with one another to achieve the goals they cannot achieve alone.'⁷⁰ In the run up to 1997 Blair said that 'Mr Major in his bunker reminds me of those die-hards who went on arguing for nationalisation and statism long after their irrelevance was plain to the rest of the world.'⁷¹ In concrete terms, however, the first fundamental principle underlying future UK participation was identified as

⁶⁸ Consolidating on the work started by Smith in implementing the 'one member one vote' system to end union block voting in party leader and parliamentary candidate selection.

⁶⁹ David Marquand, *The progressive dilemma* (1st edn, Heinemann 1991) 201 cited in Heath et al., *Rise of New Labour: Party Policies and Voter Choices* (OUP 2001) 101

⁷⁰ Labour Party, *New Labour, New Life for Britain (Road to the Manifesto)* (Labour Party 1996) 35

⁷¹ Blair (n 1) 35

success in 'restoring a central role for Britain in shaping the direction in which we want Europe to go'.⁷²

Like Churchill, Blair wanted the UK not to be subsumed but instead to take a leading role in guiding Europe. The resumed export of British rights norms through the HRA and the jurisprudence of the domestic courts that it would foster, slotted tidily in with this imperative of pushing British ideas into the 'Heart of Europe'. Early in the first Labour term Lord Irvine reported that 'our approach marks a return to the nineteenth century and early twentieth century liberal tradition of constitutional reform, which gave Britain what was until recent decades widely regarded as Europe's most progressive and stable constitutional settlement'. That this was as much an outward exercise as an internal one is made clear in his closing words, stating: '[w]hat we are about is improving our traditions whilst we transmit them.'⁷³

In Madsen's terms, this strategy can be seen as an attempt to throw the rights boomerang again, using the HRA to empower the domestic courts to interpret the Convention norms and thus resume the export of British constructions of fundamental rights norms into the European space. As shown in previous chapters this approach would have been inconceivable to earlier Labour Governments. The enduring fear of judicialisation out of a concern not to arm conservative judges with the tools to frustrate radical socialist programmes meant there was little desire to provide the domestic courts with any opportunity to apply human rights law, let alone to give these interpretations

⁷² Labour Party (n 70)

⁷³ Lord Irvine, *Government's Programme of Constitutional Reform* (The Constitution Unit, Constitution Unit Annual Lecture, 8 December 1998) 4

European influence.⁷⁴ The New Labour outlook, however, further diminished a concern that was already fading.

In the latter years of the prior Conservative Government the Courts had become increasingly critical of the application of executive power and in a number of cases, most notably *ex p World Development Corporation*⁷⁵ had adopted a liberal approach in permitting judicial reviews against the state.⁷⁶ To this end the courts' reputation was improving on the left and, as Young notes, 'traditional views of the judicial role have given way to a perception of the judiciary as the last bastion against an over-powerful executive, unchecked by Parliament.'⁷⁷

With the arrival of the '3rd way', the standard left wing objection – that socialist politicians might be prevented from carrying through their programme as a result of a Bill of Rights – evaporated in the face of a new socialist program so liberal in its approach that there was little against which a constitutional bill could gain traction. There was also a growing precedent of the Courts employing the Convention as a tool for interpreting ambiguous legislation⁷⁸ and for developing the common law⁷⁹ and, far from being hostile to this development, Labour insiders seem to have welcomed this action. In his evidence to the Leveson enquiry Jack Straw explained that Labour had intended for the Courts to use the HRA to develop a law of privacy without the need for

⁷⁴ Klug (n 2) 159

⁷⁵ *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 W.L.R. 386

⁷⁶ See Young (n 3) 34 and *Hazell and Sinclair* (n 36) 170

⁷⁷ For examples note James Young, 'The Politics of the Human Rights Act' (1999) 26(1) *Journal of Law and Society* 27; I Loveland, 'The War Against the Judges' (1997) 68 *Political Quarterly* 2; Loveland (1999) (n 5) 119 for examples

⁷⁸ *R v Home Secretary, ex p Brind* [1991] 1 AC 696

⁷⁹ *Derbyshire CC v Times Newspapers Ltd* [1992] UKHL 6

legislative input. Asked about politicians' concerns with this development Straw responded:

to be truthful the politicians thought they'd like to will the end of a law of privacy but hand the means to The Strand and the Law Lords because it's tricky, if you're a politician, to develop a law of privacy and we thought that their Lordships on the bench would do a better job, so it was really a set question of passing the parcel to them. Everybody knew what was happening.⁸⁰

Far from concern that the courts might hamper Labour's plans, the Blair Government, through the HRA, was, in effect deliberately delegating politically sensitive areas of law making to the Courts as the most competent body to deliver the results that Labour sought. Such an approach also carried the added benefit that it avoided Labour having to expend political capital on the issue. While the HRA stopped short of incorporating the Convention in a manner that would have given it conventional *de jure* supremacy over domestic law, Lord Irvine shows that this retention of ultimate supremacy was viewed as a relatively superficial matter of 'constitutional propriety'⁸¹ and the Convention system was effectively given a kind of functional supremacy in its pervasive influence over the construction of all law and the creation of the non-parliamentary fast-track procedure to change statute via 'remedial order' where incompatibilities were found and declared by the courts.

The key innovation of the HRA was finding a way for domestic and Convention systems to exist in balance, each holding the other in its throes and to avoid further eroding the talismanic principle of parliamentary sovereignty.

⁸⁰ Leveson Inquiry, Day 72 - Transcript of Morning Hearing, evidence of Jack Straw (London 16 May 2012) 32-3

⁸¹ Irvine (n 73) 8

Overall then the HRA can be seen to have come into existence not just passively, as a result of the erosion of the prior principled obstacles, nor as a simple response to a general swell of popular support for rights, but instead as part of a deliberate and integrated, if incremental, program of constitutional reforms that were an essential foil to the economic policies of the '3rd way'. While the HRA was probably the most controversial component of the program, and was delivered in a weaker form than originally proposed in the aftermath of Labour's 1992 defeat, its continued presence in the Labour program after 1997 was not just as a superficial, populist, reaction to Thatcher (indeed it wasn't that popular), it can be seen not just as the result of policy momentum after the death of Smith, but instead as an intrinsic and functional component of New Labour's European and domestic reforming agendas.

3. New Rights, New Europe

Against the rights protecting current evidenced in the HRA's passage, in this second section I explore the countervailing resistance displayed towards the EUCFR.⁸² This resistance is important as it helps us define the limits of New Labour's shift towards constitutional rights protection (in both a domestic and a European context) and because it underlines the ongoing significance and sufficiency of the supranational objection as an obstacle to further rights development. This resistance can be seen both in the original drafting of the Charter, a process that in many ways resembles that of the Social Charter's drafting, and in the much debated, and functionally questionable, 'opt-out' protocol appended to the Charter before it was brought into force under the

⁸² Charter of Fundamental Rights of the European Union [2000] OJ C 364/1

Treaty of Lisbon.⁸³ New evidence, however, suggests that, even at the height of the UK's external recalcitrance, behind the scenes the Labour Government had softened slightly towards European supranational authority and were willing to compromise so as to avoid causing serious damage to the European Union rights regime.

I begin this section by laying out the growing divergence between the influence of the two major European legal orders on British law and politics in the run up to 1997, detailing Labour's movement towards endorsing greater European centralisation of socio-economic policy and law. I then move on to examine Labour's backtracking on these policies in the drafting of the Charter of Fundamental Rights. I conclude by analysing this conflicted process in contrast to the drafting of the European Social Charter, as explored in chapter 3, and identifying an approach to social rights that strongly resembles that seen in connection with the European Social Charter but with some, highly restrained, movement towards a greater acceptance of the central importance of integrating a broader range of constitutional rights into the European Union legal framework.

i. Two Speed European Law

The failed project to create a European Political Community in the mid-1950s helped ensure that for several decades a clear division of labour existed between the Council of Europe and the EEC/EC/EU legal orders.⁸⁴ The Convention dealt with core political rights while community law dealt with

⁸³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] C 306/01

⁸⁴ Paul Craig, *The Lisbon Treaty: Law Politics and Treaty Reform* (OUP 2010) 194

economic integration, along with a range of, related, peripheral regulation. The separation was not complete for long, since the European Court of Justice (now Court of Justice of the European Union) soon determined that in exercising its supremacy vis-à-vis community law it had a duty to protect 'fundamental rights'. It did this by interpreting human rights as 'general principles' integral to EU law (creating a complex and unclear area of shared responsibility between the ECJ, the Strasbourg Court, and national constitutional courts⁸⁵). While the relationship between the ECJ and ECHR remained unclear, the ECJ decided to afford the Convention 'special significance' as a source of general principles to guide its interpretation.⁸⁶ The 1992 Maastricht Treaty gave formal recognition to human rights as a part of EU law but it was not until the coming into force of the EUCFR in 2009, that the EU possessed any codified statement of constitutional human rights.⁸⁷ The extent of the continued division of responsibilities between the two European courts carried profound implications for the enforceability of the two legal orders.

It is worth noting however that the status of EC law within the domestic courts was not well appreciated by British politicians at the time of the passage of the European Communities Act. Notwithstanding that the ECJ had already established the principles of supremacy of Community law over subsequent state legislation, and of individuals to rely on Community law before domestic

⁸⁵ Leading to the imperfect compromise formulated in *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1

⁸⁶ Case 11/70 *International Handelsgesellschaft v Einfuhrund Vorratsstelle Getreide* [1970] ECR 1125

⁸⁷ Sybe A de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9(1) Utrecht Law Review 169-192, 169

courts in *Costa* and *Van Gend en Loos*,⁸⁸ the 1966-1970 Wilson Government believed that EU law held a similar status to delegated legislation.⁸⁹ The 1970-1974 Heath Government was similarly misguided, claiming that EC membership would not entail 'any erosion of essential national sovereignty'.⁹⁰ Landmark ECJ judgments in *Frontini*, *Marleasing*, *Simmenthal*, and *Factortame*⁹¹, showed this to be a nonsense, establishing that Community law had to be fully applied by domestic courts, even if it meant bending domestic provisions, setting national law aside, or creating new remedies.

This growing European was supplemented by a series of references to the ECJ from domestic courts (particularly in relation to the implementation of the Equal Treatment Directive⁹²). With little room left for a Diceyan belief that the EC Act would not overbear subsequent legislation, one of the few grounds for governmental relief must have been the relative absence of human rights in community law. Kilpatrick notes that the ECJ's responses were 'a crushing disappointment', not least because they were, in parts, 'extremely confused' and saw the Court 'rewriting the questions asked to allow it to avoid the issues of principle'.⁹³ However, notwithstanding this upgrading of the ECJ's status, and

⁸⁸ Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

⁸⁹ Ian Loveland, 'Parliamentary Sovereignty and the European Community: The Unfinished Revolution?' (1996) 49(4) *Parliamentary Affairs* 517, 522

⁹⁰ *ibid*

⁹¹ Case 187/73 *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372; Case 106/77 *Simmenthal (No.2)* [1978] ECR 629; Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135; Case 213/89 *Factortame Ltd (No.1)* [1990] ECR I-2433; Case 221/89 *Factortame Ltd (No.2)* [1990] ECR I-3905

⁹² Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ L39/40

⁹³ Claire Kilpatrick, 'Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ' (1998) 4(2) *European Law Journal* 121, 127-128

despite Thatcher's combative approach to EC politics through the mid-80s,⁹⁴ in 1986 the Conservative Government tacitly accepted all that had gone before, ratifying the Single European Act,⁹⁵ critically undermining the veto that had, to that point, been the UK's principal safeguard for domestic sovereignty.⁹⁶

As such, by the end of the 1980s European influence on British domestic legal systems was profoundly two-speed. On the one hand, and despite growing interest from British judges, the Convention had only a very weak influence, being employed simply as a tool to judicial interpretation of existing, ambiguous, statute and case law, with any further complaint still requiring the attention of the Strasbourg Court,⁹⁷ while on the other much EC law could be relied upon in the domestic courts (be it directly, indirectly or via the general doctrine of state liability). While neither Conservative nor Labour were sanguine about this progression, as the party of opposition, and in the throes of the resurgent left, Labour was particularly hostile during the early 80s. The virulent Euroscepticism on the left of the Labour party had contributed to the splitting off of the Social Democratic Party in 1981 and the 1983 manifesto contained a commitment to withdraw from the EC altogether.⁹⁸

This policy drew little support in the country and further undermined the party's credibility as a future party of government. Amongst the various changes undertaken by the party – as it moved back to the centre left and

⁹⁴ Philip Daniels and Ella Ritchie, 'The Poison'd Chalice: The European issue in British party politics' in Peter Jones (ed.), *Party, Parliament and Personality: Essays Presented to Hugh Berrington* (Routledge 2002) 72, 91

⁹⁵ Single European Act [1987] OJ L169/1

⁹⁶ Loveland (n 89) 528. Though this didn't mean the Government was happy when the Factortame litigation arose shortly thereafter. *ibid* 531

⁹⁷ AW Bradley, 'The United Kingdom, the European Court of Human Rights, and Constitutional Review' (1995-6) 17 *Cardozo Law Rev* 233

⁹⁸ Daniels and Ritchie (n 94) 88

sought to rebuild confidence amongst the electorate – the acceptance of the inevitability of ongoing EC membership marked a profound shift. By the time of the 1989 policy review, discussed above, Labour's broad, pro-European stance credited the EC as the appropriate forum for co-ordination in a range of socio-economic areas that had previously been deemed the critical preserve of a domestic socialist government.

Where the main parties came grudgingly to accept the inevitability of ceding sovereignty to Europe, civil society actors were excited by the opportunity to outflank static domestic constitutional arrangements. In the absence of tangible domestic movement Charter 88, and related groups, were keen to make use of the European courts as an indirect tool for 'updating' the British constitution, particularly through stronger individual rights.⁹⁹ Even the trade unions, weakened by consecutive Thatcher Governments and gaining little traction through the faltering Labour opposition, were warming towards the EC as an alternative channel through which to influence domestic policy.¹⁰⁰

In 1988 the President of the European Commission addressed the Trades Union Congress in Bournemouth, gathering support for proposals to develop a 'social Europe' strand to the single market program, protecting and regulating socio-economic rights under community law. Attacked by the Conservatives, this social program, part of a broader restructuring of the EC's institutions (partially in preparation for economic and monetary union) became a clear point of distinction around which Labour could structure its opposition. This enabled the party to claim the mantle of 'party of Europe' despite being almost

⁹⁹ Daniel Wincott, 'A Community of Law? 'European' Law and Judicial Politics: The Court of Justice and Beyond' (2000) 35(1) Government and Opposition 5-6

¹⁰⁰ Daniels and Ritchie (n 94) 89

as divided internally over Europe as the Conservatives were.¹⁰¹ Having proclaimed a move towards Europe, but without party consensus on the nature of such movement, and having emphasised the importance of enhanced rights protection, the Labour party in 1997 was left with an awkward problem when the EU began to make noises about codifying its own human rights instrument. In the next subsection I examine Labour's resistance to such an instrument and consider the thinking underlying this approach.

ii. White Paper, Red Lines

As Nicol states, 'in contrast to Community Membership, Parliamentarians passed the HRA with their eyes open as to the Constitutional consequences'.¹⁰² Blair's incorporation of the Convention was conducted in full appreciation of the potential channel for inward flowing rights norms that it would open. The Act avoided simply replicating the form of the prior European Communities Act so as to retain Parliamentary supervision and ensure that judicial powers of review were only enough to open dialogue and not enough to open the door to Strasbourg supremacy.¹⁰³ The EUCFR brought to the surface an acute point of tension in the New Labour policy platform. Pulling in one direction, the Blair Government had committed itself both to rights reform and to take on a 'leading role in Europe'. On the other, it wanted to give away no further ground to federalism or supranational oversight. The Charter was particularly hard to reject as one of its major aims was to provide a statement of rights

¹⁰¹ *ibid* 90

¹⁰² Danny Nicol, *EC Membership and the Judicialization of British Politics* (OUP 2001) 250

¹⁰³ Sandra Fredman, 'Bringing Rights Home' [1998] LQR 538

incorporating the social and economic protections that had played such an important role in precipitating Labour's new support for Europe.

While Labour's return to power in 1997 coincided with the British Presidency of the Council of the European Union, and both Foreign Secretary Robin Cook and Blair made early speeches committing the UK to positive engagement (albeit to the rather ephemeral, aim of creating a 'people's Europe')¹⁰⁴ contemporaneous commentators were divided on New Labour's commitment to European development.¹⁰⁵ In its first months of power Labour ended the UK's opt-out on social policy, signing the broad reaching Treaty of Amsterdam¹⁰⁶ affecting social policy, employment, asylum, immigration and judicial co-operation in civil matters.¹⁰⁷ These reforms included the integration of the Social Chapter into the EC Treaty and the empowerment of the Community to issue directives in this area with 'minimum requirements for gradual implementation'.¹⁰⁸ Certain exclusions (regarding the right to strike, of association, and to impose lock outs), as well as a general exclusion of measures that would constrain small and medium sized enterprise, and a principle that there would be no blanket harmonisation of national laws, took relatively little away from what was a clear step towards acceptance of broad supranational authority and the growing reach of EU competence.

¹⁰⁴ Tony Blair, (Speech to the Party of European Socialists Congress, Malmö, 6 June 1997); Robin Cook, 'The British Presidency: Giving Europe Back to the People' (Speech to the Institute for European Affairs, Dublin, 3 November 1997)

¹⁰⁵ See Jim Buller, 'Foreign and European Policy' in Steve Ludlam and Martin J Smith (eds.), *Governing as New Labour – Policy and Politics under Blair* (Palgrave Macmillan 2004) 198 and Kirsty Hughs and Edward Smith, 'New Labour – New Europe?' (1998) 74(1) *International Affairs* 93 for a particularly sceptical take.

¹⁰⁶ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1

¹⁰⁷ Craig (n 84) 295

¹⁰⁸ *ibid* and TEC (n 106) art 137(1)

Amsterdam also clearly pointed the direction towards a greater general role for human rights in the EU with Article 6(1) EU being amended to state that the Union was founded on principles of liberty, democracy and respect for human rights; and Article 6(2) EU to state that the Union must respect fundamental rights guaranteed by the ECHR and in the constitutional traditions of the member states. The first specific codified terms of enforcement of these obligations also found their way into the Treaty with Article 46(d) EU making Article 6(2) EU justiciable and Article 7 EU permitting the suspension of the rights of a member state if it consistently and seriously breached rights protected under Article 6(1) EU.¹⁰⁹ Seeking to further consolidate the piecemeal rights protections spread amongst the range of EU legal instruments, and codify some of the more diffuse human rights principles being developed by the ECJ, in 1999 the Cologne European Council called for a Charter of Fundamental Rights to be drafted. Critically this instrument was to contain socio-economic rights as well as civil, political and procedural rights.¹¹⁰

The draft Charter text was elaborated by a specially assembled 'Convention' of governmental or head of state representatives, Members of the European Parliament, and national parliamentarians. The UK was represented in the Convention by Lord Goldsmith (on behalf of the Labour Government); Conservative peer Lord Bowness (on behalf of the House of Lords); and Labour MP Wyn Griffiths (on behalf of the House of Commons).¹¹¹ Drafting the new Charter required consideration of familiar questions, as seen in previous

¹⁰⁹ Craig (n 84) 195-196

¹¹⁰ *ibid* 196-7

¹¹¹ HL Deb 16 June 2000, vol 613, col 1904 – along with David Chidgey MP and Lady Howells as alternates

drafting exercises, such as whether the instrument should provide strict protection for existing rights, outline progressive goals to be pursued, or simply declare political ideals. It also magnified the importance of questions around the interaction of EU law and the ECHR.

Showing that little progress in sixty years of European rights instrument drafting, another major similarity to earlier episodes was the failure to adequately deal with the basic question of form – leading to an ambiguous instrument that was neither clearly binding nor clearly declaratory.¹¹² Also reminiscent of the drafting exercises of the post-war period was the influence of Britain.¹¹³ While official records will remain sealed until 2030, some insight is available through Hansard. In January 2000 the Prime Minister provided written answers to a series of question by Conservative MP John Bercow (latterly Speaker of the House) regarding the scope, content and enforcement of the Charter.¹¹⁴ In response Blair made clear that the Government wanted a non-justiciable Charter and there was no agreement that would permit the Charter to create new rights not currently granted in common law, for it to be used as a basis for suspension of Member State rights under Article 7 TEU, or for it to be incorporated into the EU Treaties.¹¹⁵ Eurosceptics were unconvinced with vocal Conservative peer, (and later leader of the anti-EU UK Independence Party) Lord Pearson complaining that '[t]he Charter of Fundamental Rights is the fledgling EU constitution, justiciable in the Luxembourg Court and designed to

¹¹² Elizabeth Wicks, "Declaratory of existing rights" - the United Kingdom's role in drafting a European Bill of Rights, Mark II' [2001] PL 527, 529

¹¹³ Ibid

¹¹⁴ HC Deb 24 January 2000, vol 343, cols 2-3W

¹¹⁵ Ibid

take precedence over all our legislation'.¹¹⁶ While the Charter's objective was couched by the Cologne Council in terms of gathering together existing rights rather than proclaiming new ones it was evident to expert commentators that the Charter would do more than this.

In May 2000 the House of Lords European Union Select Committee published its report on the developing Charter.¹¹⁷ In it the Lords noted that the British delegates believed that the Charter would be merely declaratory. However, noting the sophistication and significance of the instrument, Lord Goldsmith expressed his belief that the Charter would have 'incidental legal effects' through clarifying the scope of the 'fundamental freedoms' protected by Article 6(2) TEU.¹¹⁸ The idea that 'the Charter should not be a legally binding instrument' also received 'only limited support' from the Committee's expert witnesses.¹¹⁹ In June the Lords examined the report further and, leading the debate Scottish Law Lord, and member of the Select Committee, Lord Hope stated his belief that while the need to make fundamental rights under EU law more visible 'can hardly be doubted' it was 'already clear that any charter that is adopted by the Council will be seen by some, and perhaps by many, as having a greater political and legal significance.'¹²⁰ Others echoed this view with former Conservative Chancellor of the Exchequer Lord Lamont citing the Liberal MEP and rapporteur on the Convention to the European Parliament, Andrew Duff,

¹¹⁶ HL Deb 17 March 2000, vol 610, col 1808

¹¹⁷ House of Lords European Union Select Committee, Sub-Committee E (Law and Institutions), 'EU Charter of Fundamental Rights' (HMSO, 8th Report of Session 1999-2000, HL Paper 67)
<<http://www.publications.parliament.uk/pa/ld199900/ldselect/ldeucom/67/6701.htm>> accessed 22 June 2013

¹¹⁸ *ibid* para 61

¹¹⁹ *ibid* para 56

¹²⁰ HL Deb 16 June 2000 vol 613, col 1851

who had emphasised that, far from a discrete rights instrument, the Charter 'is part of the process of federalising the EU' and was already being described by Italian Prime Minister, Romano Prodi, and German Foreign Minister, Joschka Fischer, as a 'Constitution for the Europe Union'.¹²¹

The lack of certainty about the Charter's true form, even within the Convention, boosted concerns. Lord Hope complained that it was odd that despite work being well underway on the draft Charter, 'no decision has yet been taken as to the status that the document is to have once the draft has been finalised'.¹²² As chapters two and three demonstrate, far from peculiar, such an approach is par for the course in European rights instrument drafting. What was new here was the fact that off the back of greatly increased interest in Europe, for the first time this structural ambiguity was becoming the focus of domestic scrutiny and public debate.

Despite this the Government continued to resist the conclusion that the Charter would produce any meaningful elevation of rights content within the EU legal system. Closing the Lords debate Baroness Scotland attempted to reassure the peers,¹²³ emphasising the UK's successes in exercising influence in the Convention¹²⁴ and pointing out that it would ultimately be for the Heads of Government to hash out the final detail of the Charter and that the Prime Minister would be arguing 'that a declaratory charter is the best way to raise the

¹²¹ *ibid* cols 1861-2

¹²² *ibid* 1852

¹²³ *ibid* 1908 cited in Wicks (n 111) 529

¹²⁴ A point substantiated by Lord Bowness who said of Lord Goldsmith that he 'argued consistently, persistently, persuasively and, on occasions, I believe some of his colleagues would have said, even valiantly to ensure that the draft charter avoids the extension of any competence for the European Union' *ibid* 1874 also cited in Wicks (n 111) 529.

visibility of human rights while preserving legal certainty' at the forthcoming Feira European Council.¹²⁵ In the Commons the Foreign Secretary, Robin Cook, was advancing another message, familiar from previous rights instrument drafting exercises, that the Government would keep the Charter within the bounds of existing domestic practice, asserting they would ensure 'the civil and political rights are consistent with the European Convention on Human Rights, which Britain helped to write, and the economic and social provisions are tied to national law and practice'.¹²⁶

Achieving such an outcome was easier said than done however and during a tense Autumn the Government struggled to minimise the Charter's socio-economic rights content under pressure on the one side from the French EU Presidency to admit more rights and on the other the Conservatives, who called for the UK to veto the Charter altogether.¹²⁷ Throughout this the Government continued to insist that the Charter would not be justiciable but in October, the Commission cast a new shadow over this Labour narrative, stating that the Charter would inevitably need to be incorporated into the Treaties at some point. *The Telegraph* effused that this 'could pave the way for far-reaching interference in Britain's way of life' while the Conservatives protested that the Charter presented 'the hugest yet transfer of power to make choices over this fundamental area of economic and social policy from elected representatives to

¹²⁵ *ibid* 1904

¹²⁶ HC Deb 23 November 2000, vol 357, cols 451-452 also cited in Wicks (n 111) 529

¹²⁷ Ambrose Evans-Pritchard, 'Britain fights EU rights charter' *The Telegraph* (London 12 September 2000)

<<http://www.telegraph.co.uk/news/worldnews/1355154/Britain-fights-EU-rights-charter.html>> accessed 23 June 2013

unelected judges'.¹²⁸ This drew the Labour cabinet into highly public gestures of dismissal, and over the following days the point was pressed on the media that the Government was forcefully resisting a justiciable Charter. The most notable (and memorable) of these rejections was given by Keith Vaz, Minister for Europe, who claimed that '[t]his is not a litigator's charter' that '[n]obody can sue on the basis of it' and that it did not 'establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Union'. Overall he concluded, in a much quoted sound-bite, that the Charter was merely a 'showcase' of existing rights and that the instrument 'was no more binding than the *Beano*'.¹²⁹

Conservative MPs claimed in the Commons that Labour was employing a straw man in focusing on treaty incorporation and that it did not matter whether it was included or not. Francis Maude, for instance levelled that while 'Ministers say that [the Charter] will not be mandatory' in its 'formal communication on the legal nature of the charter of fundamental rights, [the Commission] says that it can reasonably be expected that the charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law'.¹³⁰ While the Commission viewed inclusion of the Charter in the treaty as working to further assist the overall aim of enhancing the visibility of fundamental rights in EU law, the Charter's

¹²⁸ George Jones, 'Blair in rights charter row with Europe' *The Telegraph* (London, 12 Oct 2000) <<http://www.telegraph.co.uk/news/uknews/1369978/Blair-in-rights-charter-row-with-Europe.html>> accessed 23 June 2013

¹²⁹ George Jones and Ambrose Evans-Pritchard, 'European summit Charter on rights "no more binding than the Beano"' *The Telegraph* (London, 14 October 2000) <<http://www.telegraph.co.uk/news/worldnews/europe/1370340/European-summit-Charter-on-rights-no-more-binding-than-the-Beano.html>> accessed 23 June 2013

¹³⁰ HC Deb 23 November 2000, vol 357, cols 468-469

contents would become enforceable in any event. Further out on the Eurosceptic spectrum, John Redwood echoed the words of Lord Pearson calling the draft text 'a dangerous charter that is a model for a constitution for Britain and for Europe—along with many other moves towards the creation of an integrated super-state'.¹³¹

The Charter was proclaimed, on 7 December 2000 at the Nice European Council, having been drafted in under a year (bound by the need to get the instrument ready in time for governmental consideration before the Council meeting). This departure from previous, spiralling, drafting episodes, was, however, only the first stage of the Charter's negotiation. While the substantive language was agreed, the status of the instrument was far from settled. However, notwithstanding this, Vaz was quick to claim success. In a written answer to a Parliamentary question he stated: '[t]he charter is a political declaration; it is not legally binding. It was neither incorporated, nor attached, nor referred to in the treaties, just as we said.'¹³² The suggestion that Labour had managed to keep the Charter out of the treaties was to prove short lived. Post-proclamation, international pressure to incorporate the Charter into the treaties soon returned as part of the broader investigations into the creation of a European Union constitution.¹³³ While the media reported on Labour's efforts to keep the Charter isolated from the treaties, the right-of-centre press continued to complain that the ECJ would still apply it anyway (*The Sunday*

¹³¹ *ibid* col 464

¹³² HC Deb 23 January 2001 vol 361 c556W

¹³³ Stephen Grey and Michael Woodhead, 'Schroder lays down the EU law for Blair' *The Sunday Times* (London, 28 January 2001) accessed via Lexis Nexis

Times lamenting that the Court was ‘already notorious for its judicial activism’ and ‘interprets its role as furthering EU integration’).¹³⁴

Like the ECHR in the 1950s however, the following years saw the Charter in limbo instead. Little more than a declaration, the Charter was seldom referenced by the ECJ and was not determinative in any case.¹³⁵ British resistance saw the Charter sidelined in the Treaty of Nice¹³⁶ but its role was again emphasised in the Laeken Declaration, agreed at the European Council in December 2001.¹³⁷ Following from this the Charter found a central place in the Constitutional Treaty¹³⁸ with Article I-9(1) CT, requiring ‘respect’ for its content, alongside EU accession to the ECHR, and its text being incorporated into Part II of the Treaty.¹³⁹ The failure of public support for the Constitutional Treaty in French and Dutch referenda during mid-2005 saved the UK from having to take a strong position but the proposal was again reprised, in a minimally modified form, at the Brussels European Council as part of the proposals for the upcoming Treaty of Lisbon.

In advance of the Lisbon Council the UK Government identified a set of ‘red lines’ that would ‘ensure that there would not be a transfer of power away

¹³⁴ Melanie Phillips, ‘Europe: the election issue they don't dare mention’ *The Sunday Times* (London 6 May 2001) accessed via Lexis Nexis

¹³⁵ Dorota Leczykiewicz, ‘The EU Charter of Fundamental Rights and its effects’ *UK Constitutional Law Blog* <<http://ukconstitutionallaw.org/2011/08/04/dorota-leczykiewicz-the-eu-charter-of-fundamental-rights-and-its-effects/>> accessed 24 June 2013

¹³⁶ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C80/1

¹³⁷ Laeken Declaration on the future of the European Union”, Annex I to the Presidency conclusions, (Laeken 14 and 15 December 2001) 23 <<http://european-convention.eu.int/pdf/lknen.pdf>> accessed 24 June 2013

¹³⁸ Treaty establishing a Constitution for Europe [2004] OJ C310/1

¹³⁹ Craig (n 84) 199

from the UK on issues of fundamental importance to our sovereignty'.¹⁴⁰ These included protection of the UK's existing labour and social legislation, the common law system, with its police and judicial processes; maintenance of the UK's independent foreign and defence policy; and the continuation of discrete UK tax and social security systems. In a White paper issued after the June Council by the Foreign Office, the new Prime Minister, Gordon Brown, concluded that '[t]he Mandate for the new amending Treaty meets these red lines.'¹⁴¹

On the surface the new proposal for the Charter was relatively similar. Rather than directly incorporating it into the treaties it instead afforded the Charter the same status as the treaties. It did however come along with a new declaration reasserting that the Charter did not extend the scope of EU Law, create any new power or task, or modify any existing tasks or powers.¹⁴² Also, and more significantly for this study, the United Kingdom and Poland had negotiated an additional protocol to the Charter.¹⁴³ Art 1(1) of Protocol 30 states:

The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Further Art 1(2) added

¹⁴⁰ Foreign and Commonwealth Office, 'The Reform Treaty, The British Approach to the European Union Intergovernmental Conference, July 2007' (HMSO, 2007)

¹⁴¹ *ibid*

¹⁴² Declaration 1 concerning the Charter of Fundamental Rights of the European Union

¹⁴³ Protocol on the application of the Charter of Fundamental Rights to Poland and the United Kingdom [2007] OJ C306/156

In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Again the Government were quick to claim success. A statement asserted that the 'UK-specific Protocol' clarified 'beyond doubt the application of the Charter in relation to UK laws and measures, and in particular its justiciability in relation to labour and social articles' adding that '[t]his Protocol is legally binding and sets out clearly that the Charter provides no greater rights than are already provided for in UK law, and that nothing in the Charter extends the ability of any court to strike down UK law.'¹⁴⁴ In the Commons Blair told MPs that it was 'absolutely clear that we have an opt-out from both the Charter and judicial and home affairs'.¹⁴⁵ However, for all its reassuring sounding language, this 'opt-out' protocol was roundly criticised by lawyers, academics, and commentators for offering no real protection from the Charter.¹⁴⁶ The ECJ never possessed the competence to directly scrutinise domestic law and indirect review, via interpretation of the Treaties, or secondary legislation, could not be ousted by this protocol.¹⁴⁷ The UK Courts were already considering the Charter

¹⁴⁴ Foreign and Commonwealth Office (n 140) 11

¹⁴⁵ HC Deb 25 June 2007, vol 462, col 37

¹⁴⁶ Catherine Barnard, 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' (Cambridge University Law Faculty Working Paper 2010) 3 <<http://www.law.cam.ac.uk/faculty-resources/download/barnard-uk-opt-out-and-the-charter-of-fundamental-rights/7309/pdf>> accessed 24 June 2013; Kieron Beal and Tom Hickman, 'Beano No More: The EU Charter of Rights After Lisbon' [2011] JR 113; Aidan O'Neil, 'Is the UK's 'opt-out' from the EU Charter of Fundamental Rights worth the paper it is written on?' (*EUTopia Blog*, 15 September 2011) <<http://eutopialaw.com/2011/09/15/>> accessed 24 June 2013

¹⁴⁷ Leczykiewicz (n 135)

before it came into force,¹⁴⁸ and applying it soon after.¹⁴⁹ The Government even admitted (in proceedings before the Court of Appeal¹⁵⁰) that the protocol would not prevent the Charter being applied, and simply clarified its effect.¹⁵¹ In a preliminary reference from the Court of Appeal (made as part of those same proceedings) the ECJ found that the Protocol did not release the UK from its obligation to protect the rights in the Charter (though it did leave open the issue of the protocols effect on the application of social and labour rights in the UK).¹⁵²

This public collapse of Protocol 30's veneer of an opt-out has attracted renewed criticism of the Government either for its naivety, or its negligence in drafting. However recent information on the drafting of the protocol, released after a prolonged freedom of information battle with the European Commission, suggests that the Labour Government were well aware that the protocol was meaningless and deliberately pulled back from pushing for real concessions. Barnard claimed in 2010 that the protocol was 'an exercise in smoke and mirrors' to 'help convince the British public that the Lisbon Treaty was different to the Constitutional Treaty'.¹⁵³ This conclusion is supported by the new evidence obtained by the European Citizen Action Service¹⁵⁴ which show that while the UK was certainly reticent to subject itself to the Charter it was also

¹⁴⁸ O'Neill offers numerous examples (n 146)

¹⁴⁹ See for instance *R (Zagorski and Baze) v Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin)

¹⁵⁰ *R (NS) v Secretary of State for the Home Department & others* [2010] EWCA Civ 990

¹⁵¹ Beal and Hickman (n 146)

¹⁵² Joined Cases C- 411/10 and C-493/11 *NS v Secretary of State for the Home Department and Others* [2011] ECR I-0000

¹⁵³ Barnard (n 146) 19

¹⁵⁴ With assistance from the EU Rights Clinic, a joint initiative with the University of Kent and the Brussels School of International Studies.

aware of the hugely divisive effect that a properly constructed opt-out might have. A note, dated 6 June 2007, sent to President Barroso by the Director General of the European Commission Legal Service considered the various ways in which the Charter might be incorporated in the Lisbon Treaty.¹⁵⁵ The note suggested that '[i]t seems certain that the text of the Charter will not directly form part of the new treaty' and that it 'could be an Annex or Protocol or be reproduced in the Official Journal'. This solution, which the Director stated was already a concession, had the advantage of simplifying the Charter but 'remain[ed] insufficient for those who want to return to the binding character of the Charter'¹⁵⁶. Whilst noting that 'an opt-out may appear legally baroque in the field of human rights'¹⁵⁷ he asked President Barroso, 'is an opt-out for one or two Member States with a fully preserved Charter not preferable to a weakened Charter applicable to all Member States?'.¹⁵⁸ A second note dated 21 June 2007 stated that while the Charter was now likely to be included in the Lisbon treaty in binding form that, following a meeting with German Chancellor Angela Merkel, a binding UK opt-out might no longer be proposed.¹⁵⁹

Two reasons for this potential change of approach were given. The first was that the 'UK itself does not like it' because an 'opt-out from fundamental rights is hard to sell!' and secondly because it created the 'risk of contagion (if

¹⁵⁵ Michel Petite (Head of Legal Service, European Commission), 'Note to President Barroso' (Brussels, EU document MP/avs JUR (2007) 30329, 6 June 2007)

¹⁵⁶ Translated from 'demeure insuffisante pour ceux qui veulent revenir sur le caractère contraignant de la Charte'

¹⁵⁷ Translated from 'un opt-out peut apparaître juridiquement baroque dans le domaine des droits fondamentaux'

¹⁵⁸ Translated from 'un opt-out pour un ou deux Etats membres avec une Charte pleinement préservée n'est-il pas préférable à une Charte affaiblie applicable à tous les Etats membres?'

¹⁵⁹ Michel Petite (Head of Legal Service, European Commission), 'Note to President Barroso' (Brussels, EU document MP/CL SJ(2007) JUR/55081, 21 June 2007)

UK, then Poland, then France, ...etc...)'.¹⁶⁰ Instead of an opt-out the Germans had proposed tweaking the language on Member State application to make the instrument more palatable. The Commission still believed this would only serve to create confusion without having any effect on the Charter's force and thus were resistant to the move.¹⁶¹ If any change was to be made the Director proposed replacing references to Member States with simple references to 'the Union' which would still serve to catch all the member states but would do so without creating as much friction.¹⁶² In the end the decision was taken not to muddy the waters of the main Charter text and the special protocol approach was adopted. What this confidential exchange reveals however is that the Labour Government were not as stubborn in their strategy behind the scenes as they maintained in public. Labour needed to provide a front of resistance in the Commons and before the Eurosceptic media, but also avoid being too difficult within the EU itself (particularly at a time when the UK was fighting to retain its strategically valuable veto, which had been mooted as a possible bargaining chip)¹⁶³. Bound, however, to a public policy of an opt-out or a walk-out,¹⁶⁴ and not wanting to accept any change that might mean triggering a referendum (which risked providing an opportunity for a venting of pro-Conservative

¹⁶⁰ *ibid*

¹⁶¹ *ibid*

¹⁶² *ibid*

¹⁶³ Matthew Campbell, 'Sarko's "Club Med" makes regional waves' *The Sunday Times* (London, May 20, 2007) News 29

¹⁶⁴ David Cracknell and Nicola Smith, 'Brown to fight for opt-outs on EU treaty' *The Sunday Times* (London, 10 June 2007) News 2

sentiment),¹⁶⁵ the value of a functionally weak but dramatic sounding protocol becomes clear.

iii. The Charter in Context

Looking back at the Charter we can see a number of clear parallels with previous rights instrument drafting episodes. Wicks connects the drafting with that of the European Convention, drawing out certain similarities in the Labour Government's objectives, but there are also strong, arguably stronger links with the European Social Charter drafting examined in chapter 3. Additionally there are unique qualities to the Charter debate that demonstrate further, albeit slow, progress over the years towards diminution of the four core areas of concern identified in chapter 2.

Wicks identifies the Government's key objectives as passing a non-binding instrument and limiting the Charter to existing rights and claims that these two, fundamentally negative, objectives are the same as those held by Labour during the Convention drafting.¹⁶⁶ Wicks also claims that these two objectives were 'complementary, if not co-dependable' given the 'unusual' approach of drafting the Charter substance in the dark of the Charter's likely status and enforcement.¹⁶⁷ As mentioned above, while far from ideal, there is nothing unusual about this approach and, while, in Wick's broad terms, there are similarities between the Charter drafting and the Convention drafting, as a means of understanding how the Charter drafting fits into the history of British contributions to rights instrument development, it is again more revealing to try

¹⁶⁵ *ibid*

¹⁶⁶ Wicks (n 112) 529

¹⁶⁷ Wicks (n 112) 531

and pick apart the constituent elements underlying vague political resistance. Focusing on evidence of codificatory, supranationalising, judicialising and substantive objections a clearer comparison can be drawn.

The task of uncovering such evidence will be easier once full documentary records become open to public inspection, particularly given the potentially disingenuous nature of public political statements on rights. Wicks argues that Labour's public position was insincere, and that while the foreign secretary, Robin Cook, stated Government resistance was rooted in potential conflict between the ECHR and the Charter¹⁶⁸ she believes the answer is the somewhat simpler, impetus of constraining European supranational authority. Resistance to supranationalisation is doubtless an important part of the picture. This is particularly evident in the Government's growing emphasis on the principle of subsidiarity. The 2007 Reform Treaty White Paper states that subsidiarity is a priority for the Government and defines it as the sharing of competence between EU and member state in such a manner that 'the EU should only act where 'the objectives of the intended action cannot be sufficiently achieved by the Member States alone'.¹⁶⁹ To drive the point home it adds that 'in other words, the EU should only get involved where it can add value.'¹⁷⁰

However there certainly appears to be more going on in the UK's resistance to a binding Charter than this. The socio-economic content of the Charter provides a clear point of difference from the Convention and its impact

¹⁶⁸ HC Deb 15 June 2000, vol 351, col 1129 cited in *ibid*

¹⁶⁹ Foreign and Commonwealth Office (n 140) 11

¹⁷⁰ *ibid*

on the UK position deserves separate consideration. To this end comparisons with the European Social Charter are also merited.

Looking at the other heads of concern in turn: specific codificatory resistance to the Charter's socio-economic content is seen clearly in Labour's 'red lines' and in the specific wording of Protocol 30 with regard to the non-justiciability of the rights contained in chapter IV of the Charter, as well as more subtly in the emphasis on the Charter going absolutely no further than protections already established elsewhere under EU law. These chapter IV rights cover workers right to information, collective bargaining, access to placement services, unjust dismissal protections, fair working conditions, prohibition on child labour, professional and family life, social security/assistance, health care, 'services of general economic interest', environmental, and consumer protection.¹⁷¹ The specific singling out of this part of the Charter clearly demonstrates a particular codificatory objection in the field of socio-economic regulation that parallels the EUCFR drafting to both the Convention and the Social Charter drafting episodes.

Contrasting the two charters another major similarity is the unity of Conservative and Labour parties in resisting the instrument, their representatives in the respective drafting bodies acting in concert to resist further human rights constitutionalisation at the European level. While domestic debate was not a feature of the Social Charter drafting and so cannot be directly compared, the public domestic debate around the EU Charter reveals that the main disagreement between the parties regarded the most effective

¹⁷¹ Charter of Fundamental Rights of the European Union Arts 27-38

strategies for participating in Europe without being further bound by it. This contrasts with the Convention where the relationship between the parties was in high tension. Flowing from this, another similarity between the two Charter drafting processes that distinguishes them from the Convention drafting process is the degree to which the UK Government was on the periphery of the debate. In chapter two I showed that during the Convention drafting Labour was initially marginalised (partly of the Government's own volition) and only in the latter stages, having realised that the Convention was not going away, was forced to operate strategically from the periphery against a broad consensus in favour of passing a binding instrument. By contrast, both Charter drafting exercises saw a greater diversity of state attitudes, with a greater number of other states also concerned to limit the instrument to a political declaration.¹⁷² In these contexts the UK was happier to take on a central, focal, almost outspoken role in opposing the binding elements of the proposed instruments and openly stipulated how the instrument needed to look for the UK to be able to ratify it.

In common with the Convention and Social Charter drafting processes, but at odds with the later HRA's passage, the EU Charter drafting also shows the ongoing importance of judicialising objections. Despite reduced concerns about the power of the Convention to interfere with the Labour agenda, clearly this faith did not extend to the extra rights being proposed under the Charter. Again the resistance to further transfers of sovereignty from legislature to judiciary can be seen in the Government White Paper which stated that '[t]he

¹⁷² Wicks (n 112) 530

Government sought to ensure that nothing in the EUCFR would give national or European courts any new powers to strike down or reinterpret UK law, including labour and social legislation. This has been achieved.¹⁷³)

This is not to say that the EU Charter approach was directly equivalent to the Social Charter approach. In the slight softening of the UK position revealed through the Commission/Barroso memos, and also in the drafting of the underpowered Protocol 30 we can see a slightly more conciliatory approach than was present in the Social Charter drafting, and also a more open attitude towards further rights protection than was seen in the Convention drafting (where, despite the diplomatic constraints placed on the UK by its marginal position, the Labour Government was still internally determined to minimise procedural safeguards and active systems of enforcement).

Overall then, the EU Charter debate can be seen to reflect elements of both the Convention and the Charter debates, as well as showing some small amount of further development. A full account of the positions of Labour and Conservative actors will have to wait until the release of official documentation under the 30 year rule but from the limited information already available it is possible to discern that ongoing and central supranational concerns appear to have been supplemented by slightly weakened but still weighty codificatory objections with respect to socio-economic rights. Additionally, and despite the signs of growing faith in the domestic judiciary evidenced in the passage of the HRA, a specific ongoing, or resurgent, judicialising concern also appear to have played a part. Further evidence of this is seen in the UK's input into the

¹⁷³ *ibid* 10

amending of the horizontal provisions under Article 52(5) of the Charter. Here the Government promoted language making clear that while provisions of the Charter containing principles (as opposed to those clearly expressed in the form of rights¹⁷⁴) could 'be implemented by legislative and executive acts', when it came to court interpretation of the law, these principles were to be 'judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.¹⁷⁵ The status of these 'principles', and their relationship to rights remains unclear, however, with the CJEU rejecting the Advocate General's extensive opinion delineating the two concepts in the recent case of *AMS*.¹⁷⁶ Instead the court ruled that while the Charter applied 'in all situations governed by European Union law', the article under consideration (art 27) was not a directly applicable rule of law, as it is was generally formulated and not sufficient to confer a subjective right on individuals that could be invoked before domestic courts.¹⁷⁷ The door has however been left open for other articles to be found applicable.¹⁷⁸

Further enquiry into the motivations of the Labour Government will have to wait upon greater documentary access than is currently available, but to a degree actions and outcomes (particularly the pressure applied to the Charter drafting and the absence of any serious domestic rights instrument proposals)

¹⁷⁴ Which were principally those that were civil or political in nature, though a couple of exceptions existed in the articles on collective agreements and unfair dismissal (art 28 and art 30).

¹⁷⁵ Barnard (n 146) 3-4

¹⁷⁶ Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* (CJEU, 15 January 2014) reported at [2014] WLR (D) 2

¹⁷⁷ *ibid* para 46-47, as noted in Jasper Krommendijk, 'After AMS: remaining uncertainty about the role of the EU Charter's principles' (*EUtopia Blog*, 29 January 2014) <<http://eutopialaw.com/2014/01/29/after-ams-remaining-uncertainty-about-the-role-of-the-eu-charters-principles/>> accessed 7 April 2014

¹⁷⁸ Krommendijk *ibid*

speak for themselves. Rather than looking to Europe, the last of the Labour party's three terms saw renewed interest in domestic reforms. In the final part of this chapter I look at the return of the domestic Bill of Rights debate since the HRA and consider what lessons, drawn from the rest of the thesis, can contribute to the future of this debate.

4. Return of the Bill of Rights Debate

In this final section I consider the new Bill of Rights debate that has emerged, particularly during Labour's third term and continuing into the new Conservative administration under David Cameron. This discussion has involved a number of strands including a return of the pre-97 'rights and responsibilities' discourse, a renewed interest in drafting an instrument that protects specific 'British rights' (though not a corresponding interest in defining what such rights might be), and a new wave of explicit resistance to the influence of Strasbourg jurisprudence over politically charged domestic issues.

From the HRA's passage in 1998, with support or acceptance from all of the major political parties, the last fifteen years has seen a remarkable decline in the reputation of human rights in mainstream political discourse. Amidst a wealth of critical media narratives, executive frustration at the constraints placed on various policy areas by the HRA¹⁷⁹ has led to a novel brinksmanship with the Court and the Council of Europe (most notably in connection with the issue of prisoner voting). The period has also seen a growing willingness amongst politicians to publicly criticise human rights and the Courts (at home and abroad) that enforce them. From calls for reform of the HRA to efforts to

¹⁷⁹ Particularly in connection with immigration, anti-terrorism, and prison policy.

reform the Strasbourg system; from consideration of a supplementary British Bill of Rights to commitments to replace the HRA; and from promises that the UK's ratification of the Convention would never be under question to the insistence that withdrawal remained an option worthy of serious consideration; the future of human rights in the UK remains in the balance.

While this debate is a significant and ongoing part of political debate there is still scope to compare the events that have played out so far against those that have come before and in this section I highlight some continuities and discontinuities. The most obvious point of comparison is the Bill of Rights debate of the 1970s. Surface similarities are not difficult to identify: both the 1970s and the current Bill of Rights debates emerge from a period in which the parties were relatively even in the polls with fine electoral margins and a precarious balance of power boosting the influence of the Liberals (now in Liberal Democrat form). Another comes with the contiguous rise of other constitutional issues, most significantly the serious consideration of further devolution in the case of Scotland. A third comes in the failure of cross bench exploratory exercises, with the inconclusive input from the special Commission on a Bill of Rights little more than a rehash of the findings of the 1970s House of Lords Committee.

Taking the long view, the current British Bill of Rights debate thus appears, at least superficially, to be a clear case of history repeating itself. However this is an inadequate characterisation because the current debate has the distinction of being the first episode since the birth of the post-war human rights discourse where the principle concern has been to downgrade, restrict, or narrow the protections available to the public rather than to develop them.

Again there is only so much one can extract from the limited documentary evidence available (particularly as much of what is available is coloured by the toxic media environment that surrounds any controversial human rights adjudication). However, there is no ignoring that attitudes appear again to be shifting and in the final part of this section I consider how my framework may help us understand these shifts.

i. Rights in Decline

After the HRA came into force in 2000 all eyes were on the courts as politicians, activists and the media waited to see what use would be made of the new instrument. The uptake was relatively swift with almost 150 cases in the first six months relying on the HRA, and twenty four complaints upheld.¹⁸⁰ Despite the Lord Chancellor's hopes that, in striving for compliant interpretations, the courts would produce few declarations of incompatibility, this first six months saw two issued,¹⁸¹ and one 'near miss'^{182, 183} Whilst Labour had agreed with the Liberal Democrats that two pieces of monitoring and enforcement machinery would be created, a joint Select Committee of both Houses and a Human Rights Commissioner or Commission, only the former had come into existence by the

¹⁸⁰ Keir Stamer and Francesca Klug, 'Incorporation through the "front door": the first year of the Human Rights Act' [2001] PL 655, 655

¹⁸¹ *R (on the application of H) v. Mental Health Review Tribunal for North and East London Region* [2001] EWCA Civ 415 and *Wilson v. First County Trust Limited* [2001] EWCA Civ 633, albeit this second was subsequently overturned by the House of Lords *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40

¹⁸² *R v Secretary of State for the Environment Transport and the Regions, ex p Alconbury Developments* [2001] UKHL 23

¹⁸³ Wicks (n 180)

end of 2010 (itself delayed after the Liberal Democrats insisted that the Chairperson be drawn from one of the opposition parties).¹⁸⁴

After 9-11 and the start of the 'War on Terror' the prioritisation of security policy put a freeze on any further strengthening of domestic rights systems and saw progressive vigour replaced by anti-liberal measures propped up by questionable national security justifications (most clearly seen in the hastily passed 2001 Anti-Terrorism, Crime and Security Act¹⁸⁵).¹⁸⁶ Despite the Courts' care to maintain dualist orthodoxy and resist the opportunity to develop a fuller rights based approach, the Labour Government was still hit by major decisions such as *Anderson*,¹⁸⁷ stripping the Home Secretary of his power to alter life sentence tariffs, the *Belmarsh case*,¹⁸⁸ finding indefinite detention of foreign nationals disproportionate and discriminatory, and *S and Others*¹⁸⁹, where nine Afghani asylum seekers, who had hijacked a jet and flown it to the UK to escape from the Taliban, were granted discretionary leave to remain. As the HRA's potential was revealed, Labour increasingly played down the Act's significance, first replacing the bold language of constitutional reform with milder language about access to justice and 'tidying up' the loose ends of the Convention's distant ratification.¹⁹⁰

¹⁸⁴ Robert Hazell, 'Reforming the Constitution' (2001) 72(1) The Political Quarterly 39, 43

¹⁸⁵ Introduced on 19 November and receiving Royal Assent on 14 December.

¹⁸⁶ Conor Gearty, 'Rethinking civil liberties in a counter-terrorism world' [2007] EHRLR 111, 115

¹⁸⁷ *R v Secretary of State for the Home Department, ex p Anderson* [2001] EWCA Civ 1698

¹⁸⁸ *A and others v Secretary of State for the Home Department* [2004] UKHL 56

¹⁸⁹ *S and others v Secretary of State for the Home Department* [2006] EWCA Civ 1157

¹⁹⁰ Francesca Klug, 'A bill of rights: do we need one or do we already have one?' [2007] PL 701, 713

After the *Belmarsh* case, open criticism of the courts became a regular feature of Labour reaction. Amidst the firestorm of media condemnation following *S¹⁹¹*, Blair labelled the Court's ruling 'an abuse of common sense', while the Home Secretary, John Reid, called it 'inexplicable'.¹⁹² Opposition leader, David Cameron, took a more direct line, vowing he would 'reform, replace or scrap' the HRA if the UK could not reach memorandums of understanding with Arab states that would permit deportations to take place (building on a pledge in the 2005 Conservative manifesto to 'review' the Act).¹⁹³ In a TV interview he further rejected the influence of European rights norms:

[I]et's look at getting rid of the Human Rights Act and say instead of that, instead of having an Act that imports, if you like, a foreign convention of rights into British law, why not try and write our own British Bill of Rights and Responsibilities, clearly and precisely into law, so we can have human rights with common sense. That would be a constructive way forward.¹⁹⁴

In a speech to the Centre for Policy Studies the following day he accused the HRA variously of tilting the justice system towards criminals, undermining the fight against terrorism, and crippling public sector organisations through concerns about costly rights litigation. These complaints chimed with a powerful media narrative that was developing, portraying human rights protection at the preserve of minorities as the expense of the greater public

¹⁹¹ n 189

¹⁹² BBC Reporter, 'Tory pledge on Human Rights Act' *BBC News* (London, 12 May 2006) <http://news.bbc.co.uk/1/hi/uk_politics/4765861.stm> accessed 9 July 2013

¹⁹³ *ibid*

¹⁹⁴ Nigel Morris, 'Cameron pledges to scrap Human Rights Act in constitutional review' *The Independent* (London, 26 June 2006) <<http://www.independent.co.uk/news/uk/politics/cameron-pledges-to-scrap-human-rights-act-in-constitutional-review-405562.html>> accessed 12 July 2013

good.¹⁹⁵ This can be seen most clearly in *The Sun*'s high profile campaign for the HRA to be scrapped, complaining that '[l]aw abiding citizens must walk in fear while human rights give their assailants the freedom of the streets'.¹⁹⁶

Had Labour wished to defend the HRA, battle lines could easily have been drawn, but there seemed little inclination in Government to stand by the Act. Instead, amidst talk of 'rebalancing' the HRA, Blair stated that Labour had been 'complacent' in failing to appreciate that the HRA would impede efforts to deal with immigrating criminals.¹⁹⁷ However, as in previous episodes, the absence of any significant distance between the policy positions of the Labour and Conservative leaders, was not an obstacle to human rights taking a focal position in party politics. Seeking to address the issue of low public buy-in, at the end of 2006 an unusual alliance of the Conservatives, the Liberal Democrats, Charter 88, and Justice, agreed to pursue an initiative dubbed 'Future Britain' to attempt to co-ordinate and foster debate to ensure that by the time of the next election a better supported consensus could be reached.¹⁹⁸ Cameron repeated his aspiration for 'a modern British Bill of Rights to define the core values which give us our identity as a free nation' in speeches inside and outside the House of

¹⁹⁵ Vernon Bogdanor et al., 'Human Rights and the UK Constitution' (British Academy 2012)

¹⁹⁶ Editorial, 'Time to stop the madness' *The Sun* (London, 31 July 2007) <http://www.thesun.co.uk/sol/homepage/news/sun_says/48041/Time-to-stop-the-madness.html> accessed 12 July 2013

¹⁹⁷ *ibid*

¹⁹⁸ Jamie Doward, 'Rival parties unite to fight for a bill of rights' *The Observer* (London, 31 December 2006) <<http://www.guardian.co.uk/politics/2006/dec/31/uk.constitution>> accessed 12 July 2013

Commons,¹⁹⁹ and while Blair hung back, forthcoming Prime Minister, Gordon Brown, was widely reported to be sympathetic to such an initiative.²⁰⁰

Despite the support of influential civil society groups, even some senior Conservative politicians joined with academic commentators²⁰¹ in criticising the lack of conceptual rigour in the Cameron plan²⁰² (which claimed that a restatement of British rights would somehow protect uniquely 'British' rights, and maintain the UK's compliance with the Convention, while still managing to unfetter the operation of immigration control, policy over prisoner voting rights, and other hot-button issues popular with the press). However, ample indignation over the decision in *Hirst*²⁰³ was helping to fuel a resurgence of Blair's pre-election rights and responsibilities discourse and with both party leaders arguing that rights should somehow be tethered to societal duties, such criticisms were marginal to the mainstream popular political discourse. Both parties also reemphasised the importance of British judges developing a British body of rights law. Given that the substance of these complaints appears to have been frustration at the increasing encroachment of Strasbourg law into the domestic policy sphere, it is worth noting that while Cameron was criticising the lack of respect for UK subsidiarity (a concept, Klug notes Cameron has conflated

¹⁹⁹ First outlined in David Cameron, 'British Bill of Rights' Speech to the Centre for Policy Studies (London 26 March 2006) and repeated at the Conservative Party Conference in October 2006 and at HC Deb 19 February 2007 vol 457, col 68 cited by Klug 2007 (n 190) 715

²⁰⁰ *ibid* and A Grice, 'Tory Leader is stealing Brown's best tunes', *Independent* (London, 30 September 2006) cited in Klug (2007) (n 190), footnote 4

²⁰¹ Klug 2007 (n 190) 715-6

²⁰² Notably party heavyweight and future Lord Chancellor Ken Clarke – 'Cameron's plan to overturn rights laws labelled 'complete nonsense'' *Independent* (London 27 June 2006) cited in *ibid*

²⁰³ *Hirst v the United Kingdom (No 2)* [2005] ECHR 681

with margin of appreciation)²⁰⁴ the Courts were exercising their discretion to expand the scope of human rights protection into the margin of appreciation explicitly prescribed by Strasbourg.²⁰⁵

Such ironies are, however, easily lost in the heat of topical political debate and the final years of the Labour administration were dogged by Conservative calls to square the human rights circle: preaching absolute adherence to the ECHR, promising strengthening protection for 'British' rights, pushing for UK jurisprudence to have a greater influence over the European Court, but also attacking domestic judicial incursion into the Strasbourg demarcated margin of appreciation.²⁰⁶ Whilst numerous anti-liberal initiatives brought into being by Labour²⁰⁷ could have been used as a platform to claim that the Convention was not far reaching enough, the only additional 'British right' regularly mooted by the Conservatives was protection for jury trials.

Conservative suggestions that a British Bill of Rights, to replace the HRA, might start from the text of the Convention, but go further in defining and elaborating the drafting into a more restrictive form, are notable for reprising Labour's aim at the time of the Convention's drafting.²⁰⁸ While such a process was mooted to 'recalibrate' the relationship between domestic courts, the

²⁰⁴ Klug 2007 (n 190) 716

²⁰⁵ Aileen Kavanagh, 'Strasbourg, the House of Lords or Elected Politicians: Who decides about rights after Re P?' [2009] MLR 828

²⁰⁶ See for instance future Attorney General, Dominic Grieve's speech 'Can the Bill of Rights do better than the Human Rights Act?' (Middle Temple, London, 30 November 2009) which claimed 'that the substance of the ECHR and our country's adherence to it as an international obligation, are a key benchmark of our shared values as a nation' whilst also suggesting that concerns that the HRA would cause courts to 'usurp the role of the executive' were 'entirely legitimate'.

²⁰⁷ Such as ID cards, broadening use of stop-and-search, the police DNA database, or the various exceptional measures contained in the Regulation of Investigatory Powers Act 2000

²⁰⁸ Grieve 2009 (n 206)

ECtHR, and Westminster the reality is that there is little room for manoeuvre on this front. Changing the terms of the Convention's incorporation in the proposed manner could only fetter the decision making processes of domestic courts and would do nothing to raise the status of British jurisprudence in Strasbourg eyes. Breaches would still be found, and with reduced flexibility for domestic judicial interpretation, these would also be likely to occur more often at the supranational level.

Thus the Conservatives argued that it would pursue ends that appear conflicting: a more influential domestic judiciary, that would lead Europe, but also a more constrained domestic judiciary, that would be limited in the scope of its interpretation of the Convention. The desire to resist foreign intrusion into domestic policy making is wholly understandable, the belief that this could be avoided without future default of the UK's treaty obligations is rather less so. Klug describes the Conservative proposal as 'shot through with legal confusion'.²⁰⁹

The return of the idea that protection of individual rights might be made conditional on adequate performance of certain societal duties shares the same practical problem as 'rebalancing', i.e. that it is incompatible with the Convention. It also relies on the unattractive theoretical position that the state may remove supposedly fundamental protections from marginal individuals. Notwithstanding this, by the end of the decade, both Labour and Conservative parties were arguing that a statement of responsibilities must be a central part

²⁰⁹ Klug (2007) (n 190) 715

of any new Bill of Rights.²¹⁰ This is not to say that the key legal minds in either party seriously believed that such a position would be workable. On the Labour side Jack Straw commended the Dutch example, where a 'Charter for Responsible Citizenship' was under consideration but acknowledged that making rights conditional upon responsibilities 'would be an absurdity and an affront to democratic society'.²¹¹ On the Conservative side Dominic Grieve admitted in a 2009 speech that any statement of responsibilities 'would be no more than a largely symbolic document' and that he thought 'symbolic legislation should be avoided'.²¹² Notwithstanding the extremely limited scope for achieving substantive ends; the Government's commitment in a 2009 green paper not to adversely impact protection of rights by incorporating responsibilities into the domestic constitutional framework; and a Ministry of Justice report concluding that there was little scope to codify any duty more detailed than an obligation to respect the rights of others,²¹³ the responsibilities discourse continued to feature right up to the 2010 election.

The 2010 election marks an important break in the debate and one that again mirrors the 1970s Bill of Rights debate. In the absence of a single party capable of forming a majority government, the Liberal Democrats were once again thrust into the centre of the executive policy-forming milieu. To the anger of the anti-HRA press, the Conservative manifesto commitment to replace the HRA was trumped by the coalition agreement with the Liberal Democrats, who

²¹⁰ Francesca Klug, 'Solidity or Wind?' What's on the Menu in the Bill of Rights Debate?' (2009) 80(3) *The Political Quarterly* 420, 422

²¹¹ *ibid* 423

²¹² Grieve (2009) (n 206)

²¹³ Liora Lazarus et al., 'The relationship between rights and responsibilities' (Ministry of Justice Research Series 18/09, 2009)

would not accept such a repeal.²¹⁴ With this route to domestic reform barred, the Conservative leadership turned to the possibility of reforming the Strasbourg institutions instead, driving the domestic Bill of Rights idea out of the limelight by referring it to a multi-party 'Commission on a Bill of Rights' formed of four representatives from each side of the Coalition and a single neutral chairperson. The Strasbourg reform approach was in many respects far more promising than the loose and vague plans for domestic reform. The staggering backlog of cases at the European Court made the case for some form of reform irresistible and the UK was well placed to make suggestions, being about to take up the Chairmanship of the Council of Europe's Committee of Ministers.

Outlining priorities for its Chairmanship in October 2011 the Government identified Court reform as key to its strategy. This included 'efficiency measures' to allow the Court to focus on 'the most important cases', developing implementation of the Convention at the national level and improving the quality of Strasbourg case law.²¹⁵ At the heart of these proposed reforms was the idea that a strong subsidiarity principle should be incorporated into a new protocol to the Convention.²¹⁶ This would reserve decision making to the member state and avoid review in all but the most extreme cases. Such a

²¹⁴ James Chapman and Tim Shipman, 'Human rights cave-in: Cameron pledged to scrap Act... now Clegg champions it under ANOTHER coalition compromise' *The Daily Mail* (London, 20 May 2010) <<http://www.dailymail.co.uk/news/article-1279544/Nick-Clegg-champions-Human-Rights-Act-David-Cameron-pledged-scrap.html>> accessed 12 July 2013

²¹⁵ Priorities of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe (7 November 2011 – 14 May 2012) (Council of Europe document CM/Inf (2011) 41, 27 October 2011)

²¹⁶ Dominic Grieve, 'European Convention on Human Rights: current challenges' (Speech at Lincoln's Inn, London, 24th October 2011)

proposal provided the dual effects of allowing a significant reduction in the Court's future caseload whilst also insulating the UK (and other member states) from unwelcome supranational scrutiny in borderline (and, perhaps, some not so borderline) cases. Showing that the latter intention was the key motivator, Grieve also argued that where adverse decisions did arise in Strasbourg, the UK should have a 'right of rebuttal'²¹⁷ as Parliament was best placed to judge difficult policy questions.²¹⁸

This process was started with a November 2011 conference²¹⁹ attended by delegates from member states, the Council of Europe secretariat, the European Court registry, the Court itself, academia and civil society. The conference attempted 'to look beyond the immediate problems facing the European Court of Human Rights and begin to develop ideas for the Court's long-term future'.²²⁰ The substance of these discussions then formed the basis for a proposal for reform to be debated at the Council of Europe High Level Conference on the Future of the European Court of Human Rights, held over two days in Brighton in April 2012. This conference was the third annual gathering aimed at developing the Council's plans for making the Court system sustainable in the long run. At previous meetings at Interlaken in 2010 and Izmir in 2011 the importance of subsidiarity had been raised as an important part of the solution to the Courts woes as lack of awareness and lack of proper judicial enforcement of human rights at national level continued to precipitate enormous volumes of complaints.

²¹⁷ Presumably a euphemism for a right to disregard the decision!

²¹⁸ *ibid*

²¹⁹ Entitled '2020 Vision for the European Court of Human Rights'

²²⁰ Vaughne Miller and Alexander Horne, 'The UK and Reform of the European Court of Human Rights' (House of Commons Library Note SN/IA/6277, 27 April 2012) 8

There were concerns in the run up to the Conference that the UK Government would use the Brighton meeting as an opportunity to push for a winding back of the Court's competence. These concerns were fuelled by a leaked version of the draft declaration prepared by the Government in advance of the meeting. This document placed heavy emphasis on the national margin of appreciation and proposed a number of measures clearly aimed at decentralising power from Strasbourg back towards national courts. Stating that 'the Convention system is subsidiary to safeguarding of human rights at national level' and that 'national authorities are in principle better placed than an international court to evaluate local needs and conditions'²²¹ it proposed a system of preliminary reference to the Strasbourg court – akin to that available to the Court of Justice of the European Union under Art 267 TFEU – but with the Court's 'advisory opinions' having no binding force on the national courts.²²² Further, and more controversially, the draft declaration proposed a new, highly restrictive, subsidiarity-based, admissibility criterion to be applied by the Court's registry when filtering applications. This proposal suggested that an application should be found inadmissible if it were 'the same in substance as a matter that has been examined by a national court taking into account the rights guaranteed by the Convention' (i.e. the majority of cases and effectively all cases from the UK) unless the domestic court had 'clearly erred' in its interpretation or application of the Convention, or the question raised was sufficiently serious in nature.²²³ Taken in combination these reforms held the potential to

²²¹ Revised draft Brighton Declaration (Council of Europe document reference DD(2012)220 rev4 E, 12 April 2012) para 11

²²² *ibid* para 12(d)

²²³ *ibid* para 15(d)

substantially roll back the jurisdiction of the Strasbourg court with a decision to request and then disregard an advisory opinion potentially ousting the Court's jurisdiction except in 'serious' cases.

In the final declaration the states reaffirmed 'their deep and abiding commitment to the Convention', to the right of individual petition, and affirmed their commitment to pursuing further measures aimed at enhancing subsidiarity.²²⁴ The new filtering criteria was slightly watered down, being bundled into the interpretation of the existing rejection criteria for 'manifestly ill founded' applications. The suggestion that the margin of appreciation and the principle of subsidiarity be written into the Convention was affirmed – though without further commitment as to what form this might take, or what new weight the Court might be expected to afford. Advisory opinions also made the cut, though without any specifics. Finally, it was agreed that time limits for applications to the Court be reduced from six months to four. Overall the Government achieved most of its aims and, closing the conference, Secretary of State for Justice Kenneth Clark claimed that the Government's pledge to reform the European Court had been achieved.²²⁵ 'Taken together' he stated 'these changes should mean fewer cases being considered by the court' and would mean that '[t]he court will not normally intervene where national courts have clearly applied the Convention properly'.²²⁶ To this the Attorney General added:

[t]his Declaration makes clear that the primary responsibility
for guaranteeing human rights rests with the government,

²²⁴ Council of Europe, 'Brighton Declaration' (Brighton 2013)

<<http://hub.coe.int/20120419-brighton-declaration>> accessed 12 July 2013

²²⁵ Ministry of Justice Press Release 'UK delivers European court reform' (London 20 April 2012) <<https://www.gov.uk/government/news/uk-delivers-european-court-reform>> accessed 12 July 2013

²²⁶ *ibid*

parliament and courts of a country. It sets out clearly that the Court should not routinely overturn the decisions made by national authorities - and it should respect different solutions and different approaches between states as being legitimate.²²⁷

Post-Brighton the international picture was one with which the Government could have been reasonably satisfied. Domestically however the Commission on a Bill of Rights was making less progress. The equivocal nature of its report, delivered to the Government in December 2012, was clear from its title - *A UK Bill of Rights? – The Choice Before Us* – with the document containing no strong consensus and no plausible plan of action.²²⁸ Of the nine Commissioners, seven believed a Bill of Rights was desirable, but with broad divisions over form. The sprawling report was riddled with qualifications, with many sections annotated on a paragraph-by-paragraph basis as to which Commissioners supported which propositions. The report also incorporates no fewer than eight additional sub-reports authored by individual commissioners or sub-groups. One Conservative member of the Commission even resigned in the run up to the report's release, citing his fellow Commissioners' failure to respect the Government's desire to 'reassert the sovereignty of Westminster over the European court'.²²⁹

These differences closely mirror those seen amongst the 1976 House of Lords Select Committee,²³⁰ as does the ultimate finding that regional devolution

²²⁷ *ibid*

²²⁸ Commission on a Bill of Rights, 'A UK Bill of Rights? – The Choice Before Us' (HMSO 2012)

²²⁹ Conal Urquhart, 'Bill of rights commissioner resigns over bypass of Commons' *The Guardian* (London, 11 March 2012)

²³⁰ House of Lords Select Committee on a Bill of Rights, *Report of the Select Committee on a Bill of Rights: Together with the minutes of proceedings* (HMSO, House of Lords Paper 176, 1976)

presented a critical obstacle to human rights reform, and the conclusion that this issue must be resolved before further progress on rights be attempted. However unlike the 70s debate, rather than petering out, the Bill of Rights issue has become even stronger in the wake of the inconclusive scoping exercise. With continued irritation and media lobbying over the ongoing role of human rights law, both around prisoner voting, and also the embarrassing, and protracted, sequence of appeals in connection with the deportation of 'radical cleric' Abu Qatada.²³¹ With the Eurosceptic United Kingdom Independence Party gaining significant electoral ground, and the Liberal Democrats constrained by coalition, the Conservatives have become even more aggressive over rights issues. On 7 July 2013, the day Abu Qatada was finally deported, the Lord Chancellor, Chris Grayling, told the Telegraph that the Conservatives would fight the next election on wholesale human rights reform, including possibly advocating for withdrawal from the European Convention.²³² The following day the Home Secretary, Teresa May, mirrored these remarks and, in a statement to the Commons, said that 'we have to do something about the crazy interpretation of our human rights laws', that '[i]n the end the Human Rights Act must be scrapped' and that '[a]ll options, including withdrawing from the Convention all together must be kept on the table.'²³³

²³¹ Most notably: *Othman (Jordan) v Secretary of State for the Home Department* [2008] EWCA Civ 290, *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1, *Othman (Abu Qatada) v Secretary of State for the Home Department* [2013] EWCA Civ 277

²³² Christopher Hope and Tim Ross, 'Abu Qatada: Tories to fight next election on wholesale human rights reform, says Chris Grayling' *The Telegraph* (London, 7 July 2013) <<http://www.telegraph.co.uk/news/uknews/10165262/Abu-Qatada-Tories-to-fight-next-election-on-wholesale-human-rights-reform-says-Chris-Grayling.html>> accessed 18 July 2013

²³³ HC Deb 8 July 2013, vol 540, col 24

To add fuel to this fire the following day (9 July) the European Court released its judgment in *Vinter*, ruling that the system of ‘whole life terms’ without chance of parole (employed by the English courts in some particularly serious murderer convictions), were a breach of the Article 3 right against torture.²³⁴ This drew even more ferocious criticism with Justice Secretary, Chris Grayling, ‘profoundly disagreeing’ with the ruling, and stating the ruling reinforced his ‘determination to curtail the role of the Court of Human Rights in the UK.’²³⁵ Theresa May expressed further dismay to the Commons, complaining highlighting the inconsistency between the new decision and previous findings by the Strasbourg Court that permitted extradition where life sentences without parole were liable to be applied.

Looking forward to the next general election, mooted for 2015, it is clear that the Bill of Rights issue is liable to play a significant role. In late September 2013 the Justice Secretary announced that he would be reviewing the UK’s relationship with Strasbourg, stating that his aim was ‘to see our Supreme Court being supreme again’.²³⁶ In a TV interview, coinciding with the start of the 2013 Conservative Party Conference, the Prime Minister stated his belief that ‘[w]e can scrap the HRA as a first act without actually altering the relationship with

²³⁴ *Vinter and others v UK* (2012) 55 EHRR 34

²³⁵ Matt Chorley, ‘Dozens of Britain’s worst killers set to launch bids for freedom after European Court of Human Rights rules we DON’T have the right lock them up for life’ *The Mail Online* (London, 10 July 2013) <<http://www.dailymail.co.uk/news/article-2358669/Jailing-Britains-notorious-murderers-forever-breaches-THEIR-human-rights-European-court-rules.html>> accessed 18 July 2013

²³⁶ A confusing line given the Supreme Court had only come into existence five years after the Human Rights Act came into force. Christopher Hope, ‘UK Supreme Court should have final say on human rights cases, not Strasbourg, says Chris Grayling’ *The Telegraph* (London, 25 September 2013) <<http://www.telegraph.co.uk/news/politics/10334855/UK-Supreme-Court-should-have-final-say-on-human-rights-cases-not-Strasbourg-says-Chris-Grayling.html>>

the European Convention on Human Rights' and suggested there were a range of options before focusing again on writing 'a British bill of rights so that when cases go to the European Convention [sic] of Human Rights you have a proper margin of appreciation.'²³⁷ When asked why he was not simply advocating the UK's departure from the Convention he responded '[i]t may be that that is where we end up.' The following day Home Secretary Theresa May announced that the 2015 manifesto would commit the Conservatives to scrapping the HRA, complaining that it had let '[s]ome judges chose to ignore Parliament and go on putting the law on the side of foreign criminals instead of the public'.²³⁸

In this period of uncertainty attempting to pre-empt the future path of the debate is unwise. It is, however, notable that despite the important concessions achieved by the Conservative Government on the future function of the European Court, we now stand at a stage where departure from the European Convention is being mooted as a serious policy option by the leading elite of the Conservative party with little objection from the Labour opposition. Only the Liberal Democrats continue to stand by the HRA and whether the Act will survive the next Parliament is far from certain. In the absence of any consensus on what kind of instrument might replace it there are a great many more questions surrounding the United Kingdom's future protections for human rights than there are answers.

²³⁷ BBC Andrew Marr Show interview transcribed at <http://www.theguardian.com/politics/2013/sep/29/conservative-conference-opens-and-david-camersons-interview-with-andrew-marr-politics-live-blog>

²³⁸ David Barrett, 'Tory manifesto will promise to scrap Labour's Human Rights Act, says Theresa May' *The Telegraph* (London, 30 September 2013) <<http://www.telegraph.co.uk/news/politics/conservative/10345499/Tory-manifesto-will-promise-to-scrap-Labours-Human-Rights-Act-says-Theresa-May.html>>

ii. Linking Past and Present Debates

In this final substantive chapter I have considered the recent history of human rights protection in the United Kingdom. From the return of the 'rights boomerang' in the passing of the HRA, through the strained interaction with the EU over the EUCFR, to the return of the Bill of Rights debate, the last fifteen years has seen several new initiatives but all with significant echoes of previous chapters in the UK's interaction with human rights protection. In terms of my four factors of resistance the period has been volatile. New Labour's early tolerance for rights judicialisation (and to some degree even enthusiasm for judicial involvement in some politically charged and technically complicated areas) has been undermined by a period of adverse decisions in the domestic courts that have also drawn unprecedented criticism from the Conservatives. Supranational concerns with the influence of the Strasbourg Court, which arguably were a significant contributor to the 'bringing rights home' program in the first place, have also grown with a small number of highly unpopular decisions feeding a furious media narrative.

Less conspicuous, and slightly more constant, has been the attitude towards rights codification. The HRA was artfully drafted to incorporate the Convention without adding to its substance, and the Charter drafting shows significant ongoing concerns over further rights codification – particularly in the socio-economic domain. Whilst talk of further domestic rights codification has been raised by the Conservatives in connection with a new British Bill of Rights, the detail in these propositions is minimal and the apparent intention is instead a move towards rights deregulation, loosening the strictures of the Convention

and providing Parliament and the Government with more leeway in connection with politically controversial issues.

Finally substantive issues have featured again in a minor fashion making a small appearance in the Charter drafting and then again in connection with the Bill of Rights Commission's work. The most conspicuous importance afforded to substantive detail was seen in Dominic Grieve's complaints about the language of the Convention and in the proposal for the British Bill of Rights to be a redrafted version of the Convention rights, phrased in a manner more familiar to British Parliamentary Counsel draftsmen.

What is particularly interesting from the perspective of this study is the new relevance of external triggers such as adverse judgments, press campaigns and public political pressures. This is a marked change from previous human rights debates which occurred either without public attention – as seen in the Convention drafting, the Social Charter drafting, or, to a lesser extent, the acceptance of individual petition – or with superficial public pronouncement but little public engagement or interest – like the first Bill of Rights debate, the HRA's passage, and the EUCFR. It would appear that we might be entering a new stage where public opinion will be a major factor in making or breaking rights instruments.

What does not appear to be changing, however, is the importance of inter-party conflict, intra-party reorientation, and single party dominance to developing rights protection. The HRA's passage directly mirrors the acceptance of the right of individual petition in 1966, with frustration with a long period of Conservative rule, a revisionist ideological shift, and a landslide victory combining to create a hospitable environment for constitutional reform. By

contrast the Charter of Fundamental Rights, mirroring the European Social Charter drafting, saw single party dominance but a consensus between Labour and Conservatives combined with mid-term executive pragmatism to create a far less amenable environment for further rights protection. Finally the new Bill of Rights debate sees inter-party conflict and ideological development amongst the Conservatives, but no clear party dominance. As a result, like the 1970s debate, a lot has been said but relatively little done.

Chapter 7 Conclusion

Through this enquiry I have sought to cast light on the curious relationship between the UK and human rights. British politicians have had a huge influence over rights development in Europe in the post-war period and have gradually assembled an extensive system of rights protection at home. Progressive action has come from across the benches with Conservative politicians stimulating and guiding the drafting of the European Convention in the late-40s, and Labour politicians both invigorating the European Court by allowing individual petition in 1966, and, from 2000, incorporating the ECHR into the domestic legal order. Both parties claim to support human rights protection, and yet both parties are equally quick to scorn the Strasbourg Court, criticise domestic judges, and question the Convention, contributing to a discourse that fundamentally undermines public faith in the whole idea of human rights. This conflicted attitude is manifested throughout the last seventy years of spasmodic engagement with rights both in Europe and at home. Periods of powerful advocacy or fundamental support, breathing life into European supranational supervisory systems, have been interspersed with stonewalling, resistance, and even outright confrontation.

Applying a socio-historical analysis, in each of the preceding chapters I have considered why the Government of the time acted as it did and what influence was exerted on these policies both by opposition elites and external forces. Attempting to tie constitutional legal change to detailed political history, I have gathered together primary archive sources, reports, and public accounts, along with contemporaneous secondary commentary, to build a rich picture of

developing human rights engagement in Whitehall and Westminster. Through this exercise the acute contingency of rights progress upon contemporaneous political context has become clear.

The inevitable corollary of this contingency has been significant volatility in political attitudes and engagement by the two main parties. Starting from the passing of the Convention, the Conservative approach was defined by conflict with Labour, with Churchill's domestic disappointment in the 1945 general election fuelling an attempt to outflank Labour in the nascent European space (assisted by the vehemently anti-socialist Maxwell-Fyfe). The support this lent to rights fell through as soon as power beckoned again at home and it was only in the mid-1970s, struggling with slim-majorities and a left-swinging Labour party, that the Conservatives have again looked seriously at rights. Here, again, a range of motives underlay rights proposals with individual ideological advocacy sitting uncomfortably alongside Maxwell-Fyfe-esque plans to constrain Labour socialism through constitutional rights.

Between these more active periods Conservatives have shown little enthusiasm for rights and have generally supported the status quo. In the 1950s this meant resisting the right of individual petition, and in the 80s and 90s it meant making only minimal amendments to statute where necessitated by adverse Strasbourg judgments. Only where Labour has actively resisted rights have the Conservatives done so also. This can be seen wherever socio-economic protections have been proposed, and, in the last decade, as the HRA has begun to bite. At the heart of this long-term, moderate, resistance appears to be scepticism towards supranational influence and, in latter years, as the judiciary has liberalised, towards judicialisation. The greatest continuity in Conservative

orientation thus appears to be the maintenance of a superficial commitment to rights as a means to suggest commitment to Europe without wanting to see that symbolic link ramify into a serious political force in the domestic constitutional space.

The Labour party has also maintained a critical attitude over the years, notwithstanding having presided over the three key steps in the UK's embrace of human rights law (the ratification of the Convention, the acceptance of individual petition, and the HRA's passage). Labour resistance has often focussed more on the merits of Convention incorporation and the potential impact of further rights protection on Labour's own policies. Right up to the 1990s the fear of right-wing judicial interference was a major source of concern for Labour elite actors (it is ironic that post-HRA frustration has instead stemmed from the liberality of the courts). Euro-scepticism and attendant resistance to supranationalism have provided additional, though more volatile, sources of concern.

While the Convention's passage was exceptional – Labour having been caught on the back foot and effectively outflanked by Churchill's Euro-federal tactics – looking at individual petition and the HRA the attitude towards European oversight has been more complex (seeking to influence as much as to be influenced). The changing nature of Labour socialism over the last seventy years has had a marked impact on the terms in which the party interacts with rights. While Simpson and others have argued that practical shifts have underlain the movement towards rights, in chapters 4 and 6 I point to the significant interaction between rights acceptance and party ideological development. Rather than simple amelioration of obstacles, a positive intent to

build rights ideas into domestic law appears to have been bound up in the broader processes of modernising Labour's policy framework. Human rights measures have come hand-in-hand with revisionist ideological development and the growing influence of the right of the party. This is not to say that the whole party has moved as one. Economic and social shifts to the centre (or to the right, depending on one's perspective) have been fiercely resisted by those on the left of the party, and these traditionalist elements have been resistant to the human rights initiatives that have come hand in hand with reforming agendas.

Moving outside of the leading parties, the contribution of the Liberal Party has also been significant and distinct. Whilst periods of enthusiasm for rights amongst both Labour and Conservative elites have been notably short lived,¹ the Liberals have been much more constant and, apart from temporarily lowering the priority of a Bill of Rights within their program towards the end of the 1970s debate, have been continuous advocates for rights (right up to their present day defence of the HRA against repeal by the Conservative portion of the coalition Government). On one level this is unsurprising as human rights advocacy fits more tidily with Liberal political ideology than it does with socialism or conservatism. Human rights support flowed easily out of both the Liberal Party's strong history of proposing civil liberties measures, and its generally pro-European sentiment. Additionally, until the 2010 coalition, the Liberals/Liberal Democrats had not had to fit their rights policies around the

¹ Each of the three major steps forward being followed by a retreat: (the Conservatives turn from the Convention post-1949; Labour's shortening of the period of acceptance of the optional articles in the late 1960s; and new Labour's winding back of support for the HRA through the mid-00s).

business of governing, removing potentially awkward interactions of policy and principle. However, since 2010 the party has not been swayed from its position, even in the face of public criticism, and, as a partner in coalition, has provided support for the much-maligned HRA during a period where few amongst the Labour and Conservative political elites would.

This support, in the face of media criticism, brings us on to one of the key dynamic factors across the last seven decades of human rights development: the shift of human rights from niche interest of European political elites to the substance of popular public discourse. While growth in awareness of rights norms was one of the principal motivations of the rights movement, the UK development has not seen growing mainstream public engagement or support, just the growing glare of public scrutiny. Against this shift there is a notable constant in that neither the Conservative nor Labour parties have ever made concerted efforts to whip up public support for pro-rights initiatives. Struggles over the Convention drafting were a private matter between the parties, played out overseas, the acceptance of individual petition was a quiet principled move played out with minimal fanfare, and the HRA was, despite its centrality to the Labour programme of constitutional renewal, a piece of fairly technical legislation handed to the public rather than sold to them.

It is only in the last few years that commentary on winding back rights protection has seen central elite actors address the issue of rights in an official party capacity. Prior to this elite actors commented publicly only on their own behalf, or as representatives of interest groups. While press coverage of the 1970s debate showed an opening up of rights debate to the public, and public elite advocacy played an important role in stimulating elite consideration, there

is no evidence of any strong connection between public interest and rights development. With a media backlash against rights building momentum it will be interesting to see how greater public input will affect the future for rights.

Other important variables that have only entered the equation later in the period of study are the potential impact of the anti-European United Kingdom Independence Party. Threatening to steal some portion of the Conservatives' euro-sceptic base could drive the Conservatives to further distance themselves from human rights or could serve to split the Conservatives' vote, either leading to more coalitions and likely perpetuating the current Bill of Rights debate (as seen in the 1970s) or returning a Labour majority (whose actions are harder to predict given the ambiguity around the party's leanings under Ed Milliband).

Whether Labour concerns with the judiciary will continue to build again, and how far Conservatives will be willing to tolerate supranational interference with domestic decisions (Parliamentary or judicial) is unpredictable (particularly as the impact of the Brighton Convention's changes to admissibility criteria will not be seen for some years). A resistance to further codification can be more safely relied upon, having been a relatively constant factor throughout the period of study, and the legacy of the substantive form of the Convention drafting will certainly continue to exercise the media if protection continues to be extended by the courts.

Considering my research's relationship with the broader academic literature this study has identified a number of shortcomings in existing arguments and potential areas for further research. Whilst endorsing the trend towards conflict-based accounts of human rights development, I have flagged up

the importance of considering a variety of inter- and intra-party motivations. Looking at the Convention drafting I have built upon Duranti's conflict account by looking deeper into Conservative intentions while also offering a new analytical take on Labour resistance. Adopting the same scrutiny to subsequent episodes reveals that while conflict appears to play an important component in rights development, it is only one amongst a range of relevant practical and principled factors. To wit, my analysis of the Social Charter drafting shows that Labour and Conservative cooperation on rights was possible, notwithstanding ongoing domestic conflict, where it was politically expedient. From the opposite perspective, my exploration of the Bill of Rights debate demonstrates that domestic rights protection comes more readily from the combination of party conflict and electoral dominance than from attempts at finding consensus.

Considering the episodes of progress: regarding individual petition I have argued that while a long period in opposition might have helped stimulate anti-executive Labour sentiment in the run-up to the 1965 decision to accept, there is also a strong link between rights support and the growing emphasis on equality and the individual in the mid-60s Labour agenda. As such, while an element of conflict may have played a part, I prefer a composite explanation combining the positive driver of a new Labour agenda with the waning of some of the existing practical and principled objections. My account of the passage of the HRA identifies a very similar pattern. A neo-revisionist ideological shift in party policy, a reactionary response to prolonged Conservative rule, and the reduction of judicialising concerns (in concert with a new openness to Europe) creating a productive environment for rights reform.

Rather than reducing the complex motivations of diverse politicians to crude collective accounts of rational choice or idealism the only way to understand Britain's interaction with rights is by drilling down into the detail of elite party opinion. The ideas, opinions, and objectives that have shaped constitutional rights reform over the last seven decades are not readily seen on the surface of the debate and only through detailed archival research and the adoption of clear analytical framework can some of the subtler, critical, shifts be brought to light.

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