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The United Kingdom’s Human Rights Act: Using its Past to Predict its Future

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THE UNITED KINGDOM’S HUMAN RIGHTS ACT: USING ITS PAST TO PREDICT ITS FUTURE

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ABSTRACT

The results of the recent General Election in the United Kingdom have both highlighted the flexible nature of the UK’s constitution and placed the UK’s existing bill of rights (the Human Rights Act 1998) in jeopardy. In order to predict the HRA’s future, it is useful to consider how and why the HRA was enacted. Through the use of primary data, this article shows that the HRA was enacted as a result of a unique combination of historical factors and the efforts of public interest groups. These two main elements are analyzed using Rational Choice Theory and Social Movement Theory, which at least partially explain how public interest groups can influence political actors to enact progressive legislation. However, neither of these theories alone offers a clear picture of what caused the UK’s bill of rights movement to succeed.

This article addresses this problem by using primary and empirical data to identify the five main techniques that public interest groups used to make the UK’s bill of rights movement successful. Those five factors are: public campaigning, capitalizing on historic trends and events, overcoming politicians’ existing prejudices, political strategizing, and creating “true believers” among key politicians. All five of these factors were necessary for the UK’s bill of rights movement to succeed and to convince the Labour Government to pass the HRA. These factors are also present in the Conservatives’ attempts to repeal the HRA.

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I. INTRODUCTION

The latest General Election in the UK resulted in its first “hung Parliament” in thirty-six years and its first coalition Government in sixty-five years. The Conservative/Liberal-Democrat coalition has already announced that it intends to make several major legislative changes. In

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1 General Elections are held at least once every five years. The public votes for their local Members of the House of Commons and the majority party in the Commons chooses who will be the Prime Minister and his or her cabinet.
2 According to the BBC, “[a] hung parliament is one in which no party has an overall majority, which means no party has more than half of MPs in the House of Commons. It means that whichever party ends up in power will not be able to win votes to pass laws without the support of members of other parties.” What is a Hung Parliament?, BBC News, May 7, 2010, available at http://news.bbc.co.uk/2/hi/uk_news/politics/8427233.stm.
3 Patrick Wintour et al., Clegg: deal or no deal?, THE GUARDIAN, May 8, 2010; The Workout Begins; Cutting the Fiscal Deficit, THE ECONOMIST, May 22, 2010. A coalition Government is a cabinet of a parliamentary government in which more than one political party cooperates. The usual reason for this arrangement is that no party on its own can achieve a majority in parliament.
addition to sweeping electoral changes, the new coalition Government is considering changing the structure of the House of Lords and altering or replacing the UK’s existing bill of rights, the Human Rights Act 1998 (HRA).\textsuperscript{4} Implemented less than 10 years ago and largely unpopular, the HRA does not have the same standing as the Bill of Rights and it is therefore vulnerable to repeal, particularly because it does not enjoy any enhanced “constitutional” status.

The HRA “incorporates” the European Convention on Human Rights (ECHR) into British jurisprudence so that the rights contained in the ECHR are now enforceable in British courts. The HRA, perhaps surprisingly to Americans, is a controversial law that has been consistently criticized by the Conservatives who have also promised to repeal it.\textsuperscript{5} However, they may be prevented from doing so by the Liberal-Democrats whose support is necessary for the Conservatives to maintain their majority in Parliament. With these opposing forces in place, it is difficult to predict what will happen to the HRA in the next few months.

The best way to discover whether the HRA is likely to be repealed is to examine what led to its enactment in the first place. Contemporaneous information contained in newspaper articles, government documents and the impressions of key players shows that the HRA’s enactment was the end result of a successful bill of rights movement that began in the UK as early as the 1960s. The movement consisted of several years of campaigning by commentators and public interest groups and, in the end, those groups were able to persuade the newly-elected Labour Government\textsuperscript{6} that the HRA should be enacted.

This result was unexpected by political commentators because the HRA was not popular and was detrimental to the political party that championed it. Incorporation of the ECHR into British law was unpopular in the UK because the ECHR was perceived as being “European” and not connected to the UK.\textsuperscript{7} The HRA also limited Labour’s power once it was in Government. The enforcement of the HRA required that the judiciary be given increased powers that were likely to lessen the powers of the Government that enacted it. After the 1997 General Election, Labour

\textsuperscript{5} Coalition Agreement: Compromising Positions, THE GUARDIAN, May 21, 2010.
\textsuperscript{6} “Government” in the UK means the Prime Minister and his or her cabinet. The Government is essentially the executive branch of the British government.
obtained executive power through its majority in Parliament, which meant that giving the judiciary the power to more creatively interpret legislation under the HRA would mean that the judiciary could use that new power against Labour’s other legislation. Enacting the HRA was clearly against Labour’s best interests. And yet, Labour was still willing to enact the HRA, which begs the question: why?

Whether a social movement like the UK’s bill of rights movement will be successful and why has been the subject of legal and political science scholarship for decades. Two theories, Rational Choice Theory (RCT) and Social Movement Theory (SMT) can shed some light on what made this social movement succeed. Rational Choice Theory is an economics-based theory that assumes that all individual political actors (whether politicians or political institutions) will create laws that advance those individual actors’ best interests. Social Movement Theory focuses on the actions of public interest groups and their ability to mobilize resources to convince politicians to adopt a policy and enact laws that are sympathetic to the group’s cause.

Despite the sophistication of these two theories, they have both been criticized as myopic or incomplete. To correct these deficiencies, this article uses goes beyond RCT and SMT to analyze the UK’s bill of rights movement, which led to the enactment of the HRA. Both RCT and SMT can shed some light on the effectiveness of this movement but neither are sufficient. Empirical evidence surrounding the events that led to the passage of the HRA, such as official documents and interviews with key players, show that SMT’s traditional campaigning and RCT’s political strategizing must be combined with other factors to fully explain this successful social movement. The five factors that made the UK’s bill of rights movement successful are traditional campaigning, capitalizing on historic trends and events, overcoming politicians’ existing prejudices, political strategizing, and creating “true believers” among key government players. Each one of these factors was instrumental in the passage of the HRA and none of them alone could have led to the same result.

This article analyzes the enactment of the HRA and its potential repeal in the several ways. Part II of this article explains the HRA and how it changed UK jurisprudence. Part III examines RCT and SMT and describes their strengths and weaknesses, particularly when applied to the creation of law. Part IV then goes beyond these two theories and, using the five factors listed above, shows how these factors came together to create

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the HRA. Part V applies these same factors to current efforts to repeal the HRA and predicts the HRA’s future.

II. THE HUMAN RIGHTS ACT 1998

The HRA’s primary purpose is to “incorporate” the myriad of political rights found in the European Convention on Human Rights (ECHR) into British law. The ECHR is an international treaty that was drafted in 1950 by the Council of Europe to protect the human rights and freedoms of its member’s citizens. The rights contained in the ECHR include several of the rights that make up the Bill of Rights such as the right to a fair trial, freedom of speech, and freedom of religion. Originally, the ECHR was intended as a vehicle where nations could bring grievances against each other but it was later expanded to allow individual citizens to sue their own countries before the ECtHR. Incorporation of the ECHR into British law means that British citizens can sue the British government for violations of the civil rights contained in the ECHR in British courts instead of going to the European Court of Human Rights (ECtHR) in Strasbourg.

In the 1940s, Labour opposed the very idea of the ECHR partly due to a fear of giving power to a European governing body. By signing the ECHR, the UK would be agreeing to be bound to the European Commission’s rulings and would be vulnerable to lawsuits from other nations. That phobia was overcome in the 1950s when the UK, under a Labour Government, signed the ECHR. In 1966, Labour also agreed that British citizens should be able take their human rights grievances to the ECtHR, which could rule a British law or executive act to be in violation of the ECHR. ECtHR rulings do not automatically alter domestic laws in UK but, in order to remain a party to the ECHR, the UK must respond to

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10 The ECHR is an international treaty that protects human rights in Europe. The rights included are mainly socio-political rights and many are similar to those found in the United States’ Bill of Rights.
11 For a brief overview of the ECtHR, see http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_EN_Portes_ouvertes.pdf
adverse decisions. However, appearing before ECtHR means filing a claim against one’s own country and travelling to the court in Strasbourg, which is a costly journey. In addition, due to the ECtHR’s considerable backlog, it can be five years before cases are heard by the court.

Despite these limitations, because the rights contained in the ECHR were already available to British citizens, the major change the HRA brought about was to empower British courts to hear human rights grievances against the British government. More specifically, the HRA gives the judiciary the ability to creatively interpret statutes and the ability to issue a Declaration of Incompatibility (DOI), which is a court-issued statement to Parliament that a law should change.

Section 3 of the HRA empowers all British courts to interpret all legislation to be compatible with the ECHR so far as it is “possible” to do so. The term “possible” is not only vague but appears to give substantial leeway to the judiciary because it does not limit judges to what is “reasonable.” Section 3 therefore encourages judges to interpret statutes creatively, with only “impossible” interpretations being excluded, so that these statutes will conform to the ECHR. The requirements of Section 3 represent a fundamental shift from traditional British statutory interpretation principles, which required the statute in question to be ambiguous or clearly erroneous before a judge’s interpretation could go beyond its literary meaning. This new judicial power also allows courts to re-examine old issues (even those decided by the ECtHR) and allows lower courts to break with prior senior judiciary decisions.

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14 The UK’s adoption of the private right to petition the ECtHR came about mainly as the result of the historical influence of the UK’s declining empire, pressure from a few interested individuals combined with the Labour Government’s naïveté regarding the decision’s constitutional impact. For fuller descriptions, see Lord Lester, U.K. Acceptance of the Strasbourg Jurisdiction: What Really Went on in Whitehall in 1965, PUB. L. 237 (1998); ALFRED WILLIAM BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE (Oxford University Press 2004). Because only two cases had been decided by the ECtHR at that time, it would have been nearly impossible to predict that the ECtHR’s prominence and activism would increase as much as it did. LORD ESTER & DAVID PANNICK, HUMAN RIGHTS LAW AND PRACTICE 8 (Butterworths 1999). As will be shown in this article, these factors are also present for the adoption of the HRA.


16 Human Rights Act, 1998, c. 42, § 3 (Eng.).


18 FRANCESCA KLUG, The United Kingdom Experience, in COMPARATIVE PERSPECTIVES ON BILLS OF RIGHTS 4 (Christine Debono & Tania Colwell eds., National Institute of Social Sciences & Law 2004); Hunt, supra note 17, at 98; Leigh & Lustgarten, supra note 17, at 517.
Section 4 of the HRA comes into play when courts find it “impossible” to interpret a statute to conform to the ECHR because to do so would alter a “fundamental feature” of the statute.\(^{19}\) When higher courts\(^{20}\) find that an Act of Parliament is incompatible with the ECHR and the incompatibility cannot be remedied through a creative interpretation, Section 4 allows these courts to issue a DOI, an official statement to Parliament that, in the court’s opinion, the statute is incompatible with the ECHR. The DOI has no legally binding effect but does put political pressure on Parliament to remedy the defect.

In addition, the HRA’s “fast-track procedure” allows the executive branch (the Government) to amend Acts of Parliament through Henry VIII clauses when it believes that doing so will improve human rights. Henry VIII clauses are statutory instruments that substantially amend or even repeal Acts of Parliament.\(^{21}\) They are controversial because they are enacted without significant parliamentary oversight and yet they can change legislation that was fully debated by Parliament. An obvious reason for the Government to use this power is in response to a DOI, which, according to some, would allow the Government and the judiciary to completely circumvent Parliament’s role in the creation of legislation.

The judicial powers created by the HRA had a significant impact on the UK’s government structure. In contrast to the United States, the British executive branch is the branch that proposes most legislation that is then reviewed and amended by Parliament. The executive has, in modern times, been the dominant branch in the British government through party control of Parliament and the use of parliamentary sovereignty. The executive (or Government) is created by whichever political party has a majority of seats (either alone or in a coalition with another party) in the House of Commons.\(^{22}\) Because Members of Parliament almost invariably vote along party lines, the Government automatically has a majority of votes for the bills it proposes to Parliament and can essentially enact whatever legislation it wants.

Power over Parliament is essential for the Government because it also ensures that, due to the UK’s doctrine of parliamentary sovereignty, the

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\(^{19}\) Re S (Minors) (Care Order: Implementation of Care Plan), Re W (Minors) (Care Order: Adequacy of Care Plan) [2002] 2 AC 291; Conor Gearty, Revisiting section 3(1) of the Human Rights Act, 119 L. Q. REV. 551, 553 (2003).

\(^{20}\) Under HRA Section 4(5), the only courts that can issue DOIs are the Law Lords, the Judicial Committee of the Privy Council, the Courts-Martial Appeal Court, the High Court of Justiciary sitting otherwise than as a trial court, or the Court of Session (in Scotland), and the High Court or the Court of Appeal (in England and Wales or Northern Ireland).

\(^{21}\) The official definition of these clauses is located at: http://www.parliament.uk/site-information/glossary/henry-viii-clauses/.

\(^{22}\) The House of Lords is not elected but also cannot block legislation which means that dominating the Commons essentially ensures that the Government’s legislation will pass.
judiciary will not unduly interfere with the Government’s legislation. The doctrine of parliamentary sovereignty states that Parliament is the most representative of the British people and the judiciary must therefore defer to it when interpreting legislation. In practice, the judiciary has shown substantial deference to Parliament but because the Government has effectively taken over Parliament through strong party control of the House of Commons, the judiciary essentially defers to the Government.

By giving power to the judiciary (both UK and the ECtHR), incorporation of the ECHR could be seen as diminishing parliamentary sovereignty and the power of both the legislature and, to a greater extent, the executive. In order for the HRA to pass, it also had to be proposed by the executive, the very branch that stood to lose the most power from its enactment. The fact that the HRA exists, therefore, is a mystery. This mystery may be solved by using (and then expanding upon) two American political science theories: Rational Choice Theory and Social Movement Theory.

III. RATIONAL CHOICE THEORY AND SOCIAL MOVEMENT THEORY

RCT is one of several economics-based theories used by some legal scholars to explain a wide range of legal phenomena such as the enactment of statutes. RCT’s central assumption is that individuals’ self-interested choices can explain or predict collective behavior in a wide variety of settings, including politics. Individuals are presumed to maximize their utility, which means that each individual will choose the option that is most beneficial or desirable to him or her. According to RCT, elections are competitions where political parties compete like businesses, but for votes rather than money. The public controls government officials through their

24 Similar theories are Positive Political Theory and Public Choice Theory. Although some researchers argue that these theories are unique, they also appear to have several elements in common. Researchers disagree as to the difference between these theories, see Daniel A. Farber & Phillip P. Frickey, Foreword: Positive Political Theory in the Nineties, 80 GEO. L. J. 457, 458-60 (1991), and they also appear to use these theory titles interchangeably. See, e.g. WILLIAM RIKER, POLITICAL SCIENCE AND RATIONAL CHOICE, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 173 (James E. Alt & Kenneth A. Shepsle eds., 1990). This article will therefore refer to all of these like-minded theories under the umbrella term “Rational Choice Theory.”
25 Fiorina, supra note 8, at 97.
26 John Ferejohn, Positive Theory and the Internal View of Law, 10 U. PA. J. CONST. L. 273, 273, 280 (2008); MARK I. LICHBACH, IS RATIONAL CHOICE THEORY ALL OF SOCIAL SCIENCE 38 (University of Michigan Press 2003). This includes ideological benefits that can also benefit others.
individual votes, which lead government officials to adopt policies that a majority of the population supports. Based on existing research, public opinion is clearly most important in determining what public policy will be. Consequently, public interest groups can influence politicians because they can have a large effect on the voting practices of their members and the public through publicity of an issue. Public interest groups can even coerce a political candidate to change his or her position if the number of the group’s supporters outweighs the costs of shifting position.

Despite its power over some voters, public interest group membership does not fully explain why politicians adopt the policies they do under RCT. A public interest group’s large size does not always result in a change in policy. Although RCT scholars have shown that politicians have good reason to listen to public interest groups who can marshal votes or funding, not all groups can promise that their members are motivated enough to base their votes or donate money on that single stance, or that their membership is large enough to make a difference at the election. Moreover, RCT does not explain in any quantifiable way when a politician will or should change his or her stance or adopt a policy favored by a public interest group. Without such data, RCT is left with a commonsensical theory that politicians can be swayed by public interest groups if the cost of supporting their policies is outweighed by the benefits. Such an intuitive theory can have very little analytical or predictive value.

To fill this gap, social scientists have used RCT to create a resource mobilization theory, Social Movement Theory (SMT), which uses RCT’s methodological individualism and combines it with concepts of ideology. SMT has shown that it takes more than discontent with one’s current situation to produce a social movement. Instead, a movement is created when groups combine their ideologies with instrumentally rational action.
This combination creates organizations that can mobilize resources that are sufficient to overcome individuals’ reluctance to bear the costs of working for change. The resources mobilized by public interest groups include obvious things such as the money and time of its participants, as well less obvious resources such as media coverage of historical incidents and alliances with other groups or authorities. SMT also studies the techniques that these groups use to gain public and government support, such as “framing of issues” to make them seem more timely and important. In other words, according to SMT, catalysts such as dramatic incidents can be combined with public interest groups’ social networks and individual motivations to result in the creation of a human rights law.

Like RCT, SMT has some limitations and is inconsistently applied. Some scholars who use SMT seem to presume that if a group can obtain enough resources (including number of members and financial capital), it can cause the government to adopt the policies it wants. To these researchers, the connection between a well-supported public interest group and its ability to influence political actors appears to be automatic. In contrast, some scholars have hypothesized that public interest groups will seek out sympathetic government actors and, if none are found, they will use more aggressive tactics such as public demonstrations. Those scholars see public campaigning as a more powerful method of influence than behind-the-scenes negotiations with politicians. This disagreement among SMT scholars means that there is no clear theory for how public interest groups can influence politicians and there are no stated criteria of when public interest groups should use overt campaigning or informal discussions.

These gaps and inconsistencies in both RCT and SMT make both theories insufficient to explain the creation of law. In addition, the empirical data analyzed below shows that the combination of these two theories also cannot fully explain the existence of the HRA. Both theories do have some predictive power: RCT’s political strategy and SMT’s traditional campaigning are manifest in the events leading up to the enactment of the HRA. However, in order to fully capture why the HRA

35 McCarthy, supra note 33, at 1216; Quigley, supra note 32, at 52-53.
36 Rubin, supra note 9, at 32, 46; McCarthy, supra note 33, at 1222-23.
37 Quigley, supra note 32, at 47-48.
was enacted, empirical evidence shows that five factors must be considered: traditional campaigning, capitalizing on historic trends, overcoming prejudices, political strategy, and creating true believers. Only two of these factors are fully explained by RCT and SMT and, as shown below, all of these factors were necessary for the HRA to be adopted by Labour and then enacted into law. As shown below, all five of these factors are also currently influencing the HRA’s uncertain future.

IV. BEYOND RCT AND SMT: FACTORS THAT CONTRIBUTED TO THE HRA

A. Traditional Campaigning

As noted above, SMT literature focuses primarily on public campaigning and public interest groups’ efforts to obtain the resources necessary to make that campaigning successful. There was certainly plenty of traditional campaigning involved with the incorporation movement in the UK. Public interest groups such as the Institute for Public Policy Research (IPPR), Charter 88, Liberty and JUSTICE were heavily involved with traditional campaigning for a bill of rights or incorporation of the ECHR. Charter 88, a pressure group that was concerned with raising public support for constitutional reform and human rights, was primarily concerned with recruiting members of the public for its cause and using the media to press for change.

As noted in some SMT literature, the acquisition of allies can be an effective way for public interest groups to obtain favorable results. Early on, public interest groups began to focus on the Labour party as most likely to support incorporation. For that reason, Charter 88 and Liberty combined forces to create the Labour Rights Campaign (LRC). The LRC was essentially a political lobby inside the Labour Party that generated substantial grassroots Labour support for incorporation, or at least gave the appearance of it. Liberty also organized a massive human rights conference in London in 1995 and began to meet regularly with other public interest groups such as JUSTICE, the IPPR, and Charter 88 in order to keep

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41 JUSTICE was originally divided on incorporation but eventually decided to come out in favor of it, although it was always a more objective public interest group than Liberty or Charter 88. Interview with William Goodhart, Member of the House of Lords, in London, UK (July, 16 2008).
43 Cress & Snow, supra note 39, at 1082.
44 Erdos, supra note 42, at 541.
Liberty also worked with lesbian and gay groups, women’s groups and ethnic minority groups to convince them that their rights would be enhanced through incorporation. These groups also took part in Liberty’s 1995 Convention, “the People’s Convention,” and contributed to its size and attendance. The convention was an essential part of the momentum generated by public interest groups.

Public interest groups’ final campaigning tactic was to create a proposal for the HRA. IPPR, a political think tank with some personal links to prominent members of the Labour Party, worked with Charter 88 and created a draft constitution. IPPR’s draft constitution was helmed by Sarah Spencer and James Cornford and constituted an important advance in the political debate about bills of rights and written constitutions. Instead of merely advocating a written constitution, IPPR showed what one could look like. The rights embodied in the Bill of Rights section of the draft constitution were mainly taken from the ECHR and the International Covenant on Civil and Political Rights as well as existing bills of rights in other countries such as New Zealand. Liberty’s leaders, Andrew Puddephatt and Francesca Klug, took this concept a step further and worked with a Labour Party official who drafted incorporation language with which Labour leaders agreed and this language was then made part of Labour’s 1996 draft Manifesto. After the Manifesto was published, public interest

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46 Klug, Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights, supra note 45, at 161-62; Interview with John Wadham, supra note 45.
47 Interview with Andrew Puddephatt, supra note 45.
48 Id. Puddephatt emphasized that “parties don’t operate on rational basis. . .They are not organized intelligences, they are masses of people and interests and they move in a certain direction when there is a certain momentum. So the whole point was to get the momentum focused by 1997 so it would be delivered. Which, I think it was. We delivered it in essentially seven or eight years.” Id.
50 Matthew Flinders, Charter 88, New Labour and Constitutional Anomie, Centre for Socio-legal Studies, July 4 2008 at 7; A Lester et. al., A British Bill of Rights (Institute for Public Policy Research 1990); Excerpts from IPPR’s Bill of Rights are available in Robert Blackburn, Towards a Constitutional Bill of Rights 533-46 (Pinter 1999).
51 Interview with William Goodhart, supra note 41. More controversially, it also allowed the judiciary to strike statutes that conflict with the ECHR.
52 Id. A manifesto is a party’s official statement of the policies it intends to enact if elected into power.
groups continued to put pressure on Labour to keep its promises for fear that Labour would lose interest once it was in power.\(^{53}\)

Although public interest groups were still putting pressure on Labour to enact the HRA once Labour was in power, these organizations did not have the huge public backing that would have made acceding to their demands necessary. Only public interest groups and political intellectuals were really pushing for incorporation or a bill of rights.\(^{54}\) Opinion polls at that time showed that there was substantial public support for a bill of rights but the public was not asked about most of the rights contained in the ECHR.\(^{55}\) Polls conducted in 2006 show that the rights people were most interested in protecting were the right to medical care and the right to have an abortion, not the more socio-political rights contained in the ECHR.\(^{56}\) Arguably, without widespread public interest in an issue, there would be no reason for Labour to adopt it because there would be no resulting significant gain in votes. Consequently, SMT’s traditional political campaigning tactics do not fully account for the public interest groups’ power over the Labour Government. Instead, in order to be successful, public interest groups had to use other resources and tools to induce Labour to make incorporation part of its campaign promises and then enact the HRA.

**B. Capitalizing on Historic Trends**

SMT literature accounts for public interest groups using the media attention that historic events can create.\(^{57}\) However, it does not so readily account for more slow-moving historical trends, which are also important because they change government actors’ minds regarding certain issues. Long-term historic trends are effective not because they draw attention to

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\(^{53}\) As discussed below, they were right to be concerned; the HRA was a weaker version than they anticipated and the Labour Government did very little consulting with these groups while it was actually drafting the HRA. JUSTICE, *JUSTICE Human Rights Bill: JUSTICE briefing for second reading in the House of Lords* (1997); Liberty, *Parliamentary Briefing on the Human Rights Bill*, (1997).

\(^{54}\) Interview with Lord Lester, Member of the House of Lords, in London, UK (May 19, 2008); Interview with Francesca Klug, former leader of Liberty and Professor at London School of Economics, in London, UK (May 1, 2008).

\(^{55}\) In 1995, seventy-nine percent of people surveyed said that they believed that Britain needs a bill of rights and an identical percentage believed that Britain also needs a written constitution. Patrick Dunleavy, et al., *Public Response and Constitutional Significance*, 48 Parliamentary Affairs 602-616 (2000). See also *GOLDSMITH & POSNER*, *supra* note 7, at 109; Interview with Lord Lester, *supra* note 54; Young, *supra* note 7, at 33-34; Weir & Boyle, *supra* note 7, at 130-31.


\(^{57}\) Rubin, *supra* note 9, at 29.
these issues but because they cause government actors to rethink their stances on them. With regard to the HRA, public interest groups capitalized on a few historical trends in order to persuade Labour to adopt incorporation. First, beginning in the 1960s, prominent judges and other commentators began to argue that a bill of rights would be beneficial to the UK. These pleas led to (ultimately unsuccessful) human rights bills in Parliament and, eventually, Labour becoming interested in the issue. Second, Labour’s historical mistrust of the conservative judiciary began to wane in the 1980s as the judiciary began to speak out against the Conservative Government on key civil rights issues.

1. Increasing Public Pleas for a Bill of Rights Led Labour to Seriously Consider the Issue

A UK bill of rights was never a major political issue until the late 1960s when a historical event “kick-started” a growing interest in bills of rights. More specifically, the Labour Government’s hasty denial of citizenship to British Asians who were expelled from East Africa caused two prominent lawyers from the Labour and Liberal parties, Anthony Lester and John MacDonald, respectively, to publish pamphlets on the possibility of a British bill of rights. However, there was no further movement on the bill of rights debate until 1974 when judge (and later Law Lord) Leslie Scarman gave a public Lecture about a bill of rights. The Guardian newspaper reported on this lecture and the media discussed it over the next few days.

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58 Prior legislation that could be referred to as a “bill of rights” such as the Magna Carta or Bill of Rights 1689 were more concerned with limiting the power of the Monarch than establishing a formal set of rights for British citizens. For example, the Magna Carta was the result of pressure placed upon John I by a group of barons wherein he agreed, among other things, that he would be bound by the law and follow legal procedures.

59 Anthony Lester later joined the Liberal-Democrats and actually represented the East Africans before the ECtHR. He was successful by using United States Supreme Court cases that held that discrimination was inherently degrading. Interview with Lord Lester, supra note 54.

60 ANTHONY LESTER, DEMOCRACY AND INDIVIDUAL RIGHTS (Fabian Tract 1968); BLACKBURN, supra note 50, at 571-575 (MacDonald’s bill as presented to the Commons by Emily Hooson in 1969 as Bill of Rights (No 2)).

61 LESLIE SCARMAN, ENGLISH LAW - THE NEW DIMENSION (HAMLYN LECTURES) (Stevens & Sons 1974); STEVENS, supra note 12, at 74.

During the 1970s, parliamentarians in both Houses and all three of the largest political parties made several attempts to create a bill of rights. These draft bills were isolated, sporadic, disconnected from any international or comprehensive human rights movement, and ultimately unsuccessful, particularly in the Commons. The most substantial of these efforts was that of a multi-party House of Lords Select Committee, which was appointed to “consider whether a Bill of Rights is desirable, and if so, what form it should take.” The arguments the Committee entertained regarding a bill of rights based on the ECHR would be echoed in the HRA debates two decades later. The Committee unanimously concluded that any bill of rights should be based on the ECHR but found they could not reach a complete agreement as to whether the UK should have a bill of rights at all. The Committee concluded, six members to five, that a bill of rights should be enacted. The proposed bill of rights was debated and carried the House of Lords by a vote of 56 to 30 but, as with prior attempts, it did not pass in the House of Commons.

The increasing number of bill of rights proposals in the 1970s were matched by Labour’s increased interest in adopting a bill of rights. In 1976, the Human Rights subcommittee of the National Executive Committee of the Labour Party published a discussion paper entitled “United Kingdom Charter of Human Rights: A discussion document for the Labour Movement.” That same year, Labour’s Home Office published its own discussion document, “Legislation on Human Rights: With Particular Reference to the European Convention.” Although neither of these documents resulted in a formal bill, Labour had shown itself willing to consider adopting a bill of rights, which made public interest groups focus on the Labour party in the future.

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64 Klug, Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights, supra note 45, at 157.
66 Id. at 32-34.
67 Id. at 20-21.
68 Surprisingly, all three Conservative members of the Committee voted for incorporation (Lord Blake, Lord Jellicoe, and Lord O’Hagan). Of the remaining three who voted yes, one was from Labour (Lady Gaitskell), another was a Liberal (Lord Wade) and one was a former civil servant who was not formally affiliated with a party (Lord Redcliffe-Maud).
69 Blackburn, supra note 50, at 917-26.
70 Excerpts of this document are available at Id. at 165-67.
By the late 1980s, there was a “growing chorus of commentators” who wanted incorporation or a bill of rights, which included academics and the senior judiciary.\(^{71}\) For example, respected judges such as Lord Bingham, Lord Browne-Wilkinson, and Sir John Laws eschewed the judiciary’s traditional reticence towards giving “political” opinions and were quite vocal in their support for incorporation in their extra-judicial writings.\(^{72}\) Other judges such as Lord Woolf, Lord Goff and Lord Bridge agreed with Lord Scarman and began using the common law more expansively to protect fundamental rights.\(^{73}\) Once the judges had made their views known, public interest groups and liberal academics began to lobby even more seriously for incorporation of the ECHR both publicly and within Labour.\(^{74}\)

2. Conservative Government’s Human Rights Abuses Revealed a Need for Incorporation of the ECHR

The Conservatives’ presidential governing style and arguable civil rights abuses during the 1980s made public interest groups and prominent commentators push even harder for incorporation or a bill of rights. Even though the Conservative Party did not obtain an actual majority of the votes in the elections of the 1980s, the Conservative Government, due to the UK’s unique electoral system, was still able to have a majority in the Commons and pass whatever legislation it wanted while in power.\(^{75}\) As the executive branch (the Prime Minister and his or her Cabinet, also known as “the Government”), the Conservative Government used its strong majority in the House of Commons to push through unpopular legislation that gave the executive even more power. For example, the Interception of


\(^{75}\) KLUG, *The United Kingdom Experience*, supra note 18, at 2.
Communications Act 1985 allowed the executive to intercept private citizens’ mail and telephone communications. Parliament, traditionally thought of as a check on the executive, was proving ineffective in this capacity and the result was a diminishment of rights such as privacy and freedom of expression. According to former Liberty leader Andrew Puddephatt, “the trouble was that as the government began to legislate more extensively in this area in the 1970s and 1980s, the traditional silences of the law became smaller or a bit more noisy. The Conservative Government started to encroach upon those traditional areas.”

The Conservative Government also flexed its muscles in other areas, which led to an upswing in judicial activism and made the Conservatives increasingly unpopular. For example, the poll tax passed by the Conservative-dominated Parliament in 1989 unfairly penalized the poor, and led to public protests. In the Spycatcher case, the Government attempted to stop the publication of a book written by a former MI5 employee by arguing that the publication was in violation of the Official Secrets Act 1911. The Law Lords refused to grant the additional injunctions that the Government wanted because the book had already been published in Australia and the United States. The Conservative Government was also blamed for the number of rulings from the ECtHR that found the UK wanting in human rights protections. British citizens were able to repeatedly obtain human rights remedies that were not available in domestic courts, which was, in effect, “airing Britain’s dirty

76 STEVENS, supra note 12, at 141.
77 Interview with Andrew Puddephatt, supra note 45.
80 Attorney General v. Guardian Newspapers (No. 2), (1990) 1 A.C. 109. However, this case is also an instance of excessive judicial deference because the Law Lords found that, although no new injunctions should be issued, the Guardian had breached its duty of confidence. This deference likely led to lingering doubts that the judiciary could be trusted to protect human rights. See STEVENS, supra note 12, at 75.
laundry” in the ECtHR. Such rulings were, at the very least, bad press for the Conservative Government and possibly also a lightning rod for political commentators, the media and the public at large to demand serious changes. As time went on, UK judges and politicians began to want a way to take human rights cases away from European judges and place them in the hands of British judges who, despite their historically conservative image, were appearing more and more capable of opposing the Government on personal liberties grounds.

3. The Judiciary Began to Shed its Conservative Image

The British judiciary has traditionally been perceived as being conservative and out of touch with the average citizen. That impression was exacerbated by a series of unpopular decisions in the 1970s where the judiciary failed to protect civil rights or prevented the Government from instituting social reforms. However, a trend of increased judicial review of administrative action had begun as early as the 1960s when the House of Lords began to attach concepts like due process to the traditional and deferential Wednesbury doctrine. By the 1990s, it was usually the judiciary that ended up limiting the Conservative Government’s human rights abuses. The judiciary arguably turned the other way in some

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82 JACKSON, supra note 71, at 9. Commentators disagree as to how poor the United Kingdom’s human rights record in ECtHR actually was. Compare KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS, supra note 45, at 20; JACKSON, supra note 71, at 1 (“During the first thirty years (1959-89) of the European Convention on Human Rights, the United Kingdom was found to be in violation of the ECHR twenty-three times; measured both by the number of complaints before the Court and by the violations found, it was the most frequent offender.”); Janet L. Hiebert, Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?, 4 INT’L J. CONST. L. 1, 2-3 (2006); STEVENS, supra note 12, at 48 (noting that the UK was the ECtHR’s “second best customer” and it lost most of the cases that went to Strasbourg) with Clive Walker & Russell L. Weaver, The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World, 33 U. MICH. J. L. REFORM 497, 513 (2000) (The United Kingdom’s number of adverse decisions from Strasbourg “is even modest compared to fellow European states that have domestic constitutional review.”); K. D. Ewing, The Human Rights Act and Parliamentary Democracy, 62 MOD. L. REV. 79, 83 (1999) (“Britain does not have the worst record of compliance under the Convention as is sometimes claimed”). Since the implementation of the HRA, the UK’s record has improved. See Merris Amos, supra note 15. But see Robert Verkaik, Britain in the Dock for Human Rights Failures After More than 100 ‘Guilty’ Judgements Filed, THE INDEPENDENT, Oct. 3, 2005 (“Britain has one of the worst human rights records in Europe”).

83 Walker & Weaver, supra note 82, at 513.

84 STEVENS, supra note 12, at 38, 75.

85 Courts were particularly criticized for overly deferring to the police, which led to wrongful convictions in several high-profile cases such as the Guildford Four. Ros Franey, Trial and Error, THE GUARDIAN, Oct. 18, 1989.

86 STEVENS, supra note 12, at 41. The Wednesbury test applies when courts review administrative actions and it is very deferential to the agencies.
noteworthy cases but it had also begun to use its power to curtail “the excesses of the Conservative government.”

The common law was also vigorously developed during this time and statutory interpretation began to expand, most notably with Pepper v. Hart, which allows courts to examine a statute’s legislative history to determine the statute’s meaning instead of merely looking at the language of the statute. After the enactment of anti-discrimination legislation, the judiciary also began to adjudicate regarding a form of civil rights. In addition, British courts gradually had more contact with and interest in the ECHR. The senior judiciary began to add ECtHR jurisprudence into British common law, which arguably broadened their approaches to statutory interpretation and paved the way for alternative views on the proper limits to judicial review. The British judiciary’s inclination towards increased judicial review was accelerated in the area of European Union law in the 1980s and 1990s, culminating in the Factortame case, which held that British courts can strike British laws (even Acts of Parliament) if they conflict with EU laws.

British judges had also began to speak out against Government policies in their decisions and extra-judicially. Some of these extra-judicial speeches showed that the judiciary was seeing its powers more expansively. The Conservative Government was not pleased with this development and criticized the judiciary as undemocratic and opportunistic. There is also evidence that the Conservative Government deliberately encouraged confrontation with the judiciary in the belief that

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87 Ewing, The Human Rights Act and Parliamentary Democracy, supra note 61, at 81; Klug, The United Kingdom Experience, supra note 18, at 2; Stevens, supra note 12, at xv.
89 Lester & Pannick, supra note 14, at 3.
90 Jackson, supra note 71, at 123.
91 Young, supra note 7, at 34. For cases exemplifying this transition, see R v. Secretary of State for the Home Department, ex parte Simms, (2000) 2 A.C. 115, 131 (Lord Hoffman); Derbyshire County Council v. Times Newspaper Ltd., (1992) Q.B. 770, 812. This was a gradual and piecemeal process. For a description of older cases that introduced ECHR concerns into British jurisprudence, see Lord Lester, The Art of the Possible - Interpreting Statutes Under the Human Rights Act, supra note 13, at 666.
92 Stevens, supra note 12, at 46; Andrew Le Sueur, The Judges and the Intention of Parliament: is Judicial Review Undemocratic?, 44 Parliamentary Affairs 283, 294-95 (1991); Wade, supra note 73, at 521; R v. Transport Secretary, ex parte Factortame (No. 2), (1990) 1 A.C. 603.
93 Id. at 70.
94 Id. at 50.
the Government would win public support. Instead of restraining the judiciary with its criticisms, the Conservative Government may have unwittingly begun to paint the judiciary as a more modern, citizen-friendly branch. During the 1980s, the media began to highlight the increasing conflicts between the British judiciary and the Government. The tabloid press was clearly biased against the judiciary whereas the traditional press was more even-handed in describing the conflicts. However, the media’s scorn of judicial interference had an unexpected effect: it allowed the judiciary to shed its conservative image.

By the early 1990s, the media had begun to argue that the judiciary’s conservative reputation was no longer justified. Labour’s fear of the senior judiciary’s homogenous and privileged background began to seem overly simplistic and unfair when judicial review had been repeatedly used as a tool to remedy injustices. As a result, the Labour party became less reluctant to enact an incorporation scheme that gave increased power to the judiciary. In fact, for both main opposition parties, Labour and the Liberal-Democrats, “[j]udicial review of executive action, particularly of the action of successive Conservative Home Secretaries, had come to seem like the only effective check on an overreaching government.”

History therefore paved the way for the HRA by showing the flaws in the UK’s existing government system. Public interest groups were then able to portray the executive as somewhat tyrannical and the judiciary as a new champion for civil rights. Although several key events drew the media and commentators’ attention to the bill of rights issues, it is the combination of these events and the momentum generated by public interest groups that

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95 Id. at 72. The Conservative Government was also wary of what it perceived as activism by the ECtHR. Lord Mackay even went to Strasbourg himself to petition for restricting the ECtHR’s powers in the wake of a series of embarrassing rulings against the UK, which had “put Britain almost at the top of the league table for breaches of the European Convention on Human Rights.” Frances Gibb, Mackay Seeks Curbs on European Court, THE TIMES, Apr. 9, 1996.

96 STEVENS, supra note 12, at 49.

97 Compare, e.g., Does This Judge Think He’s Above Democracy?, THE DAILY MAIL, Nov. 2, 1995 (referring to Lord Justice Sedley), with, e.g. Nick Cohen, The Long Arm of the Law: Government Clashes with the Judiciary are Mounting – and They Won't Stop Under Labour, THE INDEPENDENT, Nov. 5, 1995.

98 KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS, supra note 45, at 158.

99 Stephen Ward & Cathy Newman, Judges vs. the Government; As the Government seeks to defy Nolan, the Battle Between the Executive and the Judges is now More Intense than at Any Time in Recent History, THE INDEPENDENT, Nov. 3, 1995.


changed Labour’s mind about the viability of incorporation. The UK’s historic trends may have paved the way for change but probably would not have resulted in massive constitutional reform without public interest groups’ further intervention. In addition to showing that a need existed for incorporation, public interest groups also had to overcome Labour’s remaining mistrust of the judiciary and fear of judicial review because the judiciary would be at least partially responsible for enforcing the HRA.

C. Overcoming Labour’s Fears of Judicial Review

In addition to the typical problems associated with convincing politicians to adopt a new policy that may be unpopular with their constituents, the public interest groups that were campaigning for incorporation of the ECHR faced additional obstacles. Incorporation of the ECHR was a difficult sell for public interest groups because, as shown above, it would entail taking power away from the executive by giving increased power to the judiciary. 102

To combat this obstacle, public interest groups had to frame incorporation so that it would not appear to give too much power to the judiciary. Framing of issues is an essential part of SMT and resource mobilization. 103 In order to recruit participants, public interest groups must frame events so that these potential participants interpret them as causes that they will support. 104 These frames can include amplifying the intensity of a problem or extending its sphere so that more people will perceive it as affecting them. 105 Although SMT scholars do posit that public interest groups may change their frames to appeal to different audiences, including government actors, SMT research focuses on the framing of issues that bind an organization’s participants together. 106 It does not consider whether public interest groups can also frame issues so that they will be more palatable to those in authority. However, that is precisely what happened with the HRA.

Although the UK had signed the ECHR, successive UK Governments were still unwilling to incorporate the ECHR into UK law to make it enforceable by British courts even though the vast majority of the

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102 The legislature also received power from the HRA through the creation of the influential Joint Committee on Human Rights and the HRA’s requirement that Government Ministers make a statement regarding a bill’s compatibility with the ECHR when introducing any new bill.


104 Id. at 466; Quigley, supra note 32, at 56.


106 Benford & Snow, supra note 105, at 630.
other ECHR signatories had already done so. The major impediment for incorporation was that no Government in power wished to risk giving power to the judiciary. All prior attempts at incorporating the ECHR had failed mainly because once a party became dominant in the Commons, it became uninterested in risking judicial intervention or further European interference with the running of the British government.\textsuperscript{107} Because there was no public pressure to incorporate the ECHR, there was no reason to risk any power shifts that incorporation would entail. For example, when the Conservative Party took power under Margaret Thatcher in 1979, it did not pursue passing a bill of rights even though it had committed to considering one in its Manifesto.\textsuperscript{108} Although the Conservatives said in 1985 that they were considering the idea, by 1989 they had decided that having a bill of rights would give too much power to the judiciary.\textsuperscript{109}

Labour was also resistant to increased judicial power because, as noted above, it believed that the judiciary was incapable of using its powers to protect the rights of the people. For this reason, Labour, like the Conservatives, was unwilling to give the judiciary the ability to strike down Acts of Parliament. In order to convince the Labour Party to adopt a bill of rights or incorporation of the ECHR into its policies, the public interest groups had to overcome some prominent Labour members’ continuing mistrust of the judiciary and corresponding reluctance to endorse incorporation. Public interest groups quickly realized that, in order to gain Labour’s support for a bill of rights, they would have to find a way to address these concerns of judicial parity and diminished parliamentary sovereignty.\textsuperscript{110} Consequently, Liberty began to incorporate the doctrine of parliamentary sovereignty into its proposals and jettisoned the judiciary’s ability to strike incompatible legislation, which had been a prominent part of public interest groups’ campaigns and prior bills of rights attempts.\textsuperscript{111}

\textsuperscript{107} In fact, most of the supporters of the idea of a bill of rights were Liberal-Democrats who never had a majority in the Commons while this debate existed.
\textsuperscript{108} The Conservative Party Manifesto stated that “[t]here are other important matters, such as a possible Bill of Rights . . . which we shall wish to discuss with all parties.” Conservative Party, \textit{Conservative Manifesto} (1979), available at http://www.psr.keele.ac.uk/area/uk/man/con79.htm. The manifesto also advocated greater executive control. \textit{See also} Klug, Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights, \textit{supra} note 45, at 156-57.
\textsuperscript{109} Blackburn, \textit{supra} note 50, at 901-02 (Parliamentary questions posed to the Home Office Minister in 1985 and the Prime Minister in 1989).
\textsuperscript{110} For example, Clare Short, who still mistrusted the judiciary after the Birmingham Six Case, had to be convinced to support a bill of rights before Labour would proceed with it. Interview with Andrew Puddephatt, \textit{supra} note 45.
\textsuperscript{111} \textit{Id.}; Interview with Conor Gearty, Professor at London School of Economics, in London, UK (Apr. 23, 2008). Former Labour leader John Smith’s early vision of an incorporation statute embraced the Canadian model, which includes a strong judicial component: it allows Parliament to legislate around the bill of rights only by including an express statement in the statute at issue that it wished to do so. Blackburn, \textit{supra} note 50, at 932-37. However, Blair was unwilling to give the judiciary that much power.
According to Puddephatt, enacting a bill of rights that took note of the UK’s political culture, “would be more likely to take root than if it were seen as something purely external to that society.”\textsuperscript{112} The written result of Liberty’s efforts came in 1990 as \textit{The People’s Charter}, drafted in 1991 by Francesca Klug.\textsuperscript{113} Liberty’s approach was unique because it offered an alternative to a United States’ style judicial review. It allowed Parliament to legislate expressly around the bill of rights but also allowed the judiciary to express a view as to whether that legislation or provision thereof was in breach of the bill of rights, which was a precursor to the HRA’s DOI. In 1996, the Constitution Unit\textsuperscript{114} worked closely with future Home Office Minister Jack Straw and drafted a report recommending how to technically approach incorporation, which was circulated throughout Government departments by Labour’s the various spokesmen.\textsuperscript{115} Liberty took on the challenge of convincing backbench Labour MPs\textsuperscript{116} that incorporation and parliamentary sovereignty could co-exist.\textsuperscript{117}

After Labour won the 1997 election and decided to pursue the HRA, it used public interest groups’ arguments to persuade its members in the Commons that the HRA would not give the judiciary too much power. For example, the HRA’s consultation paper downplayed the court’s potential increase in powers and took great pains to show that parliamentary sovereignty would remain intact.\textsuperscript{118} It also made much of the Government and Parliament’s responsibilities to ensure that future UK legislation did not run afoul of the ECHR.\textsuperscript{119} Labour’s anticipation of its member’s mistrust of the judiciary is evident. Even while Labour praised the HRA’s “culture of rights” as a boon for citizens, it attempted to mitigate potential litigiousness or abuse of these new rights. In its campaign document “Rights Brought Home,” Labour proposed that “[b]y increasing the stake which citizens have in society through a stronger constitutional framework of civil and political rights, we also encourage them to better fulfill their responsibilities. This is an essential part of our strategy to re-establish a balanced relationship between rights and responsibilities.”\textsuperscript{120}

\textsuperscript{112} Interview with Andrew Puddephatt, \textit{supra} note 45.
\textsuperscript{113} \textit{FRANCESCA KLUG, A PEOPLE’S CHARTER: LIBERTY’S BILL OF RIGHTS: A CONSULTATION DOCUMENT} (National Council for Civil Liberties 1991), available in\textit{ BLACKBURN, supra} note 50, at 547-571. Civil Liberties organizations in Scotland and Northern Ireland also published bills of rights in 1990 and 1992, respectively.
\textsuperscript{114} The Constitution Unit is a UK based think tank that specializes in constitutional affairs and comparative constitutional studies.
\textsuperscript{115} Interview with Robert Hazell, leader of the Constitution Unit, in London, UK (Aug. 26 2008); N. SMITH, HUMAN RIGHTS LEGISLATION (The Constitution Unit 1996).
\textsuperscript{116} Backbench MPs are members of the House of Commons who are not also members of the Cabinet.
\textsuperscript{117} \textit{KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS, supra} note 45, 161.
\textsuperscript{119} \textit{Id.} at 12.
\textsuperscript{120} \textit{Id.} at 14.
Labour made similar statements in the documents it circulated to civil servants as guidance for drafting the HRA. In June 1997, Klug wrote a paper entitled “Briefing on Incorporation of the European Convention on Human Rights into UK Law: the ‘British Model’,” which was circulated to civil servants. This paper described the HRA and made recommendations regarding issues such as judicial review and constitutional entrenchment. Klug wrote a second paper that focused exclusively on the solution to judicial review that was reached by Labour and public interest groups: the DOI. Klug’s second paper emphasized that a DOI would not allow courts to strike down legislation. The Human Rights Bill’s white paper also emphasized the limits to the judiciary’s new powers. It spent very little space explaining the judiciary’s interpretative powers and only slightly more on the DOI. Instead, the white paper explained at length that, in order to preserve parliamentary sovereignty, judges would not have the power to overturn primary incompatible legislation. Although it did note that a DOI “will almost certainly prompt the Government and Parliament to change the law,” it also stated that DOIs are not binding and enabled “the Government to continue to argue, for example in Parliament or in Strasbourg, that the legislative provision is not incompatible.”

In addition, the white paper attempted to minimize other potential threats to parliamentary sovereignty. It stated that the Human Rights Act would not be entrenched or given a special constitutional status – it would retain the same status as any Act of Parliament. The white paper also detailed the Government’s new relationship with Parliament. The white paper explained the limits on and utility of the “fast-track” remedial procedure for revising incompatible Acts of Parliament with a statutory instrument, which arguably increased the Labour Government’s ability to circumvent parliamentary debate. However, the Bill’s statement of

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123 A “white paper” is the authoritative report that accompanies proposed bills.
124 Labour Government, supra note 118.
125 Primary legislation is Acts of Parliament as opposed to regulations (also called secondary legislation or statutory instruments).
127 Id. at § 2.16.
128 Statutory instruments are a form of regulations that have greatly reduced parliamentary scrutiny. The fast-track procedure and its controversial nature are described more fully below.
129 Labour Government, supra note 118, at Notes on Clause 10. (“There is no requirement for the Government to make amendments under this clause, but it is almost certain that the Government would wish to respond in some way to any declaration of incompatibility.”).
compatibility requirement\textsuperscript{130} and the creation of a parliamentary committee for human rights would, the white paper promised, increase transparency and parliamentary involvement in the legislation process.\textsuperscript{131} The Home Office’s press release on the HRA repeated the points made in the white paper and focused on the retention of parliamentary sovereignty through the judiciary’s inability to strike down legislation.\textsuperscript{132} The DOI was once again phrased in terms of the ability and duty of Parliament and the Government to “put matters right.”\textsuperscript{133}

During the HRA’s parliamentary debates, the Labour Government and those in favor of the HRA spent a lot of time arguing that parliamentary sovereignty would remain intact through DOIs and the ability of Parliament to repeal the HRA.\textsuperscript{134} In the House of Lords debates, the Opposition’s fear of increased judicial power was linked to its concerns of increased judicial politicization and unelected judges making policy decisions.\textsuperscript{135} Unsurprisingly, this argument was met with incredulity by HRA proponents who noted that UK judges already decide political cases just like other judges throughout the world do.\textsuperscript{136} In the Commons, the nuances of the new powers HRA would give to the judiciary – increased interpretation and DOIs – were not overly dwelt upon.\textsuperscript{137} Notably, Labour Minister Jack Straw praised the HRA as complementing existing rights, providing a cost-effective alternative to Strasbourg and contributing to ECtHR jurisprudence.

\textsuperscript{130} Section 19 of the HRA requires that when a Minister introduces a bill to Parliament, he or she must make a statement that he or she believes the bill is compatible with HRA or that it is not. Current Departmental Guidance requires that the Minister also give reasons for his or her opinion.

\textsuperscript{131} \textit{Id.} at §§ 3.4-3.7. In contrast, the idea of a human rights commission was side-stepped, but not rejected outright. \textit{Id.}

\textsuperscript{132} Home Office, Rights Brought Home After 50 Years (Oct. 24, 1997).

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} 582 P. L. D., H.L. (5th ser.) (1997) 1228, 1231 (Lord Irvine); 1246 (Lord Bingham); 1307 (Lord Mostyn) 1263, 1265 (Lord Kirkhill), 1275 (Lord Borrie), 1298 (Lord Renton) (arguing that Parliament has always had to amend judge-made law); 1286 (Earl Russell). Other proponents of the HRA (and historical proponents of bills of rights) such as Lords Lester and Scarman proclaimed it to be a victory for parliamentary sovereignty with the courts being empowered to interpret statutes to give effect to parliament’s desire to satisfy its obligations under the ECHR. \textit{Id.} at 1240 (Lord Lester), 30 (Lord Scarman), 66 (Lord Donaldson).

\textsuperscript{135} Id. at 1254 (Lord Waddington); 1238 (Lord Kingsland); 1266-68 (Lord McClusky); 1267 (Lord McClusky), 1275 (Lord Borrie); 1262-63 (Lord Mayhew); 1281 (Lord Wilberforce); 66 (Lord Donaldson); 1306 (Lord Henley); 1254 (Lord Waddington). The opposition also warned of a “deluge of claims of breach of the convention” that would surely follow the enactment of the HRA. \textit{See Id.} at1292 (Lord Donaldson).

\textsuperscript{136} 582 P. L. D., H.L. (5th ser.) (1997) 1246 (Lord Bingham); 1262 (Lord Lester); 1287 (Earl Russell); 1298 (Lord Renton). The Lords also noted that both the public and the senior judiciary supported incorporation and it was part of a historical movement. \textit{Id.} at 1239 (Lord Lester); 1307 (Lord Mostyn); 1275 (Lord Borrie); 1294 (Lord Cocks); 1236 (Lord Kingsland).

\textsuperscript{137} STEVENS, supra note 12, at 174; Interview with Merris Amos, Senior Lecturer at Queen Mary, University of London, in London, UK (Mar. 31, 2008).
and doing this in a way that did not compromise parliamentary sovereignty.\(^{138}\)

The Conservatives opposed the HRA during the parliamentary debates mostly on parliamentary sovereignty grounds. The DOI, combined with the “fast-track” procedure, was seen by some as a way for the Labour Government to circumvent parliamentary scrutiny.\(^{139}\) The “fast track” power was justified by the Lord Chancellor and other proponents as an efficient and not automatic response to a DOI.\(^{140}\) This was a difficult line for the Labour Government to walk – no response to a DOI would eviscerate its effectiveness but automatic remedial responses would seriously weaken parliamentary sovereignty. To combat this problem, the Labour Government emphasized Parliament’s ability to ignore the DOI while being aware of the informal pressures placed upon it by both the UK courts and the ECtHR to remedy perceived incompatibilities, with the result that legislation (fast-track or otherwise) would be likely (but not necessary) to occur.\(^{141}\)

While the HRA was being debated in Parliament, the House of Lords published its Research Paper on the Human Rights Bill. With regard to the constitutional issues embedded in the HRA, the Research Paper focused on the preservation of parliamentary sovereignty and the limits placed on judicial power, including the fact that a DOI is not the same as striking down legislation.\(^{142}\) It also showed another limit to judicial power: “a decision of the Government not to introduce legislation to correct an incompatibility would not be capable of being challenged in the courts.”\(^{143}\) Therefore, if the Government or Parliament refused to respond to a DOI, there would be no way for citizens to challenge that decision in British courts. The Research Paper, therefore, attempted to quell the fears of some

\(^{139}\) 582 PARL. DEB., H.L. (5th ser.) (1997) 1253-54 (Lord Waddington); 1266-67 (Lord McClusky); 1275 (Lord Borrie); 1250 (Lord Lichfield); 1238 (Lord Kingsland). The Select Committee on Delegated Powers and Deregulation also considered the HRA and warned about the dangers of the Henry VIII clauses contained in the HRA’s “fast track” procedure. SELECT COMMITTEE ON DELEGATED POWERS AND DEREGERATION HUMAN RIGHTS BILL. NO. SESSION 1997-98, 6TH REPORT, 1997, 6.
\(^{140}\) 582 PARL. DEB., H.L. (5th ser.) (1997) 1231 (Lord Irvine); 1237 (Lord Kingsland).
\(^{141}\) Id. at 1228, 1231 (Lord Irvine); 1289 (Earl Russell); 1252 (Lord Mischon); 1284 (Lord Windlesham). Lord Windlesham feared that the new pressures would not be as effective as the older, more hidden political pressures inherent in the UK’s government system.
\(^{143}\) Id. at 22.
Lords that the Government would use the “remedial fast-track” procedure to contravene parliamentary scrutiny.\textsuperscript{144}

These documents and debates show that increased judicial power was a major hindrance to incorporation that public interest groups had to overcome. In addition to its historical mistrust of the judiciary as being overly conservative, Labour was unwilling to compromise parliamentary sovereignty and its own executive power. Public interest groups therefore worked with Labour to create the DOI solution to the judicial review problem. Once it was convinced to adopt the HRA, Labour spent a lot of effort to portray the HRA as having a minimal impact on parliamentary sovereignty. Public interest groups also worked with Labour to create the actual wording of the HRA and campaigned for its passage in Parliament.

However, the removal of Labour’s fears of judicial intervention was still not enough to make Labour adopt incorporation as part of its policies. Even though the psychological barriers had been removed, public interest groups still had more obstacles to overcome. SMT political strategizing and using historic events was insufficient to convince Labour to adopt an incorporation policy when Labour had opposed incorporation for so long. It was simply not enough to make incorporation palatable – it had to be a valuable platform that Labour could use to obtain power. The next step for these groups was, therefore, to find a way to make incorporation a political tool that Labour could use to win the next election or, at the very least, form a coalition with the Liberal-Democrats to oust the Conservatives from power. As shown below and as predicted by RCT, obtaining votes was Labour’s chief concern for the 1997 election and public interest groups needed to make incorporation appear useful to Labour to achieve its goals.

\textbf{D. Political Strategy}

Under a political strategizing or RCT explanation, the Labour Government would agree to pass the HRA, which gave some of its power to the judiciary, only if doing so would also give it more power or at least not less. The most obvious explanation for supporting the HRA is that Labour believed doing so would give it a majority in Parliament and return it to power. There is some evidence for this. Labour used incorporation in two ways: as a new campaigning platform and to create a potential coalition with the Liberal-Democrats.

\textsuperscript{144} \textit{Id.} at 22 (footnote omitted). The Research Paper also stated that although the Government is not required to alter legislation after a DOI, “it is almost certain that the Government would wish to respond in some way to any declaration of incompatibility.” \textit{Id.}
1. Labour’s New Platform

Although public interest groups had to frame incorporation to make it more palatable to Labour leaders, Labour itself had to frame incorporation so that it would be accepted by the public. The public had never been interested in the rights contained in the ECHR and there was a strong anti-EU and anti-Europe sentiment in the UK that Labour needed to avoid. There was no evading the fact that incorporation of the ECHR would bring European human rights law into the UK but, as Labour showed, that fact could be mitigated with the right rhetoric. In fact, Labour was able to make incorporation a powerful part of its identity as “New Labour.” While campaigning, Labour made repeated use of its constitutional reform platform as part of its efforts to modernize its message. For example, before the 1992 General Election, Labour included a precursor of the HRA in its 1992 Manifesto. The 1992 Manifesto declared that it was “time to modernise Britain’s democracy” and that Labour was committed to “radical constitutional reform” which included a “Charter of Rights, backed up by a complementary and democratically enforced bill of rights.”

Because Labour had adopted policies on crime and terrorism that were uncomfortably similar to existing Conservative policies and Labour had rejected its prior socialist bent, Labour needed something unique for which to stand. Constitutional change became that policy. Some say that Labour was trying to preserve its sense of “radicalism” while its economic policies drifted closer to those of the Conservatives. Others argue the opposite – Labour was trying to show that it wanted to preserve individual rights and not just collective ones in order to assuage the fears of the UK’s middle class that Labour stood for socialism. In any event, constitutional reform was a good choice because it brought in new issues to the debates and it also divided the Conservative party, which had no choice but to oppose these changes. Constitutional reform had also been previously adopted by the Liberal-Democrats, which made the reforms look less partisan and made the Conservatives look out of touch.

In order to persuade the public that incorporation would be beneficial for British citizens, Labour focused on incorporation’s practical benefits as well as more high-minded ideals. Labour leaders created a

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145 Available in BLACKBURN, supra note 50, at 930-31. A manifesto is a party’s official statement of the policies it will enact if elected into office.
147 Interview with Conor Gearty, supra note 102. Gearty advised Blair to do this.
149 Interview with Conor Gearty, supra note 102.
150 COOK & MACLENNAN, supra note 101, at 4.
perceived need for constitutional reform by emphasizing the UK’s current human rights problems. For example, Labour leader John Smith made a constitutional reform speech that emphasized the inadequacies of the common law in the protection of rights, the UK’s unique and lonely status of having no mechanism by which its citizens could understand and assert their rights, and the delays of going to the ECtHR.  

Smith’s speech was echoed a few months later, in May 1993, by Labour’s Constitutional Spokesman, Graham Allen, in a statement to the House of Commons that harshly criticized the Conservative Government’s dominance over Parliament and advocated a written bill of rights incorporating the ECHR. Like Smith, Allen grounded the proposed incorporation within Labour’s overall constitutional reform package. He also based Labour’s intention to incorporate the ECHR on its desire to make vindicating rights easier and to lessen the number of ECtHR cases decided against the British government. Tony Blair, Smith’s Shadow Home Secretary, made a similar speech at the 1993 Labour Party Conference, which made Labour’s case for the creation of a British bill of rights as part of its “radical” constitutional reform package. Blair declared that incorporation of the ECHR was “a necessary and sensible step” to encourage the recognition of human rights in the UK.

After losing the 1992 election, Labour continued to strategize on how it could use constitutional reform and incorporation of the ECHR to obtain more votes. The early death of Labour leader John Smith made Tony Blair the new Labour leader and he continued to use incorporation as a pledge to improve British citizens’ lives. In his Party Leadership Election Statement in 1994, Blair mentioned entrenching rights for UK citizens and in his “Speech on the Constitution” in 1996, he advocated incorporation of the ECHR. Although less bold than its predecessor’s, Blair’s constitutional reform proposals were embraced by the Labour-

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151 BLACKBURN, supra note 50, at 932-37.
152 Id. at 939, 941.
153 “Shadow” is the name added to the names of the Opposition’s (the minority party) ministers.
154 Id. at 942-51.
155 Prior to this time, he had been against incorporation or a British bill of rights. KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS, supra note 45, at 160.
156 The 1992 election was particularly painful for Labour because the Tory victory was contrary to polls, which had predicted a Labour victory.
Labour’s position on incorporating the ECHR was reiterated at the Labour Party Conference in 1994. As the 1997 election approached, Labour maintained its commitment to incorporation. Labour’s election Manifesto presented incorporation thusly:

Citizens should have statutory rights to enforce their human rights in the UK courts. We will by statute incorporate the European Convention on Human Rights into UK law to bring these rights home and allow our people access to them in their national courts. The incorporation of the European Convention will establish a floor, not a ceiling, for human rights.

Labour also issued “Bringing Rights Home, Labour’s Plans to Incorporate the European Convention on Human Rights into U.K. Law – a consultation paper.” In the consultation paper, Labour made its case for incorporating the ECHR. The consultation paper focused on the popular and elite support for incorporation, citing recent polls and listing prestigious Labour and Conservative judges who had voiced support. The consultation paper’s final major point was Labour’s desire to create a “culture of rights.” This culture, Labour stated, would ameliorate the damage done to the rights of individuals by the Conservative Government.

Labour was victorious at the 1997 election and, once in power, very quickly began to work on the HRA. As discussed above, part of passing the HRA was selling it to Parliament as well as the public. For that reason, the Human Rights Bill’s white paper’s first chapter detailed the reasons for the Human Rights Bill. In addition to ameliorating fears of judicial review, the white paper highlighted the practical utility of the Human Rights Bill for UK citizens who want to enforce their rights more easily in domestic courts, as well as how it would remedy the UK’s failings before the ECtHR both by providing a remedy at home and by allowing UK jurisprudence to influence the ECtHR. The white paper praised the utility of the rights contained in ECHR and the ECtHR and made a point of explaining the UK’s part in the

160 BLACKBURN, supra note 50, at 951.
162 Labour Government, supra note 50, at 954-60.
164 Id. at §§ 1.14-1.19.
creation of both. The white paper also took the opportunity to blame the need for the HRA on the abusive actions of the Conservative Governments in the 1980s and early 1990s. The Home Office’s press release also focused on the inconvenience of using the ECtHR.

The Labour Government continued to argue the HRA’s benefits while the bill was being debated in Parliament. The Lord Chancellor, Lord Irvine, began with a speech that justified the need for the HRA using the pragmatic reasons previously given by the Labour Government: the time and expense wasted by UK citizens in going to Strasbourg and the UK’s poor record before the ECtHR. The Lord Chancellor and other Lords also focused on the “culture of rights” the HRA would create for British citizens and the way incorporation would improve the UK’s reputation abroad. The Lord Chancellor also based the need for the HRA on more high-minded grounds such as the protection of minorities, who may suffer at the hands of the democratic majority.

In the Commons, Jack Straw introduced the Human Rights Bill with a speech similar to that of Lord Irvine. Straw praised the HRA as complementing existing rights, providing a cost-effective alternative to Strasbourg and contributing to ECtHR jurisprudence. These debates resulted in the HRA passing the Commons and the Lords with no substantial changes. Despite the controversial nature of the HRA, Labour was able to get the legislation it wanted. Labour’s arguments in support of the HRA were therefore key in creating a viable campaign platform to get into power and, once in power, making sure that the HRA actually passed in Parliament.

2. Combining with the Liberal-Democrats

In another strategic maneuver, Labour teamed up with the Liberal-Democrats to propose Labour’s constitutional changes before the 1997 election. This partnership was intended to provide a “backup coalition” so that if Labour did not get enough votes for a majority, it could count on the

165 Id. at § 1.3.
166 Home Office, Rights Brought Home After 50 Years, supra note 132, at 4.
167 The Lord Chancellor could not resist taking a shot at the failings of the prior Conservative Government and noted that over half of the UK’s violations before the ECtHR have been found since 1990. 582 PARL. DEB., H.L. (5th ser.) (1997) 1227-1312.
168 Id. at 1227-28 (Lord Irvine); 1301 (Lord Williams); 1247-48 (Baroness Amos); 1257-58 (Lord Holme); 1264 (Lord Kirkhill); 1271 (Lord Cooke); 1245 (Lord Bingham); 1235 (Lord Kingsland); 1292 (Lord Donaldson); 1307 (Lord Mostyn). However, the Lord Chancellor’s statements regarding the UK’s poor record before the ECtHR were met with criticism from all parties. Id. at 1227-1312, 1263 (Lord Mayhew); 1239 (Lord Lester), 1294 (Lord Cocks).
169 582 PARL. DEB., H.L. (5th ser.) (1997) 1234. The Lords generally supported the Government’s more idealistic reasons for the HRA. For example, Lord Donaldson’s praise of the HRA’s ability to protect human rights came in the form of a change of heart because of his realization that Parliament had failed to protect rights. Id. at 1291.
Liberal-Democrats to join with it to create a coalition to prevent the Conservatives from taking power again.\textsuperscript{171} To that end, the Labour and Liberal-Democrat parties formed the Joint Consultative Committee on Constitutional Reform, also known as the Cook-Maclennan Committee (CMC), which put forth its own ideas on how constitutional reform and incorporation should be achieved.

This joint venture was intended to create a potential coalition and was not an attempt to obtain voter support for the HRA. According to Robert Maclennan, one of the drafters of the Cook-Maclennan Report, “[n]either [Labour nor Liberal-Democrat] leader regarded constitutional reform as the key to the hearts and minds of the electorate . . . But both leaders favored attempting to do business with each other in furtherance of their interest in political re-alignment and to demonstrate the constructive possibilities of less adversarial politics than had characterized the Thatcher years.”\textsuperscript{172} After Smith’s death and Blair’s ascension, the CMC was taken over by Jack Straw and Lord Irvine.

The leader of the Liberal-Democrats, Paddy Ashdown, met with Blair several times beginning in May 1995 to discuss the formation and implementation of the CMC’s recommendations.\textsuperscript{173} In the CMC Report, the CMC praised incorporation of the ECHR as giving greater human rights enforcement access to UK citizens and emphasized that the Human Rights Act “would not affect the sovereign powers of Parliament.”\textsuperscript{174} More importantly, the Report made it clear that the Labour Government would cede power to Parliament and the judiciary.\textsuperscript{175} The Report also stated that the Act would create “a transfer of power to make political institutions more responsive to the people” and would benefit Parliament as well.\textsuperscript{176} Labour accepted these potential transfers as part of its coalition plans.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{171}Cook & MacClenannan, supra note 101, at 4; Interview with Thomas McNally, Member of the House of Lords, in London, UK (July, 18 2008). The party with a majority of members in the Commons will form the executive but if a coalition of two or more parties has the more seats in Parliament, they can form the executive instead. This exact kind of coalition enabled the Conservatives to obtain a majority in Parliament with the Liberal-Democrats after the UK’s most recent General Election.
\item \textsuperscript{172}Cook & MacClenannan, supra note 101, at 15.
\item \textsuperscript{174}Joint Consultative Committee on Constitutional Reform, The Cook-Maclennan Agreement, 1997, 6.
\item \textsuperscript{175}Id. at 6.
\item \textsuperscript{176}Id. at 5. The report explained that a new requirement for Ministers to make statements of compatibility would strengthen Parliamentary scrutiny and aid the courts in interpreting Parliament’s intentions in legislating.
\item \textsuperscript{177}The Conservatives have similarly been required to make some compromises to maintain their coalition with the Liberal-Democrats. See Coalition Agreement: Compromising Positions, supra note 5.
\end{itemize}
Although Labour apparently knew that the HRA would include a loss of power for the executive, that loss perhaps did not seem important. The smaller power shifts away from the executive were likely to have been perceived as a small price to pay obtaining executive power in the first place. Labour may also have “forgotten” what it was like to be in power and the power transfers it was proposing may not have seemed significant when viewed from the opposition seats. Labour believed that it needed to adopt constitutional reform to obtain enough votes to control the House of Commons and become the next Government and it was willing to pay to get that control. The Conservatives made similar concessions to the Liberal-Democrats in the most recent election.

3. Political Strategizing is an Insufficient Explanation for the HRA

Labour’s stated reasons for incorporation do not withstand close scrutiny because none explain why Labour changed its mind and embraced incorporation after being opposed to it for so long. Even though Labour’s pragmatic reasons are true – it is simply more practical for UK judges to be able to enforce the rights that the UK had agreed by treaty to uphold – those reasons had existed for decades and yet were not addressed by Labour until 1992.\(^\text{178}\) Similarly, the Conservatives’ human rights abuses certainly paved the way for incorporation but they were an insufficient explanation for incorporation because once Labour was in power, it could argue that it would stop those abuses without a bill of rights.

Labour’s enthusiasm for the HRA, therefore, still remains a mystery under a pure political strategy or RCT explanation. The CMC Report “was certainly the most extensive package of reforms ever offered to the British electorate in one election. That so much of it was enacted in one Parliament remains a remarkable accomplishment.”\(^\text{179}\) Neither the Liberal-Democrats or the voting public were particularly interested in incorporation so there was no overwhelming reason for the Labour Government to propose the HRA as opposed to some other platform that would not have required power transfers. Moreover, Labour remained committed to passing the HRA even after it had won a majority in the Commons. The Labour Government’s dominance over Parliament meant that it did not need to pander to public interest groups and it did not do so on other issues.

Labour’s partnership with the Liberal-Democrats also does not explain Labour’s loyalty to the HRA. After the 1997 election, the Liberal-Democrats, through their backbenchers and peers, continued to press for the constitutional and other reforms they and Labour had agreed upon in the Cook-MacLennan Report. However, although the HRA was part of the

\(^{178}\) Interview with Conor Gearty, supra note 102.

\(^{179}\) COOK & MACLENNAN, supra note 101, at 17.
constitutional reforms advocated by the Liberal-Democrats, the diaries of Liberal-Democrat leader Paddy Ashdown show that incorporation was in no way their primary concern. What the Liberal-Democrats really wanted and fought for was proportional representation, which would award seats in Parliament in accordance with the proportion of public votes a party receives instead of the UK’s current “winner takes all” or “first past the post” system. Other concerns such as the HRA were never discussed by Blair and Ashdown, which implies that Labour was not necessarily obliged to adopt the HRA in order to maintain Liberal-Democrat support. Moreover, as noted below, Labour had no qualms about dropping its ties to the Liberal-Democrats and refusing to implement other parts of the CMC Report. Consequently, RCT political strategizing or SMT political campaigning cannot fully explain Labour’s quick passage of the HRA. Instead, the personal commitments and ideology that public interest groups fostered in Labour’s leaders provide the missing piece.

E. Creating True Believers

Commentators have repeatedly explained Labour’s enactment of the HRA as being required due to Labour’s inclusion of incorporation in its Manifesto. However, Labour could have easily delayed or dropped the issue as the Conservatives had in the 1980s with no public complaint. Without public demand for the HRA, the issue probably would also have been virtually ignored by the media. As noted by Robin Cook, co-author of the CMC Report, “[t]here will always be a problem in getting those inside Parliament to vote for a change which alters the balance of power here in Parliament, or the way in which MPs work if the general public outside is not specifically demanding that change.” There was no such demand here. Although some academics and judges actively supported incorporation and public interest groups had worn down Labour party opposition to it, there was no overwhelming public demand and, therefore, no reason for the Labour to diminish its own executive power.

180 ASHDOWN, supra note 173, at 313-14, 421-22, 481-82, 536-37.
181 The Liberal-Democrats are still fighting for proportional representation but their coalition with the Conservatives has failed to produce a referendum on the subject. See Andy McSmith, How five days of tortuous talks finally yielded a coalition government, THE INDEPENDENT, May 12, 2010.
182 Interview with Conor Gearty, supra note 102; Interview with Merris Amos, supra note 137.
183 Indeed, the HRA was ignored all through the campaigning process and was reported on only after it was introduced in Parliament. Much of this reporting was quite negative. See, e.g. Editorial, Rule of Judges: The Adoption of a Code of Human Rights Marks a Welcome Change in Britain’s Constitution, THE ECONOMIST, Aug. 26, 2000.
184 COOK & MACLENNAN, supra note 101, at 7.
The fact that the HRA passed at all shows that at least some Labour leaders must have been fully committed to it. This commitment could no longer be founded upon a desire to obtain power; that had already been accomplished. Instead, contemporary accounts show that Labour leaders truly believed in the HRA and believed that it was good for the country, not just Labour.\textsuperscript{186} Labour’s stated reasons for incorporation, as shown above, do not explain why the Labour party suddenly changed its policies because it had spent decades opposing those altruistic and practical reasons for incorporation. What changed, then, was that Labour’s new leaders believed in these reasons for incorporation. Labour as a whole did not change; its key players did.

Labour leaders’ change of heart was largely affected by public interest groups who worked behind the scenes to convince Labour leaders that constitutional change and incorporation would be good for the country.\textsuperscript{187} More specifically, public interest groups were able to “frame” constitutional reform as good for Labour and the UK. Because they had been out of power so long, Labour leaders internally embraced a feeling of optimism for change from the oppressive and sleazy Conservatives.\textsuperscript{188} It was this intellectual and even moral belief in the HRA and the desire to do something good for the country that led the new Labour Government to pass the HRA so quickly. John Smith, Lord Irvine, Jack Straw and even Tony Blair were all persuaded to believe in the HRA and the good it could do for the UK.

After some persuading, key Labour players Lord Irvine and Jack Straw came to truly believe that incorporation would be good for the UK.\textsuperscript{189} After the 1992 election, Lord Irvine was approached by Lord Lester and Liberty with an incorporation proposal that no longer included a judicial strike-down power and had been approved by some Law Lords.\textsuperscript{190} Incorporation required Lord Irvine to reverse himself on his prior conviction that judges should have no policy-making abilities whatsoever.\textsuperscript{191} According to Cornford, Lord Irvine was likely persuaded to pursue the HRA because of the merits of incorporation and his own interest

\textsuperscript{186} Id. at 163.
\textsuperscript{187} Erdos, supra note 42, at 541.
\textsuperscript{188} Interview with Merris Amos, supra note 137; Yes, Prime Minister, it’s Been a Very Good Start: A year in power, THE SCOTSMAN, Apr. 27, 1998. “Sleaze” is a general term used by the UK press to describe political corruption.
\textsuperscript{189} Interview with William Goodhart, supra note 41; Interview with James Cornford, supra note 49; Interview with Frances Butler, Vice President of the British Institute of Human Rights, in London, UK (June 19, 2008); Interview with Merris Amos, supra note 137; LESTER & PANNICK, supra note 14, at 12.
\textsuperscript{190} Interview with Lord Lester, supra note 54; Interview with William Goodhart, supra note 41; Interview with John Wadham, supra note 45; 577 Parl. Deb., H.L. (6th series) (1997) 1735-57.
\textsuperscript{191} STEVENS, supra note 12, at 104.
in enacting a historic statute. At some point before the 1997 election, Jack Straw also met with Lord Lester to determine how the ECHR could be incorporated into domestic law and the two men reached a workable conclusion. Straw then pushed for the HRA to be drafted in an early cabinet meeting after Labour’s victory in 1997.

Lord Irvine and Charter 88 also persuaded John Smith, Labour’s leader at the time, to take up the bill of rights cause after the 1992 election in order to use it against the Conservatives. According to Puddephatt, John Smith was primarily concerned with Scottish devolution and added other constitutional reforms, such as a bill of rights, in order to not appear to be pandering to the Scots. James Cornford, who worked with Labour leaders and on IPPR’s draft constitution, takes a different view and believes that Smith had become “intellectually convinced” that a bill of rights would be a positive development for the UK. After Smith’s death, Tony Blair adopted the bill of rights proposal as part of Smith’s “legacy of constitutional reform.”

Tony Blair did not believe in the HRA as much as Smith did and Blair had to be persuaded by Jack Straw to stay with the reforms when Blair had doubts.

Not only did public interest groups need to convince Labour leaders of the potentially positive aspects of the HRA but they also needed to downplay the power Labour would be sacrificing. There is evidence that Labour leaders did not fully understand the constitutional implications of the HRA and that may be due to the intentional efforts of public interest groups. Public interest groups were able to capitalize on Labour’s lack of information regarding what the public wanted. Not only were existing polls not focused on the rights included in the ECHR, but there was no overwhelming media attention on this issue. The media’s disinterest in a bill of rights or incorporation was probably a benefit to the public interest

192 Interview with James Cornford, supra note 49; BLACKBURN, supra note 50, at 314-20 (text of the Bills).
193 COOK & MACLENNAN, supra note 101, at 15.
195 Interview with Lord Lester, supra note 54; Interview with James Cornford, supra note 49; Flinders, Charter 88, New Labour and Constitutional Anomie, supra note 50, at 8; KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS, supra note 45, at 160.
196 Interview with Andrew Puddephatt, supra note 45. Devolution was the statutory granting of powers from the central British government to the subnational Scottish government. Because John Smith was Scottish, there was some sense that he was showing favoritism to his home constituents.
197 Interview with James Cornford, supra note 49.
198 Interview with Andrew Puddephatt, supra note 45; Interview with Conor Gearty, supra note 102; Interview with Francesca Klug, supra note 54; STEVENS, supra note 12, at 104, 155.
199 Interview with Andrew Puddephatt, supra note 45.
groups’ campaign because the right-wing media would have been opposed to it and reported negatively about it.\textsuperscript{200} The liberal media, such as the Guardian and the Observer, generally supported a bill of rights. The tabloids, who would be (and eventually were) vocally opposed to incorporation of the ECHR, were basically unaware of what was developing.\textsuperscript{201} Without substantial media attention or consistent polling information, Labour leaders had to rely on the public interest groups themselves for information regarding what their members wanted and the public interest groups used whatever means necessary to convince Labour that adopting incorporation would be considered positively by the public and lead to more votes.

Labour also seemed to limit its focus on the HRA to preventing the judiciary from striking down legislation.\textsuperscript{202} Once that hurdle was overcome with the DOI (and despite some protests from the Opposition), Labour leaders seemed unconcerned with the (lesser) powers they would be giving to the judiciary and believed that parliamentary sovereignty would not be threatened. Labour backbenchers were convinced by Blair and Irvine to support the HRA with the vague promises that it would protect parliamentary sovereignty because there was no judicial power to strike down legislation. There was also a general sense within Labour that the HRA would not make a large impact because the UK was generally compliant with the ECHR.\textsuperscript{203} Moreover, besides Jack Straw and Lord Irvine, it appears that most Labour Government departments did not fully understand the HRA’s constitutional implications.\textsuperscript{204} Blair in particular did not fully understand the constitutional changes and power shifts the HRA would be making and he did not expect judges to be able to stop him from doing what he wanted to do as Prime Minister.\textsuperscript{205}

Public interest groups had a large hand in this ignorance. In addition to selling the HRA’s positive points, public interest groups did what they could to assuage the fears of Labour leaders that the HRA could be used to interfere with the Labour Government. Public interest groups had convinced Blair that the HRA would merely be “bringing rights home” and there would not be any major changes.\textsuperscript{206} Labour was therefore a bit naïve about the long-term effects the HRA would have on its ability to dominate

\textsuperscript{200} Interview with Andrew Puddephatt, \textit{supra} note 45.
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} Interview with Merris Amos, \textit{supra} note 137.
\textsuperscript{203} Interview with John Wadham, \textit{supra} note 45.
\textsuperscript{204} Interview with Conor Gearty, \textit{supra} note 102; Interview with Frances Butler, \textit{supra} note 189; Interview with Sarah Spencer, \textit{supra} note 49.
\textsuperscript{205} Interview with Conor Gearty, \textit{supra} note 102; Interview with Andrew Puddephatt, \textit{supra} note 45.
\textsuperscript{206} Interview with Andrew Puddephatt, \textit{supra} note 45.
the government. Because Labour leaders did not fully see the potential (or even likely) consequences of the HRA, the HRA’s positive aspects were enough to persuade them that the HRA was a good policy and that it should be implemented. Public interest groups were therefore instrumental in ensuring that several key players both inside and outside the government made personal commitments to enacting the HRA.

V. PREDICTING THE FUTURE OF THE HRA

In order for the HRA to be repealed as the Conservatives promised in their Manifesto, the same factors that existed for the HRA’s enactment must arguably be present. As shown above, the HRA was enacted as a result of decades of political pressure which led to the existence of a combination of several factors, all of which were necessary for the HRA to be adopted by Labour and then made into law. Consequently, political campaigning by interested groups, use of historic trends, overcoming politicians’ prejudices, political strategizing and true believers must all be successfully utilized by the Conservatives in order to be successful. Because the HRA was controversial from the start, several of these elements appear to be present already.

A. Political Campaigning

Public interest groups were vital in raising the issue of a bill of rights to the forefront of Labour leaders’ minds, if not the minds of the general public. Although there are no similar public interest groups that are pressing for the HRA’s repeal, the HRA has several enemies among the British press who have attacked it since its inception. As soon as HRA cases began to come through UK courts, the tabloid media began to criticize the HRA and the judiciary that had been given the power to interpret it. These “shocking headlines,” which often contain factual inaccuracies,

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207 Interview with Conor Gearty, supra note 102; Interview with John Wadham, supra note 45.
208 Indeed, political commentators such as Francesca Klug have begun using the media again to advocate the protection of the HRA and even the creation of a written constitution that is not so easily modified. Francesca Klug, Political impasse proves need for a written constitution, May 11, 2010, available at http://www.guardian.co.uk/commentisfree/libertycentral/2010/may/11/political-impasse-proves-need-written-constitution.
continue to this day.\textsuperscript{210} The result has led to the HRA being unpopular with the general public because it is perceived as being abused by “undesirable” groups such as asylum-seekers.\textsuperscript{211}

These criticisms became more vehement over time and have resulted in a form of political campaigning by the tabloid media. The tabloids are not content to write negatively about the HRA – they also repeatedly call for its repeal. Most dramatically, in 2006, the Sun, a British tabloid newspaper, set up a national hotline for readers to call in to vote to “scrap” the HRA. In May 2006, the Sun reported that over 35,000 people had called and agreed that the Human Rights Act should be repealed.\textsuperscript{212} The Conservatives, who never approved of the HRA, have happily taken these media criticisms and campaigns and used them for their own political strategy. As shown below, due to the HRA’s unpopularity, the repeal of the HRA became a Conservative political tool.

**B. Historic Trends**

Although the end of the 20th Century marked an upswing in optimism and enthusiasm for human rights,\textsuperscript{213} this trend quickly came to an end in 2001. The terrorist attacks against the United States that took place on September 11, 2001 proved to be a deeply influential event with regard to the Labour Government’s and the public’s perceptions regarding the value of the HRA. These attacks caused the British public and government became more fearful about terrorist attacks against the UK, which may have led them to become less concerned with protecting human rights.\textsuperscript{214}

In fact, the Labour Government began to see the HRA as an obstacle to its plans to deal with suspected terrorists.\textsuperscript{215} This change in perception led Labour to attack its own legislation. After September 11, 2001, David Blunkett, Labour’s Home Secretary, repeatedly criticized the HRA for being “a lawyer’s charter” and the judiciary for being too activist and “undemocratic.”\textsuperscript{216} Although the Lord Chancellor, Lord Irvine, defended the judiciary against these attacks, he eventually capitulated and agreed to

\textsuperscript{210} Interview with Andrew Puddephatt, \textit{supra} note 45; Anthony Browne, \textit{What About Our Human Rights?}, \textsc{The Daily Mail}, Oct. 6, 2007, (reporting that a recent poll showed that 61 percent of British people want to scrap the HRA). Some media outlets still support the HRA. See, e.g., Ben Russell, \textit{The Big Question: What is the Human Rights Act, and Why is it being Vilified?}, \textsc{The Independent}, Aug. 23, 2007; Francis Wheen, \textit{Do Get Your Hands Off My Human Rights, Dave}, \textsc{The Evening Standard}, June 27, 2006.


\textsuperscript{212} Oliver Harvey & Michael Lea, \textit{35,000 back Sun on Rights}, \textsc{The Sun}, May 16, 2006.

\textsuperscript{213} Interview with Merris Amos, \textit{supra} note 137.

\textsuperscript{214} Interview with Andrew Puddephatt, \textit{supra} note 45.

\textsuperscript{215} Interview with Merris Amos, \textit{supra} note 137.

\textsuperscript{216} Andrew Sparrow, \textit{Blunkett Attacks Judiciary in Fight over Terrorism}, \textsc{The Daily Telegraph}, Oct. 4, 2001; Peter Riddell, \textit{Why the Few Must Not Spoil it for the Many}, \textsc{The Times}, Oct. 4, 2001.
try to limit judicial review. Lord Irvine was later replaced by Jack Straw and, after the Antiterrorism, Crime and Security Act 2001 (ATCSA) was passed, Blunkett began to lessen his attacks.

The ATCSA itself shows how concerned the Labour Government was with terrorism. The ATCSA was drafted in direct response to the attacks on the United States on September 11, 2001 and was processed as an emergency measure. The ATCSA was heavily criticized by public interest groups and the JCHR for its potential human rights violations. In addition, the ATCSA was modified in response to judicial rulings that found it to be incompatible with the ECHR. These judicial rulings caused the Labour Government to repeatedly criticize the HRA and the judiciary. Moreover, after the London bombings in July 2005, Labour and the Conservatives again took turns attacking the HRA and its popularity lessened even further. Accordingly, historic trends are now working against the HRA and making its repeal seem more likely.

C. Returning to Existing Prejudices

While public interest groups had to overcome Labour’s mistrust of the judiciary in order to convince Labour to pass the HRA, opponents of the HRA must merely rekindle those old prejudices. As shown above, they are


218 This change may also have been in response to behind the scenes pressuring from public interest groups. STEVENS, supra note 12, at 136 n.66.


being aided by the tabloid media. The tabloids’ attacks on the HRA have been overwhelmingly concerned with the judiciary’s new powers and its controversial decisions using the HRA. These attacks became more prolific after controversial judicial decisions, such as when the UK’s highest court found that the UK’s political asylum legislation was incompatible with the ECHR. The Conservatives have also repeatedly attacked the judiciary after controversial decisions. Clearly, the British mistrust of the judiciary is still prevalent and it is a tool that has been used by the press and the Conservatives.

Moreover, as shown above, the UK’s increased interest in security has been combined with its historic mistrust of the judiciary to enhance its existing prejudices against the judiciary’s ability to use appropriately the HRA. These three elements even caused the Labour Government to say that it was going to review the HRA, which only led to criticism against Labour for turning against its own statute.

Perhaps the most damning piece of evidence of the Labour Government’s distaste for the HRA is that Jack Straw, one of the HRA’s


226 JOINT COMMITTEE ON HUMAN RIGHTS, SIXTH REPORT: THE WORK OF THE COMMITTEE IN 2007 AND THE STATE OF HUMAN RIGHTS IN THE UK, 2008, H.L. 38, H.C. 270. In response to this criticism, Michael Willis, the Minister of State for the Ministry of Justice, argued that a network of press officers was still in operation and continued to rebut inaccurate assertions in the media about the Human Rights Act. Willis also disagreed that ministers are misleading the public about the effects of the HRA and said that since he became the Minister of State, he had “seen no evidence of this.” JOINT COMMITTEE ON HUMAN RIGHTS, EIGHTEENTH REPORT: GOVERNMENT RESPONSE TO THE COMMITTEE’S SIXTH REPORT OF SESSION 2007-08: THE WORK OF THE COMMITTEE IN 2007 AND THE STATE OF HUMAN RIGHTS IN THE UK, 2008, H.L. 103, H.C. 526, Appendix Response from Michael Wills MP, Minister of State, Ministry of Justice, dated Apr. 8, 2008.

strongest supporters, criticized it to the press.228 Straw’s comments focused on the judiciary and the “nervous” judges who created problems by refusing “to accept assurances from ministers” that the deportation of Islamic extremists was in the national interest.229 Straw acknowledged that the public saw the HRA as a “villains’ charter” and blamed the judiciary for this perception. He indicated that he was frustrated with the way the HRA was being used and that he was considering “rebalancing it.” 230 To that end, Jack Straw headed the Labour Government’s final attempt to reform the HRA with a green paper231 from the Ministry of Justice entitled “Rights and Responsibilities: Developing our Constitutional Framework.”232 Straw described the green paper as not backtracking from the HRA but “bring[ing] out the responsibilities which accompany rights.”233 The social and economic rights contemplated by the green paper would not be legally enforceable in courts and Straw has said that a new “bill of rights and responsibilities” could subsume the HRA or become a separate Act.234 Since the green paper’s introduction on March 23, 2009, there was no further movement on it.

Due to the UK’s historic mistrust of the judiciary, it is understandable that it is the judiciary that has been the focus of criticism relating to the HRA. Labour’s efforts to “reform” the HRA show that public sentiment has turned away from the HRA and the judiciary has usually been blamed for misusing the HRA. As a result, the Conservatives were able to use the HRA as part of their political strategy.

D. Political Strategizing

With regard to the HRA, political strategizing is evident from both Labour and the Conservatives. As discussed above, although political strategizing helped get the HRA included as part of Labour’s proposed policies, it also made Labour less likely to be fully committed to the HRA after Labour won the election. Once Labour was in power, it began to backtrack from the promises it had made to the Liberal-Democrats and public interest groups that had supported it. Because Labour had won by large majority, it did not need its more liberal supporters any longer.235

229 Id.
230 Id.
231 A “green paper” is a tentative government report of a legislative proposal without any commitment to action.
234 Id.
Negotiations between Labour and the Liberal-Democrats fizzled and the CMC was disbanded in September 2001. This has been blamed on Blair’s unwillingness to continue with cross-party collaboration and his failure to deliver on his promise to the Liberal-Democrats to support proportional representation.

Labour did make some constitutional changes but by all accounts they were “watered down” versions of what was previously discussed. The House of Lords was not fully reformed, there was no electoral reform, no Human Rights Commission, and no British bill of rights that built upon the rights conferred in the HRA. The end result was far more conservative, piecemeal and lacking in cohesion than what was recommended by the CMC Report. There is also some evidence that many of the constitutional reforms that were enacted were also offset by other measures that increased executive power. The Labour Government also continued the presidential style of governing practiced by the Conservatives in the 1980s and early 1990s.

Like Labour, the Conservatives have used the HRA as a campaigning tactic; they have promised to repeal the HRA. The Conservatives had pledged to repeal the HRA as early as 2006 and made this pledge part of their election manifesto. Due to the HRA’s unpopularity, this campaign promise can be seen as a powerful political tool.

E. True Believers

Of all the factors listed above, true believers may be the only factor that saves the HRA. After the Conservatives won the last General Election by creating a coalition Government with the Liberal-Democrats, the HRA was placed in real jeopardy because of the Conservatives’ manifesto promise to repeal the HRA. The Liberal-Democrats, however, pledged in their manifesto to protect the HRA and they again promised to do so after

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237 ASHDOWN, supra note 173, at 276; COOK & MACLENNAN, supra note 101, at 20.
238 Interview with Thomas McNally, supra note 171.
239 COOK & MACLENNAN, supra note 101, at 4, 18-19; RUSTIN, supra note 49, at 6.
the coalition was formed.\textsuperscript{243} The result of all of this pressure has been a stalemate: the creation of a commission to review the HRA.\textsuperscript{244} As discussed above, Liberal-Democrats have consistently championed incorporation of the ECHR and are arguably even “truer” believers in the HRA than the Labour leaders who later turned on it. The Liberal-Democrats’ belief in the HRA has forced the Conservatives to back down from their promise to repeal the HRA, at least for now. What will happen after the commission reports on the HRA remains to be seen.

\section*{VI. CONCLUSION}

As RCT and SMT predict, public interest groups were essential for the passage of the HRA. However, SMT campaigning and RCT political maneuvering only partially explain why Labour was willing to adopt the HRA as part of its Manifesto and later enact it into law. In addition to RCT’s political strategizing and SMT’s public campaigning, public interest groups had to use three additional tools that are not fully accounted for by either theory. These three factors are capitalizing on historic trends, overcoming Labour’s historical mistrust of the judiciary and creating “true believers” among Labour’s leadership.

For example, public interest groups certainly used public campaigning techniques to draw the public’s attention to the bill of rights issue. However, it was public interest groups’ framing of the issues – prior proposed bills of rights, the historic trend of increased judicial review and the Conservatives’ civil rights abuses – that made incorporation more palatable to Labour. These trends were essential because the enactment of the HRA entailed power transfers that would cause those who enacted it to give up a portion of their dominant executive position. Once public interest groups were able to remove Labour’s fears of judicial review, Labour was much more willing to adopt incorporation. After their minds had been changed about incorporation of the ECHR, Labour leaders used the HRA as a political tool to obtain power. As RCT predicts, if Labour had not seen the HRA as something that would help them politically, the HRA would never have been made a part of the Labour Party’s 1997 Manifesto.

However, once the HRA had served its purpose in helping Labour win the 1997 election, it was the personal relationships and Labour’s true believers, both of which had been created by public interest groups, that stepped in to ensure that the HRA was passed. Consequently, all of these factors were necessary for the HRA to be enacted. Moreover, these factors may also be necessary for it to remain law after the last General Election. Despite the Conservatives’ promise to repeal the HRA, true believers within

\textsuperscript{244} Coalition Agreement: Compromising Positions, \textit{supra} note 5.
the Liberal-Democrats’ leadership have already forced them to compromise on the issue and, depending on how strongly these believers feel about the HRA, this may be enough to protect the HRA from the Conservatives altogether.

The five factors identified in this article have proven themselves invaluable in attempting to understand how and why a piece of controversial human rights legislation was passed in the UK and whether it will remain law in the future. However, these factors may also be used to examine the genesis of other legislation, particularly controversial legislation that is the focus of a social movement. In the United States, health care reform, gay rights and the pro-choice movement are all causes that have met with mixed success. Future research may show that the five factors that were instrumental in the enactment of the HRA were also essential in the ups and downs of these movements.