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Summary of Action Points

Gordon Brown is committed to a further programme of constitutional reform. This Briefing sets out the main options facing the new government. Below are the highlights of the main action points which he might pursue in the first 100 days, the next two years, and the next parliament. A full list of action points appears at the end of each section in the Briefing, and in a summary table at the end by subject area.

Action for the First 100 Days

The Vision

- Decide how bold the government wants to be. Is the objective a new constitutional settlement, or further specific reforms?
- Give a major speech explaining the government's objectives for constitutional reform. Set out a vision based on a new compact between citizens, communities and the state; and active and accountable government.

The Framework

- Put an experienced and committed Minister in charge of constitutional reform.
- PM to take chair of Cabinet Committee on Constitutional Affairs.
- Create small Constitution Secretariat in Cabinet Office.
-

Action Over the Next Two Years

Framework for Devolution

- Merge Scotland, Wales and Northern Ireland Offices into single department.

Conduct of the Executive

- Review main prerogative powers to subject them all to parliamentary scrutiny.
- Introduce Civil Service Act.
- Review position of constitutional watchdogs, so that they have closer relationship with Parliament.
- Legislate to make prerogative powers subject to parliamentary scrutiny.

Parliamentary Reform

- Support and advance Jack Straw's reforms: getting ministers and civil servants to co-operate with evidence-taking Bill committees.
- Implementation of changes to hand prerogative powers to Parliament.
- Continue cross-party talks on Lords reform.
- Announce wide ranging review of relationship between government and Parliament.

Electoral Reform and Funding of Political Parties

- If Cabinet still hostile to PR, announce that no decisions will be taken on voting system for House of Commons until decisions have been made on an elected House of Lords. If Cabinet lukewarm, update and publish DCA review of new voting systems. If Cabinet more supportive, announce inquiry into AV for House of Commons. g system for

Action for the Next Parliament

Part One: The Framework

This Briefing sets out the options facing the new Prime Minister if he wants to deliver a new constitutional settlement, in terms of process, machinery and substantive policies. It is divided into two parts. The first part is about the overall framework, in terms of deciding on the objectives, the narrative, the machinery inside and outside government, and the processes to be followed. The second part is about the individual policies. Each section in Part 2 concludes with a short summary of what can be done in the first 100 days, what can be done in the next two years, and what needs to wait for the next Parliament.

1 Introduction

Britain could be poised for a second big wave of constitutional reforms following Tony B1cgir's

- Britishness (Brown 2004, 2006b, 2006c).

Brown's recent speeches on Britishness are well

2.2.2 Liberty, Responsibility and Fairness

Gordon Brown has a strong sense of liberty, responsibility and fairness:

pensions and social security, and provides the basic framework and all the funding and redistributive mechanisms for the welfare state.

- Modernising our Institutions: Institutions which symbolise Britain and Britishness include the key political institutions and major public services. Some of these institutions like Parliament have lost the automatic authority and respect they once enjoyed. Reforming and strengthening institutions will help to ensure they reflect and represent the main interests and values of contemporary Britain.

2.3 Drawing the Narrative Together

These themes can be drawn together in several different ways. The following is one illustration, which informs the main themes with policy examples from Part 2 of the Briefing. Examples in brackets may be steps too far until the government feels confident about them, having worked through the implications:

New Compact Between the Individual, Community and the State: The individual needs proper and guaranteed protection within a modern constitution. This will be delivered by:

- Developing a new British bill of rights and responsibilities, based on the fundamental principles of liberty, responsibility and fairness.
- Supporting communities by strengthening institutions of civil society.
- Widening the opportunities for public participation, of individuals and communities.
-

Other policy examples can be added or subtracted. What the exercise brings home is how the narrative needs to be adjusted to the specifics of what the government plans to do.

2.4 Need for Coherence

Along with the need for an overarching narrative is the need for coherence. This can be achieved in two ways: procedural, and substantive. Procedural coherence can be achieved through a strategic Cabinet committee, chaired by the Prime Minister, and through strengthening the Whitehall machinery responsible for the constitution. As part of this there needs to be a central coordinating unit to plan the programme, its phasing and sequencing, like the Constitution Secretariat set up in the Cabinet Office in 1997. For more on the Whitehall machinery see section 5 below.

Substantive coherence is about understanding the interrelations between the different items. It can best be illustrated by a series of examples:

- Lords reform and electoral reform. The electoral system for an elected House of Lords cannot be planned in isolation from the electoral system for the House of Commons.

- Lords reform and devolution. If the elected members of the House of Lords are to represent the nations and regions of the UK, can they also help to underpin devolution by representing the devolved institutions?

- The English Question and parliamentary refo

3.3 Difficulties in Agreeing a Written Constitution

Drafting a written constitution would require agreement on the following:

3.3.1 Scope and Length

What is to be included and excluded? In the absence of a written constitution, there is no agreed boundary of what is 'constitutional' and what is not. Should the electoral system be defined in the constitution? Should the national flag? Most written constitutions define the flag, but not the electoral system. But the electoral system is vastly more important in determining the nature of the political system (King, 2001).

A related issue is the tension between brevity and detail. For political literacy, a short and simple constitution is much better. But the shorter the document, the greater the scope for interpretation by the courts.

3.3.2 Descriptive or Prescriptive

Is this to be a purely descriptive exercise, defining the constitution as it is; or prescriptive, defining the constitution as people would wish it to be? Most drafters will not be able to resist glosses or small improvements to the constitution as they write it down. Once you allow some improvements it is hard to draw the line. While defining the monarchy would it not be sensible to remove the discrimination against Roman Catholics in the line of succession, or the discrimination against women in the rule of (male) primogeniture? And once you allow small improvements it is harder to resist the lobbying for bigger changes: should we continue with the monarchy or not? A purely descriptive exercise could be left to a committee of experts; a reforming one would need political and public involvement, through a constitutional convention or constituent assembly (see section 4).

3.3.3 Entrenchment and Amendment

Entrenchment would involve giving the constitution superior legal status and priority over ordinary legislation. A fully entrenched constitution would become the fundamental source of legal authority in the state, superseding the traditional doctrine of the sovereignty of Parliament. If that was too radical a step, qualified entrenchment could create an elevated status in law for the constitution, while allowing Parliament to legislate in contradiction to the constitution if it expressly chose to do so. The constitution would contain a declaration of primacy over other law, as in the European Communities Act 1972 or the Human Rights Act 1998; but much would depend on how the courts chose to interpret the status of the new constitution in relation to other Acts of Parliament. (For more detail on different forms of entrenchment and their likely

principles of the British constitution would find it difficult to avoid being prescriptive (principles like the rule of law being normative as well as descriptive). And they would face the same difficulties about scope and length. A brief statement of principles at a high level of generality would be of little educational or practical value. But the more detail that was applied to give the principles some context and meaning (eg in providing a statement of rights and responsibilities), the closer the exercise would come to drafting a written constitution.

3.4.2 Towards a New Constitutional Settlement

The safer course might be to draft some principles to guide the constitutional reform programme, rather as the Consultative Steering Group set out some general principles to guide them as they devised the working methods for the Scottish Parliament.[1] As Gordon Brown has said, his purpose is to set a course for constitutional change, to make it more than just a short list of attractive ideas, and to place it within a framework. Early in his premiership he could deliver a major speech explaining the principles which guide the constitutional reform programme, and the course being set. He may want to avoid being too high flown, because the press would judge subsequent actions against the principles. And he need not be too specific about the eventual destination: aiming towards a new constitutional settlement is good enough.

4 Processes for Delivering Constitutional Reform Outside Government

The previous two sections have identified a range of broad objectives for the next phase of reform, ranging from drafting a written constitution, to formulating an agreed statement of principles, to planning specific reforms. Depending on the task, there is a corresponding range of mechanisms available to ensure that constitutional reform is based on broad public and cross-party consultation. The Constitution Unit's first report *Delivering Constitutional Reform* (1996) analysed the strengths and weaknesses of the various mechanisms which have been used in the UK and overseas. They can be divided into three broad categories: building political consensus, calling in the experts and engaging public participation.

government received strong Lib Dem support for its constitutional reforms, and set up a joint Cabinet committee to seek continued cooperation from the Lib Dems.

- House of Lords reform: Jack Straw initiated cross-party talks in June 2006. The cross-party group met eight times, and agreed that a reformed House should be part appointed, part elected, that the remaining hereditary peers should come to an end, and that reform should be introduced over a long transition period. The group could not agree on the proportion of elected and appointed members, nor on the precise method and timing of any elections. The February 2007 White Paper was a compromise which attempted to build on the limited amount of cross-party agreement. But its proposals were immediately denounced by the Conservatives.

- Review of party funding: These cross-party talks are unusual in being chaired by a neutral third party, Sir Hayden Phillips. In March 2006 he was asked to consider the case for increased state funding of political parties alongside tighter caps on donations and campaign expenditure. Alongside a process of public consultation he has held intensive talks with the political parties, with a deadline of trying to reach agreement of July 2007. (see http://www.partyfundingreview.gov.uk)

4.1.2

Constitution (1969-1973) which inquired into devolution, and the Wakeham Commission on Reform of the House of Lords (2000-2001). The latter reported in 12 months, and defined the key issues which have formed the basis for subsequent discussion, even though some have still not been implemented.

A constitutional commission is an independent, expert body similar to a Royal Commission, or a body of experts such as the Law Commission. Rodney Brazier has argued for a standing constitutional commission, to provide an external and independent motor of reform, and to ensure the reform programme is coherent and the interactions fully thought through (Brazier, 1998).

4.2.2 Constitutional Convention

A constitutional convention typically has a wider membership involving politicians and the wider community. It is exemplified in the Scottish Constitutional Convention (1989-1995) which laid the plans for the Scottish Parliament, with representatives from the Scottish Labour party, Scottish Liberal Democrats, local authorities, trade unions, churches, women's movement etc (Scottish Constitutional Convention, 1995).

The choice of an expert commission or wider convention depends on the nature, size and scale of the task. A convention is more suitable as a forum to negotiate between the political parties and other interests, but could lose credibility if major parties decide not to be involved (the SNP and Conservative party did not join the Scottish Constitutional Convention). A convention can more easily get bogged down: in Australia in 1985 the Hawke government lost patience with the slow progress of the Constitutional Convention (1973-1985) and set up a Constitutional Commission in its place. A commission can be equally good at engaging in systematic and widespread consultation, as shown by the Australian state of Victoria in their consultation exercise on a bill of rights, led by a four person panel in six months in 2005.

4.3 Public Participation

4.3.1 Citizens' Assembly

A citizens' assembly is a radical new model developed in Canada, using citizens drawn randomly from the electorate. It was pioneered in British Columbia, when 160 citizens were recruited (one man and one woman from each of BC's 80 constituencies) to consider whether BC should change from first-past-the-post to a new voting system. As their report put it, "Elsewhere, such a task has been given to politicians or to electoral experts. Instead, British Columbia chose to make history and to give this task to the voters". Working at weekends over 11 months, the Assembly held 50 public hearings and received 1600 submissions, and recommended STV as an alternative voting system (BC Citizens' Assembly, 2004).

Ontario has since followed suit, with a Citizens' Assembly of 103 randomly selected voters, who followed a similar procedure and have just recommended a mixed member proportional system (similar to that used in the Scottish Parliament and Welsh Assembly): Ontario Citizens' Assembly, May 2007. The nearest the UK has come to Citizens' Assemblies has been the use of citizens' juries, which sit for a much shorter period (typically 3-5 days) to debate a public policy issue and report back.

4.3.2 Referendums

Citizens' Assemblies help the government to define a constitutional reform proposal. Referendums invite citizens to endorse a proposal defined by government, though the two can also be used together. Having had no place in British constitutional tradition, since the 1970s referendums have become an increasingly frequent way of ensuring there is public consent for constitutional reforms. They have several advantages:

- Helping to educate the electorate, by forc

continue to operate in separate compartments. If the three territorial departments are merged, the three committees could also be merged into a single Select Committee, which would enable it to take a much more synoptic view of devolution. There might need to be three separate sub-

Part 2: The Policies

Part 2 of the Briefing goes through the outstanding policy issues in constitutional reform, summarising briefly the current position and explaining the options for change. It starts with the conduct of the Executive, because that links back to the end of Part 1, and then goes on to parliamentary reform, devolution, electoral reform, a bill of rights, the judiciary and freedom of information. Each section concludes with a summary of possible Action points.

6 Conduct of the Executive

6.1 Cabinet and the Ministerial Code

The new Prime Minister may wish to make some quick symbolic changes which lie directly within his power. First, to announce the revival of Cabinet and Cabinet committees in place of bilateral meetings and sofa government. It may not come easily, given Blair's example, but the most important check on centralised power within government is the collective wisdom of the Cabinet. Cabinet colleagues need to be informed by proper papers and discussion to underpin their collective responsibility (Butler report, 2004; Foster, 2005).

Gordon Brown has also signalled his intent to issue a new version of the Ministerial Code. This needs a radical overhaul, similar to the overhaul which Sir Gus O'Donnell gave in 2006 to the Civil Service Code, now a concise five pages. The Ministerial Code is meant to be divided into a Code of Ethics and a Code of Procedural Guidance, but too much detailed procedural guidance (eg over public appointments) is still contained in the Code of Ethics, which is 18 pages long. It also needs updating, eg to include the new statutory duty on all Ministers not to seek to influence particular judicial decisions, and to uphold the independence of the judiciary (Constitutional Reform Act 2005, s3). The Comptroller and Auditor General, appointed in 2006 as independent adviser and investigator of ministerial conflicts of interest under the Code, could be replaced by the Parliamentary Commissioner for Standards, who specialises in investigating conflicts of interest, and already advises ministers over such conflicts in their capacity as MPs.

6.2 War-making Power

The declaration of war and deployment of the armed forces are amongst the prerogative powers. The new Prime Minister has indicated his support for making the war power subject to parliamentary approval. On 15 May 2007 the House of Commons approved an amended resolution accepting that "The time has come for Parliament's role to be made more explicit in approving (or otherwise) decisions of Her Majesty's Government relating to the major or substantial deployment of British forces overseas into actual or potential armed conflict". The basis for implementing the resolution can be found in the 2006 report of the Lords Constitution Committee, which recommended a new convention that the government should seek parliamentary approval before overseas deployment of the armed forces, with a statement of the deployment's objectives, legal basis, likely duration and size (Lords Constitution Committee, 2006).

6.3 Other Prerogative Powers

The other prerogative powers exercised by Ministers include the making of treaties, recommendations for honours, patronage appointments (eg Church of England), organisation of the civil service, issue and revocation of passports, and the grant of pardons. In their 2004 report *Taming the Prerogative* the Public Administration Select Committee recommended that the

government should consider making most of the prerogative powers subject to parliamentary scrutiny: the most urgent being decisions on armed conflict, treaties and passports (PASC 2004).

Tony Blair was dismissive in the government's response to the PASC report in 2004. The new Prime Minister could announce that he is immediately divesting himself of patronage appointments to the Church of England, and to the House of Lords (see section 7), and introducing a Civil Service Act. If he wanted to go further he could announce a wider review of the prerogative powers, with an intent to put the ratification of treaties and the issue of passports onto a statutory basis.

6.4 Civil Service Act

A Civil Service Act has been repeatedly recommended by the Civil Service Commissioners, the Committee on Standards in Public Life and the Public Administration Select Committee. The government published a draft Civil Service Bill and consultation document in November 2004, but has done nothing since (Cabinet Office, 2004). The new administration could score a quick win by introducing the bill, which does little more than put regulation of the civil service on a statutory

Action

First 100 Days

- Revive Cabinet and its key committees with proper papers and discussion.
- Issue revised and tightened Ministerial Code of Conduct.
- Divest patronage powers, eg over Church of England, House of Lords.

Next Two Years

- Review main prerogative powers to subject them all to parliamentary scrutiny.
- Introduce Civil Service Act.
- Review position of constitutional watchdogs, so that they have closer relationship with Parliament.
- Legislate to make prerogative powers subject to parliamentary scrutiny.

Next Parliament

- Legislate to put all constitutional watchdogs on statutory footing as bodies coming under Parliament.

7 Parliamentary Reform

Gordon Brown emphasised in the speech announcing his candidacy as Labour leader that he wanted to give more power to Parliament (see Section 1). In part this relates to prerogative powers, discussed in section 6. But there are many other issues with respect to rebalancing the powers of Parliament and the executive, involving both the House of Commons and the House of Lords. In both cases progress won't be easy, but there are some quick and symbolic changes the new Prime Minister could pursue, to demonstrate a change of direction.

7.1 House of Commons

One of the biggest and most intractable issues relating to the House of Commons is the debate about the voting system, discussed in section 9. But progress on other fronts is also difficult. Most of the rules governing the Commons are set out in Standing Orders, which are the preserve of the House itself, not the government. Conventionally decisions on Standing Order changes are taken by a free vote, and without a whip applied it can be difficult to build a majority for change. Since 1997 Labour has tried to take more of a lead, through establishing the Modernisation Committee chaired by the Leader of the House of Commons. But this arrangement has proved controversial, and even reforming Leaders like Robin Cook have found their proposals treated with some suspicion. There has also been a real tension between the desire of reformers to see power dispersed, and the reluctance of the whips, Number 10 and some other ministers to let go.

As Jack Straw and Robin Cook have both made clear, however, there need not be a conflict between better parliamentary scrutiny and strong, stable government. Proper scrutiny can ensure that problems with policy are ironed out before it comes into effect, avoiding embarassment later. It also gets arguments out into the open, and requires any opponents to submit their case to scrutiny too. For these reasons many reforms to date must be welcomed: in particular the greater resources for Select Committees negotiated by Robin Cook, and the new Public Bill Committees introduced by Jack Straw. The second of these in particular, which for the first time will make evidence-taking on bills the norm, is only in its early stages. It needs firm support from the new Prime Minister and Cabinet to ensure it works. Over time the more radical move – which would bring Britain into line with most other modern parliaments – would be establishment of

permanent, specialist legislation committees to parallel the Select Committees. This would allow greater subject expertise to be developed, so would improve MPs' job satisfaction, as well as improving policy.

There are many other things that could be done

In Westminster as well as Whitehall, the handling of devolution business needs to be strengthened. The UK Parliament will continue to make use of the legislative consent (Sewel) convention to make law for Scotland in devolved policy spheres, but the procedures need clarifying and tightening up (Scottish Affairs Select Committee, 2006). Particularly given the formation of an SNP executive in Edinburgh, there is a need for a clear set of principles setting out when and why the British government will invoke the convention. The government should similarly set out a clear approach to legislating for Wales, with a committment to accepting Assembly requests for legislative competence in all but exceptional cases. The scrutiny arrangements at Westminster for Scottish or Welsh elements of bills could also be strengthened. If Lords reform progresses (see section 7), the question of how a reformed upper chamber will represent the nations and regions will also have to be addressed.

8.6 The English Question

Action

First 100 Days
- Merge Scotland, Wales and Northern Ireland Offices.
- Revive Cabinet Sub-Committee on Devolution.
- Announce revival of Joint Ministerial Committee on devolution.

Next Two Years
- Announce review of division of powers between UK and devolved governments?
- Strengthen Westminster scrutiny of Scottish and Welsh legislation.

Next Parliament
- Referendum on primary legislative powers for Welsh Assembly
- Increase capacity of Welsh Assembly from 60 to 80 members, to match its increased powers.
- Announce a review into the level and the forms of territorial representation at Westminster, in the Commons and in a reformed upper chamber.
- Funding of devolution to be reviewed by expert Commission.

9 Electoral Reform and Funding of Political Parties

9.1 Electoral Reform

Labour's 1997 manifesto boldly stated "We are committed to a referendum on the voting system for the House of Commons. An independent commission on voting systems will be appointed early to recommend a proportional alternative to first-past-the-post". The independent commission was duly appointed, chaired by Roy Jenkins, and recommended a semi-proportional voting system, dubbed AV Plus. Constituency MPs would be elected by the Alternative Vote (AV: to ensure they were elected by a majority of voters in the constituency); and there would be a relatively small number of top up seats - around 15 per cent of the whole - to ensure a limited degree of proportionality (Jenkins Commission, 1998).

In 2001 the manifesto commitment was modified by inserting a prior condition: that before holding any referendum, there should first be a review of Britain's new voting systems introduced for the devolved assemblies and the European Parliament, and the Jenkins report. The

Action

First 100 Days
- Hold early Cabinet discussion to test mood on electoral reform.

Next Two Years
- If Cabinet still hostile to PR, announce that no decisions will be taken on voting system for House of Commons until decisions have been made on an elected House of Lords. If Cabinet lukewarm, update and publish DCA review of new voting systems. If Cabinet more supportive, announce inquiry into AV for House of Commons.
- Seek cross-party agreement for a balanced solution on party funding, which controls expenditure and donations. If agreement is not possible, legislate for tighter spending limits on campaign expenditure.

Next Parliament
- If agreement is reached on new voting system, hold referendum on electoral reform.

10 British Bill of Rights

10.1 Labour's Original Commitment

It was Labour Party policy in 1997 first to incorporate the European Convention on Human Rights (ECHR) into domestic law, and then to move to a British bill of rights as a second stage. The second stage was dropped once the ECHR had been incorporated in the Human Rights Act 1998, and the human rights legislation became the subject of a sustained onslaught from the tabloid press. This reached a crescendo in summer 2006, when the Labour and Conservative leaders sought to outdo each other in attacking the Human Rights Act, echoing tabloid outrage at a court decision about deportation. Tony Blair ordered a review of the operation of the Act, and David Cameron went one stage further and promised to scrap the Act and replace it with a British bill of rights. The new Prime Minister must decide at the outset whether he is willing to defend the Human Rights Act, and to instruct his ministers likewise.

Although Cameron attracted little support from his own Democracy Task Force, support for a British bill of rights is growing. The all-party lawyers' group JUSTICE has nearly completed a very thorough study of a British bill of rights (JUSTICE, 2007). In May the parliamentary Joint Committee on Human Rights announced a major inquiry into whether a British bill of rights was needed; what rights it should contain; and what its impact would be. No timetable has yet been set, but the d rights ithuthough Cameron att[illegible]though C

catalogue is that it includes a pretty comprehensive list of minimum standard rights. Possible topics proposed by experts for addition to the basic ECHR catalogue include Protocol 4 on the right of abode, and the stronger equality clause in Protocol 12 (neither of which the UK has ratified);[7] trial by jury; access to justice, including administrative tribunals; strengthening the right to privacy; gay rights; and most controversially, economic, social and cultural rights of the kind protected in South Africa (JUSTICE 2007). To this list Klug has suggested a more extensive right to education; a right to healthcare free at the point of need; provisions from the Children's Convention; and carers' and independent living rights from the new UN Convention on the Rights of Persons with Disabilities (Klug 2007, 143).

Comparative experience is not encouraging about being too expansive in terms of the content of bills of rights. The Northern Ireland bill of rights consultation process attempted to secure support for women's and children's rights as well as cultural (language) rights, but repeatedly failed to gain consensus. The European Charter of Fundamental Rights and Freedoms also illustrates that a long list of rights may come at the expense of a weak and unenforceable document. The States Parties (led by the UK) insisted that its provisions would not be justiciable, because of their social and economic (and thus extensive financial) implications.

10.3 Entrenchment

There are four broad models for the constitutional status of a British bill of rights:

- Constitutional entrenchment: This model breaks most obviously from British constitutional traditions, establishing the bill of rights as part of a body of higher law or a written constitution.
- Qualified entrenchment: Those who have presented blueprints for a British bill of rights favour models in which it has the status of higher law, but the judges cannot use it to strike down ordinary legislation.
- Ordinary Act of Parliament: This option maintains the essence of the model of the Human Rights Act in an ordinary Act of Parliament. Such a bill of rights would not be legally entrenched, though it might acquire political and cultural entrenchment through custom and practice.
- Declaratory statement: The fourth option would be a statement of values and code of practice to guide the executive, judicial and parliamentary branches of government. Its value is more than symbolic, though its provisions would be unenforceable.

Most supporters of a bill of rights that builds on the foundations of the Human Rights Act favour some form of entrenchment. As with a written constitution (see Section 3.3), the question of entrenchment must be separated into two distinct yet related issues - the legal status and the procedure for amendment. Thus, entrenchment can involve giving the bill of rights some superior legal status and priority over ordinary legislation. It can also involve some special legislative process being laid down to govern future amendments or measures to suspend the operation of the bill of rights.

[7] Protocol 4 serves to:

- protect the right of everyone in the state to liberty of movement and freedom to choose their residence (Article 2);
- protect the right not to be expelled from, or to be refused entry to, the country of one's nationality (Article 3);
- prohibit the collective expulsion of aliens (Article 4).

Protocol 12 is designed to advance the ECHR's protection of equality beyond the relatively limited guarantee in Article 14 ECHR, by providing "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

10.4 Process

The most important question is how a British bill of rights is developed. Incorporation of the ECHR through the Human Rights Act 1998 was a top-down elite project. The lack of public involvement has enabled the Sun, the Mail and the Telegraph to depict the ECHR as a rogues' charter, and part of a European plot. By launching a widespread public consultation on a British bill of rights, the government could develop greater understanding and support for the ECHR, and foster public debate about what additional rights and responsibilities might be required. The overall change in content might not prove to be very great. But the change in public support could be dramatic, especially if the bill of rights was endorsed in a referendum. The equivalent Canadian charter of fundamental rights and freedoms commands huge public support, and has become an important symbol of Canadian national identity.

The full range of options in section 4 is available for consultative machinery on a British bill of rights. The consultation could be led by the Ministry of Justice; the new Commission for Equality and Human Rights (CEHR); the parliamentary Joint Committee on Human Rights (JCHR); an expert Commission, a constitutional convention or a Citizens' Assembly. In Northern Ireland the task was given to the Human Rights Commission, which tried to gain support for an ambitious catalogue of rights and failed. In the Australian state of Victoria it was given to an expert four person commission, which conducted a six month consultation and succeeded. In Canada a joint parliamentary committee was used for the second stage, to consider the government draft of the Charter of Rights and Freedoms, and it held nationally televised hearings around the country.

Which model is chosen will depend upon which groups the government wants to engage with. Is the main purpose of consultation to engage with the other political parties; civil society, NGOs, human rights organisations and professional bodies; or the public at large? It will also depend on the balance between the government's desire to retain control of the process and to encourage public participation. Opinion polls suggest there is limited public understanding of the notions of 'civil and political rights' (perhaps because they are taken for granted); and more enthusiasm for social and economic rights, such as the right to hospital treatment within a reasonable time (State of the Nation Poll 2004, Q6). Politically, therefore, there is a danger of creating public expectations which cannot be met (Constitution Unit, 1996 ch 8). If the government wants the process to be grounded in political realities, it could put the new Commission for Equality and Human Rights in charge of the public consultation exercise; but then require it to report back to the Joint Committee on Human Rights, to ensure there is parliamentary support for its proposals.

10.5 Referendum

The final point to make about process is the case for a referendum. A British bill of rights could remain as much an elite project as the Human Rights Act if it is not accompanied by imaginative efforts to encourage the British people to understand it and adopt it. The most effective single way to accomplish this would be by submitting it to a referendum. There are of course risks: interest groups, some of the media and some political parties will campaign against. But the clash of argument around the case for and against the bill of rights

Action

First 100 Days

- Await the report of the JCHR on the case for a British bill of rights.

Next Two Years

- Decide on the machinery for drafting a bill of rights, and the process for adopting it.
- Involve CEHR and JCHR in the decision.

Next Parliament

- Establish a body to draft the bill of rights, with wide public participation.
- Submit bill of rights to referendum, perhaps at time of next election.

11 Judiciary and the Courts

11.1 Resolving Tensions Between Executive and Judiciary

The separation between the judiciary and the executive following the Constitutional Reform Act 2005 was always going to be a gradual process, not a single event. It was bound in time to lead to demands from the judiciary for further separation. Those demands are now beginning to emerge. The Ministry of Justice has provided the occasion for that, but is not in itself the cause. There is a trend throughout Europe to introduce greater separation of powers between the executive and the judiciary, and as part of that to give the judges greater responsibility and control for managing the court service.

When the Lord Chancellor ceased to be head of the judiciary he negotiated a Concordat with the Lord Chief Justice which sets out their respective functions. As the new arrangements settle in it will need revisiting. Issues which the judiciary now want to reopen include the administration and budget of the courts, run by the Executive through Her Majesty's Court Service (HMCS). A working party between the judiciary and the Ministry of Justice has failed to resolve these issues, because the judges want a ring fenced budget for the courts, which the government is unable to concede.

Too many of the tensions between government and judges are perceived as tensions purely with the executive branch, when Parliament is also involved. One way to resolve this could be to engage Parliament, by inviting the Commons Constitutional Affairs Committee or the Lords Constitution Committee to inquire into the operation of the Concordat.

Action

Next Two Years

- Invite parliamentary committee to inquire into operation of the Concordat between the Lord Chancellor and the Lord Chief Justice

Action

First 100 Days

- Decide on changes to FOI fees regime.
- Oppose Maclean bill, unless restricted to exemption of MPs' correspondence.

Next Two Years

- Support principle of FOI in ministerial speeches.
- Build stronger evidence base to support any further policy changes.

Next Parliament

- Act on evidence built up during past two years, having included proposed changes in Labour party manifesto.

Summary of Action Points by Subject Area

Area	First 100 Days	Next Two Years	Next Parliament
Strengthening Whitehall and Devolution	• Put experienced and committed Minister in charge of constitutional reform • PM to take chair of Cabinet Committee on Constitutional Affairs. • Revive Cabinet Sub-Committee on Devolution Policy • Revive Joint Ministerial Committee on Devolution • Create small Constitution Secretariat in Cabinet Office	• Merge Scotland, Wales and Northern Ireland Offices into single department • Announce review of division of powers between UK and devolved governments?	• Referendum on primary legislative powers for Welsh Assembly • Increase capacity of Welsh Assembly from 60 to 80 members to match its increased powers • Announce a review of territorial representation at Westminster, in Commons and Lords
Conduct of the Executive	• Revive Cabinet and its key committees with proper papers and discussion • Issue revised and tightened Ministerial Code of Conduct • Divest patronage powers, eg over House of Lords, Church of England	• Review main prerogative powers to subject them all to parliamentary scrutiny • Introduce Civil Service Act • Review position of constitutional watchdogs, so that they have closer relationship with Parliament • Legislate to make prerogative powers subject to parliamentary scrutiny	• Legislate to put all constitutional watchdogs on statutory footing as bodies coming under Parliament
Parliamentary Reform	• Announce immediate end of PM's patronage powers to the Lords, giving greater power to the Appointments Commission • Announce intent to break the peerage link • Appoint reform-minded Leader of the House and Chief Whip • Announce a major Standing Orders review for the Commons • Merge Modernisation		

Area	First 100 Days	Next Two Years	Next Parliament
Electoral Reform and Funding of Political Parties	• Hold early Cabinet discussion to test mood on electoral reform • Seek cross-party agreement for a balanced solution on party funding, which controls expenditure and donations.	• If Cabinet still hostile, announce that no decisions will be taken on voting system for House of Commons until decisions have been made on an elected House of Lords • If Cabinet lukewarm, update and publish DCA review of new voting systems • If Cabinet more supportive, announce inquiry into AV for House of Commons • If agreement on party funding is not possible, legislate for tighter spending limits on campaign expenditure	• If agreement is reached on new voting system, hold referendum on electoral reform
British Bill of Rights	• Await the report of the JCHR on the case for a British bill of rights	• Decide on the machinery for drafting a bill of rights, and the process for adopting it. • Involve CEHR and JCHR in the decision	• Establish a body to draft the bill of rights, with wide public participation. • Submit bill of rights to referendum, perhaps at time of next election
Judiciary and the Courts		• Invite parliamentary committee to inquire into operation of the Concordat between the Lord Chancellor and the Lord Chief Justice	
Freedom of Information	• Decide on changes to FOI fees regime • Oppose Maclean bill, unless restricted to exemption of MPs' correspondence	• Support principle of FOI in ministerial speeches • Build stronger evidence base to support any further policy changes	• Act on evidence built up during past two years, having included commitment in Labour party manifesto

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