The December 2012 report of the Commission on a Bill of Rights by a seven to two majority proposed repealing the Human Rights Act and replacing it with fresh legislation. A British Bill of Rights would incorporate ‘all’ of the UK’s obligations under the European Convention on Human Rights, the chief difference being that the new Bill, unlike the present Human Rights Act (HRA), should be ‘written in language which reflected the distinctive history and heritage of the countries within the United Kingdom’. If all that was being proposed was the same legal rights with no change save wording, you might wonder why such a change was needed.

We can only understand the Commission’s proposals by placing them in the context of the British constitutional settlement. Our political system is different from the majority of contemporary liberal democracies, most of which were rewritten, from first principles, in the modern age.

Sovereignty is not said to reside in the British people but in our representatives, ‘the Queen in Parliament’. Further, the doctrine of ‘parliamentary sovereignty’ implies all sorts of second-order theories, including that the decisions of the Government also should not be capable of scrutiny by the courts.

British has long had a political culture in which the executive has been singularly above formal democratic control. This is the world portrayed in programmes such as Yes. Minister or The Thick of It, a world of career civil servants who are only weakly accountable to ministers, and where mere voters have no direct input into the appointment or scrutiny of key State positions.

Now the legal principles which underpin our constitutional settlement have been decaying in coherence for at least 30 years. As a condition of membership of the European Union, the UK is subject to European legislation and therefore to the jurisprudence of the Court of Justice of the European Union (CJEU). Inevitably, EU membership subordinates Parliament, if only in areas which Parliament has ceded to Europe.

By article 6 of the Lisbon Treaty of the European Union, the principles of the European Convention for the Protection of Human Rights are general principles of EU law. Britain is in effect required to sign up to the European Convention on Human Rights (ECHR) and has in any event since 1966 allowed people living in the UK to take cases to the European Court of Human Rights (ECtHR) in Strasbourg. Within the limited civil and political and democratic rights afforded by the Convention, the ECtHR is relatively activist. As with the CJEU, subordination to the jurisprudence of the Court of Justice of the European Union weakens Parliament.

Moreover, our present ‘neo-liberal’ moment, in contrast to the politics of post-war Britain and the world, is characterised by the demise of strategies for popular incorporation which attempt to tie economic reforms to national institutions reflecting a supposed consensus between rulers and ruled. In place of the old State measures of redistribution, the State is used more and more to finance units of private capital such as Atos, Capita, G4S etc. New strategies to make free market politics popular are required, whether the ‘Thatcherite’ tax-dodging and share-purchasing culture of the 1980s, or the subtler proliferation over 30 years of supposed individual rights. Trends such as the transfer of power towards the EU intensify this process. Juridification in turn makes it more difficult to justify old doctrines such as the placing of executive decisions above private legal scrutiny.

Further, in 1998, when the Human Rights Act was passed and the Strasbourg jurisprudence became directly effective in the UK, New Labour provided, in effect, that any future laws passed by Parliament must be compatible with the European Convention on Human Rights. This is done through section 3 of the Human Rights Act, which requires any court to interpret legislation in a way which is compatible with the rights set out in the Convention, and section 4, which authorises the High Court to declare any statute incompatible with the Convention. While this does not make the statute unenforceable; and for that reason Parliament remains sovereign; a declaration of incompatibility binds the hands of subsequent courts, making it difficult for the legislation to continue. The first New Labour Parliament limited the space for successor Parliaments not to legislate in certain ways. This, in the classical understanding of the British political settlement, is precisely what Parliament is never allowed to do.

Newspapers such as the Telegraph, Times and Daily Mail have been running for years a story to the effect that the Human Rights Act 1998 which gives partial domestic effect to the European Convention on Human Rights, is a major impediment to good government, i.e. neo-liberalism. It protects the rights of individuals, often unpopular individuals, and it infringes onto grounds such as national security or foreign policy which might be expected to be the exclusive domain of politicians. The newspapers are able to say this and be believed because while this story is essentially untrue it contains enough truth to be plausible.

Readers of this magazine well know that our senior judiciary has not been transformed from a bastion of conservatism into a workers’ shield. Key decisions of the courts in the past 20 years have been responsible for some of the worst features of British life. In employment law, it was the courts not Parliament which deprived Britain’s million-plus agency workers of the right to bring a claim of unfair dismissal. In housing law, the higher courts fought a desperate rearguard action for many years to enforce Parliament’s attempts to make whole categories of people evictable at will before conceding a partial defeat in the face of repeated, contrary decisions of the ECtHR.

That said, during the period of New Labour, whose authoritarian decision-making was clearly at odds with the instincts of its electorate, the senior judiciary showed a certain independence, which it proved difficult for the politicians to restrain. If the best-known judge of the 1960s and 1970s was Lord Denning, then the Master of the Rolls, who showed...
extraordinary creativity in inventing new measures of penalising workers’ strikes, the most authoritative figure in the judiciary of the 1990s and early 2000s was Lord Bingham, who as Lord Chief Justice presided over a House of Lords which reached a number of ‘liberal’ decisions, including outlawing the indefinite detention of non-UK national terror suspects, and finding that destitute asylum seekers were entitled to State support. Moreover, while in the mid-1990s, the legal challenge of authoritarian government had generally been done through reliance on legal fictions resting on the notion of an unlimited British ‘common law’, in practice, the broad language of the ECHR has meant that the terrain of contest has shifted to the ECtHR and the Human Rights Act.

The ambition of the Daily Mail and its allies in Parliament is not to depoliticise the judiciary, but to repoliticise the judiciary on fresh terms, to force back into the background its ‘Bingham’ tendencies and to make it more ‘Denning’.

The desire to repoliticise the law can be seen in the biographies of the Commission on a Bill of Rights. Three of the nine appointees, Lord Faulks, Jonathan Fisher and Anthony Speight, were members of the Society of Conservative Lawyers, while a fourth, Martin Howe, was in 2006-2010, a member of the Conservative Party’s Commission on a Bill of Rights for the United Kingdom. The Chair Sir Leigh Lewis, was formerly the senior civil servant at the Home Office with responsibility for Crime, Policing and Counter-Terrorism. This majority was ‘balanced’ by Sir David Edwards, a judge with no political background, Lord Lester, a Liberal Democrat peer, Helena Kennedy QC, a Labour critic of Blairism in the Lords during the years of the Blair-Brown governments and Philippe Sands QC, author of Torture Team.

The Commission majority justified their proposals to repeal the Human Rights Act on the basis that repeal would not be needed ‘if there were widespread public acceptance of the legitimacy of our current human rights structures, including of the roles of the Convention and the European Court of Human Rights. But they believe there is not’. It is hard not to feel scepticism as to who is supposed to make up the ‘public’ that does not consent to the HRA. The Commission organised two consultations, a large majority of responses opposed the proposed Bill, and the Commissioners accepted that the HRA is popular in Wales, Scotland, and Northern Ireland, as well as in large parts of England too.

Two Commissioners opposed the recommendations of the majority, Philippe Sands QC and Helena Kennedy QC. Their main arguments were as follows: there could be no ‘British’ Bill of Rights when Northern Ireland as part of the peace process was consulting on its own Bill of Rights and when, depending on the outcome of the Scottish devolution vote, large parts of the implementation of the new rights contained in the Bill would no longer be capable of discussion at Westminster, but would pass to Holyrood under either independence or enhanced devolved powers.

They further suggested that the Tory barristers who dominated the Commission had been proposing a British Bill merely as a halfway house towards their real goal which was to resile from the rights contained in the Convention: ‘[T]he view [was] expressed in the course of the Commission’s deliberations by a number of their colleagues on the Commission, to the effect that they would like the United Kingdom to withdraw from the European Convention on Human Rights.’

What the Government needed from the Commission was a clear mandate in favour of the removal of the Human Rights Act. The result is more equivocal; and in particular the minority seem to have persuaded the majority that the issue should at least be put on hold until the outcome of the Scottish referendum. The next step will be for the politicians to take rather than the lawyers. But the appetites of the Tory right have been whetted and we should expect them to come back for more.

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