

Can we trust the judges? - judicial power

The Human Rights Act will give them unprecedented constitutional power, so we need to know who they are and what they stand for

When the courts granted an injunction to stop newspapers publishing material from Spycatcher in 1987, a young barrister said the case showed the "inherent conservatism of the judges". Putting our civil liberties in their hands through a bill of rights would be "bizarre".

The speaker was Tony Blair, and the subject one of a number on which he has since had cause to change his mind. A bill to incorporate the European Convention of Human Rights (ECHR) into British law is now on its way through parliament.

Blair is not alone in this change of heart, which indicates a massive shift of opinion on the left, away from the position argued in 1977 by J A Griffith in his influential book, *The Politics of the Judiciary*, that judges, shaped by public school, Oxbridge and the Bar, are inevitably "conservatives, not liberals".

It was the political left's failure to construct effective opposition to Thatcherism in the 1980s that started to undermine this view. Also, says Andrew Puddephatt, director of Charter 88, "political institutions and parties, which had been seen as democratic, legitimate and representative up to the end of the 1960s, were no longer regarded as such". As a result, the centre-left started to build a new platform around the issue of constitutional reform and with it, says Rabinder Singh, barrister and author of *The Future of Human Rights in the United Kingdom*, "the concept of human rights and the idea of enforcement of them by judges". By 1991 Liberty had published a draft bill of rights, and the following year John Smith declared his support in principle.

Residual doubts about the wisdom of raising the constitutional status of judges were dispelled in the final years of the Major government, when the judiciary clashed repeatedly with the home secretary, Michael Howard. "Judges had begun to feel in their collective minds that they should adopt a more questioning role of the executive," says Puddephatt.

But the crucial question for the left is this: has the judiciary really changed? Can it be trusted to uphold basic human rights and, where necessary, challenge the government on the citizen's behalf?

Strolling through the Inns of Court in London, there is no reason to think Griffith's analysis out of date. Braying men dash about self-importantly and the typical coffee table bears back issues of *Country Life*. Griffith himself reminded the Home Affairs Select Committee last year that senior judges are still drawn "exclusively from a small section of the wealthy professional upper middle class". Eighty per cent are public school and Oxbridge and "over the postwar years these figures have varied very little".

Liberal lawyers, however, say the surface facts deceive. Geoffrey Bindman, of Bindman and Partners, a law firm that acts for *New Statesman* and displays legal aid leaflets in its reception, argues that "20-30 years ago there were a number of outspoken reactionaries on the bench, xenophobic and triumphalist about the English legal system. Appointments to the bench recently have brought to prominence more people with a liberal and humanitarian outlook."

Credit for this goes to Lord Mackay, John Major's Lord Chancellor. It was he who promoted Thomas Bingham to Lord Chief Justice and put Harry Woolf in the number two job as Master of the Rolls. True, both these men (born in the same year, 1933) went to public school (Woolf to Blair's old school, Fettes College) and fit comfortably into the padded-armchair world of the Bar. But they are also perceived as more outgoing than their predecessors, with a wider circle of friends. Bingham is a bespectacled intellectual with a sharp, forensic ability deployed in investigating the collapse in 1991 of the Bank of Credit and Commerce International. Woolf, author of the 1990 report into the Strangeways Prison riot, whose warnings about overcrowding Michael Howard so contemptuously ignored, is more floridly liberal in style and has made a major contribution to rethinking the pattern of civil justice: his Woolf reports advocating streamlined procedures and easier access to justice, most of which have been endorsed by the new Lord Chancellor, Derry Irvine.

Bingham has caused waves recently by hinting at support for a calmer consideration of the law banning cannabis, but neither he nor Woolf is expected to kick over the traces. One barrister sees the pair as "liberal on criminal procedure and traditional legal areas, such as control of police power. But in more political areas they are likely to be more uncertain and anxious. They will be sensitive to accusations of infringing parliamentary sovereignty."

Below Bingham and Woolf, the Law Lords and Lords Justices of Appeal are seen as the best bunch for some years: independent, liberal and open-minded, prominent among them the former "Treasury devils" (junior counsel who act for government departments- Woolf is a

graduate of this school), once paid to argue for the state. Such figures as Lords Slynn, Simon Brown and Browne-Wilkinson, are among the well-regarded.

After them in the pecking order are 96 High Court judges. These mostly keep a low profile, but two have become well known: Stephen Sedley and John Laws, both with a background in public law.

Sedley, as barristers point out in hushed tones, is a former communist, a point which led the Daily Mail to ask a couple of years ago: "Does this judge think he is above democracy?" Sedley was blamed by the Mail for supposedly doing the groundwork for Lord Mackay's divorce reform bill, and he plays to Middle England's suspicions by listing his Who's Who hobby as "changing the world". Laws' background is more conservative-libertarian, but his critique of the limits of parliamentary authority is one to which Lord Irvine has felt obliged to respond.

The senior bench may have done no more than shift politically to pale blue tinged with yellow, but the High Court is turning pink. Several former Labour Party members have been appointed in the past few years, among them David Keene, who has lent his French holiday home to the Blairs, Alan Moses, who tromps the bicycling Sir Richard Scott by riding a motorbike to court, and Andrew Collins, a former CND demonstrator.

According to Robert Stevens in a new collection of essays called *The Human Face of Law*, High Court and appeal judges are post-empire children, with views on the welfare state "shaped by Gaitskell and Butler rather than Milton Friedman and Michael Portillo. They lean more towards being Europhiles and are more sympathetic to the penal policies of a Roy Jenkins or a Leon Brittan than a Michael Howard."

Blair has set out to achieve a calmer relationship with judges than his predecessor: reforming, but not too radical; hence Lord Irvine's binning of Labour's plans for a Judicial Appointments Commission.

But the real test will be judicial behaviour in the wake of the Human Rights Bill, which the government claims will "bring rights home" from Europe. Instead of having to wait up to six years before their case is heard in Strasbourg, Britons will be able to have any breach of basic rights assessed at home. The effects will be widespread. A roads protester, for example, will be able to argue the right to freedom of assembly against the provisions of the Highways Act. "I don't think people realise how often it will arise," says Paul Stinchcombe, Labour backbencher and former barrister.

However, where a judge believes an act of parliament to be incompatible with the ECHR, he will have no powers to strike it down. All he can do is make a "declaration of incompatibility", leaving it to politicians to decide whether to change the law or ignore the judge.

The bill's carefully struck balance between the role of judges and that of politicians makes it possible to offer widely differing conclusions of the likely outcome of the bill.

Sir Nicholas Lyell, the former attorney general, has written that, unless handled carefully the bill "would prove to be fundamentally anti-democratic" by undermining parliament.

Griffith is still convinced that for all the motorbikes and Labour Party membership cards, establishment-mindedness will prevail and cites the decision by the Court of Appeal at the end of October ordering a journalist to return leaked Camelot documents. In future, the right to publish might be buttressed by reference to the ECHR, but the outcome would still depend on British judges.

Or take the case of gays in the military, on which a European Court ruling next year is expected to challenge Britain's practice of excluding homosexuals from the armed forces. In their judgments on the original case in 1995, Lord Bingham and Lord Justice Simon Brown waxed lyrical about human rights (the latter's opening flourish was that "Lawrence of Arabia would not have been welcome in today's armed forces"). The question remains, however, whether British judges would have pressed home their liberalism had they been empowered to make the final judgment.

Lord Lester, a pioneering campaigner for a bill of rights for more than 30 years, introduced a private member's bill in 1995 which would have empowered courts to overturn laws that breached the convention. His consultations with senior judges revealed "no enthusiasm for new powers that would put them so directly at odds with the elected branch of parliamentary government," he has written.

Michael Beloff QC and Helen Mountfield, however, have noted a shift within the judiciary from "the rhetoric of fulfilment of parliamentary sovereignty to the creation of a doctrine of judicial protection of basic or constitutional individual rights; and the notion of the community's core values to be balanced against the executive's notion of the common good".

Judges Sedley and Laws are in the vanguard of this shift. Laws has said that citizens have fundamental rights, which judges have a duty to defend from parliamentary trespass. In a 1992 lecture he asked: "Is the High Court the guardian of fundamental constitutional rights?" and answered robustly in the affirmative.

Sedley, though sceptical of Laws' idea of inalienable human rights, has written that judges have a less "myopic view" of the public interest than the government. He sees "considerable support for judicial control of an otherwise unaccountable executive . . . a popular consciousness which, at least occasionally, casts [the executive] in the role of the dragons and the judiciary in the role of St George".

Woolf has also flexed his muscles. Last year he argued that parliament could not abolish judicial review. "If parliament did the unthinkable then I would say the courts would also be required to act in a manner which would be without precedent . . . There are limits on the supremacy of parliament which it is the courts' inalienable responsibility to identify and uphold."

These views have the support of a growing faction of public lawyers, led by the likes of David Pannick, Murray Hunt, Ben Emmerson, Geoffrey Robertson and Rabinder Singh. Singh says: "When people talk about parliamentary sovereignty what they are really talking about is executive government. To give any body in the state absolute power is unacceptable."

The Human Rights Bill certainly opens new opportunities for judges. Currently, they can only challenge a decision by a public authority on the basis that it is so unreasonable that no reasonable decision-maker could have made it: the Wednesbury test which, says Lester, is equivalent to "a certificate of ministerial insanity". Under the new arrangements the public authority would have to show the action was necessary to secure the protection of the public interest (a proportionality test). Lord Irvine is aware of the possible implications: in 1995 he argued that such a test would "involve the court in a process of policy evaluation which goes far beyond its allotted constitutional role. Proportionality requires the court to address questions involving compromises between competing interests, which in a democratic society must be resolved by the legislature."

Some spy a paradox. "He seems concerned that the courts had gone too far in judicial review, yet now he is empowering judges to go significantly further," says one Law Lord.

Irvine's anxiety was expressed in a debate in the Lords last year when he reminded judges of their "constitutional imperative of self-restraint", and warned of the dangers of "judicial supremacism."

In practice the balance will be determined by individual judges: a Sedley or a Laws will reach one judgment, a more conservative figure a different one. Nicholas Nicol of the Public Law Project says: "in our analysis of judicial review in the 1990s we found a huge disparity in the divisional court over how willing judges were to let cases go forward against the government, ranging from 20-80 per cent of cases. There is no reason to suppose this will not be true for ECHR cases."

There is also the point that under the Human Rights Bill, before the second reading of any future legislation, the minister concerned will have to make a statement explaining whether the bill in question is compatible with the ECHR. "If parliament does this properly, and makes sure that human rights implications are built into legislation, the courts will find it very difficult to impose their view on parliament," says Puddephatt.

But if ministers fail to take proper account of the Human Rights Act, there will certainly be a number of judges eager to mount a challenge. In doing so, they will be mindful of a MORI poll in April, which suggested more than 70 per cent think judges tell the truth, against 12 per cent for government ministers.

In a face-off between a modernising judiciary and a modernising government, it is by no means clear that the government would win. Prime Minister Blair may yet have cause to wonder whether Barrister Blair did not have a point.

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