

## ..THERIGHTS STUFF

John Griffith

As part of its search for new and popular policies, the Labour leadership is proposing constitutional changes. Before the general election, there was conflict over the desirability of adopting a Bill of Rights and, in the event, the manifesto merely listed a number of specific reforms including a freedom of information statute and control over the security services. More recently a much wider and more comprehensive set of proposals has been advocated.

Changes in the system of government look attractive, especially after the experience of the 1980s. But the dangers are very great. The consequences of what is now proposed are, as I shall seek to show, likely to result in the serious weakening of centralised power (essential to a Labour Government) and the considerable strengthening of private interests.

A Bill of Rights, interpreted and enforced by appointed judges, an elected second chamber, devolution to regional assemblies, proportional representation, all these constitutional proposals will diffuse political power and leave a Labour Government without the means to achieve its political ends.

It is commonplace today to decry the achievements of the Attlee administrations between 1945 and 1951. Yet nothing in the last 40 years has more importantly advanced the cause of the public good. Under our constitution, electoral success gives legitimacy and authority to strong Government. That strength, in the socialist cause, must not be jeopardised.

Since 1950 the United Kingdom has been a signatory of the European Convention on Human Rights along with some 20 other countries. The Convention contains 11 substantive articles. The articles proscribing torture, inhuman or degrading treatment or punishment and slavery or servitude are absolute in their terms, while others are defined with reference to exceptions or conditions. Petitions may be lodged complaining that a country by its laws or practices has contravened an article. This is first considered by the Human Rights Commission which, if it finds that there has been a contravention, may send the case to the Human Rights

Court. If that Court upholds the Commission, the 'guilty' country must bring its law or practice into conformity with that finding.

Since the late 1960s, campaigns have been conducted seeking to incorporate the ECHR into UK domestic law. The result of so doing would be to provide that law with a Bill of Rights which would then be wholly applicable in UK courts and override or 'trump' existing laws which were inconsistent with it. In 1974 Lord Scarman joined this campaign, followed in 1977 by the Northern Ireland Standing Advisory Committee on Human Rights and in 1978 by a narrow majority in a select committee of the House of Lords. Lord Hailsham and Lord Denning have supported the campaign at times and withdrawn their support at other times. Other eminent judges have taken sides. Most members of most of the recent Liberal parties have been in favour. The Conservatives have been against, and the Labour Party prefer some specific remedies but not the general prescription.

In 1988 was launched a new campaign under the pretentious title of Charter 88. Within two years it had been supported by some 20,000 people. It called for 'a new constitutional settlement, with an enshrined Bill of Rights plus freedom of information and open government, proportional representation, a democratic House of Lords, a reformed judiciary, and certain other changes all to be incorporated in a written constitution which would 'place the executive under the power of a democratically renewed parliament and all agencies of the state under the rule of law'. The document says: 'Our central concern is the law. No country can be considered free in which the government is above the law. No democracy can be considered safe whose freedoms are not encoded in a basic constitution.'

No doubt partly because of the imminence of a general election, 1991 produced more documents. The Labour Party concentrated on freedom of information, privacy, the security services, equal opportunities, immigration, citizenship and asylum, children's rights, legal rights, and rights in employment and to assembly. Otherwise there were some constitutional changes such as the creation of elected regional authorities. The Second Chamber of Parliament would be elected, with negligible legislative powers except for an ability to hold up constitutional bills, particularly affecting fundamental rights. Presumably as the result of a compromise between opposing opinions within the party top brass, the absurd proposal is made that this delaying power would be exercised for the whole period until the next general election, under the artificial pretext that this would enable the electorate to decide.

Two much more ambitious publications followed. The National Council for Civil Liberties put forward 'A People's Charter' subtitled 'Bill of Rights: A Consultation Document'. This was an elaborate document of over 100 pages, well researched and well presented. The authors said that the Bill could form part of wider changes but did not put forward proposals for other constitutional reforms.

Also in 1991 was published 'The Constitution of the United Kingdom' the product of the Institute for Public Policy Research, a body established in 1988 and closely connected with the Labour Party though this document acknowledges help and advice from several liberals of various party allegiances.

One common belief links all these documents. It is that the principal antagonist in the battle for the enlargement of civil liberties and freedoms is the State, and its agent the Government of the day. The rights to be protected are political and modelled on the ECHR and on the United Nations International Covenant on Civil and Political Rights. Social and economic rights are listed in the IPPR Constitution but made 'not enforceable'. The UK Courts would be empowered to declare invalid any Act of Parliament or administrative practice that conflicted with the Bill of Rights.

The NCCL proposal provides that an Act of Parliament, passed after the Bill of Rights comes into effect, which is held by the courts to conflict with the Bill of Rights, may nevertheless be effective if a special Committee of the House of Commons so declares by a two-thirds majority supported by a vote in both Houses. Clearly the NCCL is worried by the criticism that Bills of Rights vest final decision-making in the appointed judiciary and wants in exceptional cases to draw the process back into ultimate Parliamentary adjudication. The result is a clumsy and elaborate device which does little to meet the principled criticism.

Because of its much broader scope, embracing not only a Bill of Rights but other constitutional reforms, the IPPR document deserves the fuller examination.

**There has over the last twenty years been a growing chorus of complaint about aspects of British government which in any other system would be recognised as constitutional.**

The words are taken from the commentary introducing the written constitution for the United Kingdom proposed by the IPPR. The 'aspects' include the electoral system, the weakness of Parliament, excessive secrecy, a political police. For these defects, the IPPR recognises that there are available remedies: select committees could be strengthened, secrecy greatly reduced, freedom of information and protection of privacy made statutory requirements, and so on.

But it is such ad hoc solutions that the IPPR wishes to get away from. For they have found 'a growing interest across the political spectrum in bringing these separate complaints together'. This interest, we are told, 'reflects a common understanding of the underlying problem which is best expressed in Dunning's famous motion of 1780: 'the power of the executive has increased, is increasing and ought to be diminished'.' So a 'growing chorus' inspires a 'growing interest' in a 'common understanding' of an underlying problem which provides its own solution: the curtailment of the power of Government. And this is to be achieved by binding rules and

precepts set down in writing, incorporated and entrenched in a new covenant. The proposal is, in some respects, radical even revolutionary. The commentary continues:

**The essential question is whether the time has come not to change the historical constitution incrementally as has been done in the past, but to change the basis of the Constitution. That is, to change from a single fundamental principle, the supremacy of Parliament, which is founded in custom and usage as recognised by the courts, to a fundamental law which is prior to, independent of and the source of authority for the system of government.**

This fundamental law is a written constitution here set down in 129 clauses and 6 schedules.

The primary proposition that the Executive has too much power is extended significantly to include not only power 'in relation to individuals' but also 'in relation to its political opponents'. So 'other collectivities' have to be protected against the Government. The argument is extended further by taking 'a radically different view' from those who are suspicious of entrenched 'rights' and who prefer political decisions always to be taken by the political decision of the representatives of the people. The written constitution, which most importantly includes a Bill of Rights, prevails over Acts of Parliament and all other rules of law.

Apart from the provisions relating to the Bill of Rights, the more important reforms contained in the written constitution include fixed four year terms for the Houses of Parliament with possibility of dissolution if the Government loses the confidence of the Commons (but the newly elected House would continue only until the expiry of the four year term); proportional representation for election to both Houses; the second chamber to have equal powers with the Commons on constitutional matters, including the Bill of Rights; and 15 elected regional assemblies.

These regional assemblies are to have powers to legislate over all major domestic functions and services. As was found during the discussions on the abortive Scotland and Wales Bills, the key problem is how to resolve disputes between the rival jurisdiction of the assemblies on the one hand and Parliament on the other. The IPPR draft runs away from any attempt at a solution. It provides that Parliament may make laws with respect to any matter within the legislative power of the assemblies if (1) that matter cannot be adequately regulated by an individual assembly or (2) the regulation of a matter by an assembly would prejudice the interests or interfere with the rights of residents of other parts of the United Kingdom.

This passes the buck directly to the Supreme Court (under the proposed constitution) which has exclusive jurisdiction in any proceedings brought by the central Government seeking a ruling that any assembly Act is wholly or partly invalid; or brought by the executive of an assembly seeking to invalidate an Act of **Parliament**. This will give rise to litigation of a quality so horrendous (except to lawyers) that nothing like it has been seen since Franklin Delano **Roosevelt** struggled, in not dissimilar circumstances, to get his New Deal legislation past the Supreme Court.

Some of the regional assemblies will be controlled by political parties opposed to the party of the central Government. They will wish to implement policies which the central Government strongly disapproves of or which will directly affect those in neighbouring regions. Examples from education, energy, environment, health, housing, social welfare, trade and industry and transport (all these being within the jurisdiction of assemblies under the Constitution) are easy to imagine. So the central Government asks the Supreme Court to rule that the assembly cannot 'adequately' regulate this matter or that what the assembly proposes will 'prejudice the interests or interfere with the rights' of those neighbouring regions. Or perhaps the central Government legislates in the matter and the assembly asks the Supreme Court to invalidate the Act of Parliament. Once again we see how unwise and productive of continuing animosity it is to seek to solve a political problem by calling in the judiciary. Such litigation would quickly destroy the working of the Constitution.

Elected local authorities are to be set up within each region; and a new structure is to be created for UK courts, with a judicial appointments commission.

All this means that the top level of Government is largely unaltered. The role of the Royal Family and the honours system are made explicit and strengthened. Individual Ministers are to be relieved of responsibility for what happens in their Departments except for matters of 'general direction and control'. Parliamentary opposition is weakened by the dissolution provisions. The stage is set for major conflicts between the regions and the Departments. And the role of the judiciary is greatly enlarged.

But the principal purpose of the exercise is to establish the new constitution as 'the sole foundation for the exercise of executive, legislative and judicial power', and to set down a list of fundamental rights and freedoms.

A Supreme Court is to have jurisdiction over the interpretation and effect of the **constitution**. If it is shown to the satisfaction of the Supreme Court that any law, convention, practice or usage in force immediately before the coming into force of the constitution, is inconsistent with any provision of the constitution, or that any decision or act of the Government or of any public body is so inconsistent, then the Supreme Court may declare any such law (including any Act of Parliament), decision or act to be invalid. In particular, the Supreme Court may so declare whenever it finds that any such law, decision or act is inconsistent with any provision of the Bill of Rights. So the provisions are retrospective as well as prospective.

A Human Rights Commission would be set up with the power, amongst other things, to investigate any act or practice that might be inconsistent with the Bill of Rights, to assist individual complainants in legal proceedings, itself to institute such proceedings whether or not it had received a

complaint, to challenge the validity of any provision of an Act of Parliament, to intervene in any proceedings that involved human rights issues, to report to Parliament and to publicise guidelines for the avoidance of acts or practices inconsistent with the Bill of Rights. This is a most formidable collection of powers to bestow on a public body.

One other quotation from the IPPR commentary on its proposed constitution is significant.

**We need rules to govern the exercise of power. It is in the interest of the less powerful that those rules should be clear and explicit, to lessen their manipulation by the more powerful. We need rules that we can accept as fair in general, though we object to their application in particulars. We need rules to protect ourselves and others against ourselves.**

And when faced with the argument that all this hands over too much power to judges, the commentary adds 'And we need referees, *even* bad referees, to interpret and enforce the rules'. The words I have here emphasised show how far the drafters of this constitution are prepared to go in defence of their own dogma.

The IPPR constitution lists 18 'fundamental rights and freedoms' including rights to life, to liberty and security, to fair and public hearing, to education, to enjoyment of possessions and to asylum; and freedoms from torture, slavery, and of thought, expression, assembly and association; and others. The constitution does not attempt to justify the inclusion of those rights and freedoms or the exclusion of others, being content to assert that these are 'equal and inalienable rights with which all human beings are endowed'. We are left to suppose, along traditional lines, that 'each person is to have an equal right to the most extensive liberty compatible with a similar liberty for others' a form of words which over the years has given political philosophers a bad name. For the truth is, as **Bentham** said:

**It is impossible to create rights, to impose obligations to protect the person. life, reputation, property, subsistence, liberty itself, except at the expense of liberty.**

In the application of a bill of rights in a case before a court of law (and no other forum is proposed) the knife of interpretation has to cut and the winners will fall on one side, the losers on the other. Some rights are indeed more equal than others. Where a provision of the bill of rights is judged to trump an existing law, 'the word *right* is the greatest enemy of reason, and the most terrible destroyer of governments' (**Bentham** again). But, then, under the proposed constitution, it is meant to be.

The creation of political rights in a constitution or elsewhere is a political act. How the rights are defined, with what exceptions and on what terms, how rights relate to each other, are all political statements. If we favour a strong executive because, for example, we believe that for our country, at this period, major reforms need to be introduced, then we will not wish to construct a system where the countervailing forces can easily frustrate the executive. In time of war or national emergency we may prefer to have a strong Government with judicial controls at a low level, as happened from

1939 until the late 1940s. If we wish to curtail executive powers, as does the IPPR in its constitution, we will make appropriate provision and one way of doing this is to create rights legally enforceable against the Government.

Mystification follows and these rights are presented in metaphysical or transcendental wrappings. Words like 'natural', 'inalienable', and 'endowed' conceal what is no more than a particular statement about the exercise of political power. Some philosophers and some lawyers have long sought extra-legal principles or standards by which legal relationships may be judged. But, not surprisingly in our conflictual society, they have not progressed beyond phrases like a sense of justice, or the morality of the community.

In the event it is inevitable that when such general rights are given legal form, interpretation will follow. The founding fathers of the United States constitution did not attempt detailed definition. 'Congress shall make no law', they said 'abridging the freedom of speech, or of the press.' No person, they said, shall 'be deprived of life, liberty, or property, without due process of law.' Later they added that no State should 'deny to any person within its jurisdiction the equal protection of the laws.' For many years, little happened to explain what was the impact of such words on civil rights. Then at the end of the nineteenth century, the Supreme Court ruled that inequality between black and white people was permissible if the two groups were segregated. In the middle of the twentieth century this was reversed and from that time the Supreme Court has been continuously engaged in sometimes broadening and sometimes narrowing the bill of rights in a multiplicity of judicial opinions, veering this way and that according to the views of the Chief Justice and his eight colleagues. Most recently, much controversy has centred on the role of the Court, how far it should reinterpret the constitution in the light and darkness of today, how far it should stay clear of matters (like abortion) which did not directly engage the attention of Madison and his contemporaries.

That is certainly one way of going about it. State the principle and let the courts decide what it means. In any event the courts will be obliged to impose their own interpretations and perhaps it is better not to seek to spell out the exceptions as to do so will only give the courts more words to play with. This looks like a paradox for if the draftsman itemises the exceptions, surely (one might think) this will reduce the scope for interpretation. But this is not so. Or not necessarily so, as we shall see.

The IPPR followed the European Convention of Human Rights in spelling out the exceptions. When the ECHR was drafted and ratified, the UK representatives had no thought of its provisions trumping Acts of Parliament. That was strictly for foreigners.

The IPPR Bill of Rights places first in its list 'Right to Life'. This provides:

2.1 Everyone's right to life shall be protected by law.

**2.2** No one shall be deprived of life intentionally.

Para **2.3** allows exceptions for self defence and the quelling of riot or insurrection, where the taking of life is 'absolutely necessary'. Para **2.4** rejects capital punishment.

Both the statement of the principle and the statement of the exceptions give rise to considerable problems of interpretation which are to be determined by the courts. It seems to allow for a considerable extension of any right to shoot to kill to suppress disorder. But it also raises one of the most divisive issues in modern society: abortion. Is the unborn embryo or foetus entitled to the protection of this article? If so, does this depend on how advanced is the **pregnancy**? A majority of the Supreme Court of the USA in *Roe v Wade* (1973) famously declared that abortion was legal. But it laid down terms which provided that (1) prior to the end of the first trimester of pregnancy, the State might not interfere with or regulate an attending physician's decision, reached in consultation with his patient, that the patient's pregnancy should be terminated (2) from the end of this trimester until the point in time when the foetus became viable, the State might regulate the abortion procedure only to the extent that such regulation related to the preservation and protection of maternal health (3) that after viability, the State might prohibit all abortions altogether, except those necessary to preserve the life or health of the mother. Subsequently the Supreme Court limited the applicability of this decision but has not, so far, overruled it. The suitability of persons nominated for appointment to the Supreme Court in recent years has been widely challenged on the basis of their attitude to the decision in this case.

Nothing in the Bill of Rights of the USA bore directly on abortion, neither the founding fathers nor their successors having considered the matter. But the majority in the Supreme Court decided that the right to privacy encompassed a woman's decision whether or not to terminate her **pregnancy and that** this right to privacy, though itself not mentioned in the Bill of Rights, was to be inferred from it.

The legal right to an abortion and the conditions limiting that right are defined by an Act of Parliament in the UK and much argument takes place from time to time, inside and outside Parliament, about these statutory rules and whether they should be amended. The policy decision is taken by Parliament. If a Bill of Rights were part of UK domestic law, the policy decision would be taken by the courts who could strike down the present and any future legislation. Perhaps the UK courts would imitate the **Supreme** Court of the USA and lay down similar rules based on trimesters or some other criteria. The courts would certainly need to decide whether the unborn child was a person for these purposes and, if so, at what stage of pregnancy it acquired that status.

To take another example: in what circumstances is the withdrawal of medical treatment which it is known will result in the patient's death to be

regarded as 'intentional' deprivation of life? More generally, are the variations of what is popularly known as euthanasia permissible (if ever)? During the *Bland* case, which established the right to withhold artificial feeding and antibiotic treatment in certain circumstances even though this would result in the patient's death, Anthony Lester QC (a well known Bill of Rights draftsman) is reported to have argued that human life was valueless without 'a minimal capacity to experience, to relate with other human beings, for life is surely valued only as a vehicle for consciousness', and so the court should allow Bland to die. That is one view though I believe many people less sensitive than Mr Lester might be surprised to know that they valued life only because it was a vehicle.

So. Is it better for these difficult questions of abortion and euthanasia to be answered definitively and finally by QCs and judges after argument in a law court, even one having the advantage of advice from Mr Lester as *amicus curiae*? Or to be answered after public debate by the representatives of the people? My view is that such social matters are best kept away from senior judges who (in fairness) have never shown much enthusiasm for them.

Article 3 of the IPPR model states: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This looks straightforward enough though the same words in the ECHR have caused problems. The security forces in Northern Ireland used five dubious methods of interrogation: wall-standing, hooding, subjection to noise, deprivation of sleep, and reduction of diet. Combined they could amount to torture, said the Commission. So could *bastinado* (in Greece). Again, a fourteen year old girl was caned by her headmistress for eating potato crisps in class, leaving three red weals across her buttocks with pain and discomfort for several days, the scars remaining for two months. No marks are given for guessing in which country that was perpetrated. Treatment of convicts (e.g. solitary confinement), and aspects of deportation and extradition, give rise to cases under this head. More interesting, especially for liberals, are the rights of sado-masochists, who voluntarily inflict or suffer pain for their own pleasure. The UK courts have recently decided against them. All these matters are better dealt with by legislative rules than by judicial interpretation.

Forced or compulsory labour (Article 4) is outlawed by the IPPR though they feel obliged to exclude from protection 'any service exacted in case of an emergency threatening the wellbeing of the community' which could be a dangerous weapon in some circumstances not difficult to imagine and not a category I would entrust judges to interpret. Here, as so often, one feels safer without the protection supplied by the Bill of Rights.

Similarly what is one to say of the express power under Article 6 of the IPPR model to exclude press and public from hearings in court, 'to the extent strictly necessary', 'where publicity would prejudice the interests of

justice'. There certainly are occasions when it is necessary for cases to be heard in private but they should be carefully defined and not left in a category so general that the presiding judge has an absolute discretion.

The provisions of articles 8, 9, 11 and 12 lie at the heart of the IPPR Bill of Rights (as they do in the ECHR). Article 8 concerns the right to privacy; 9 concerns freedom of thought; 11 concerns freedom of expression; 12 concerns freedom of assembly and association. But, as before, the catch is in the authorised restrictions on the principles, the legitimised grounds on which the principles can be set aside. In every case the grounds are those provided by law and deemed 'necessary in a democratic society' for the prevention of disorder or the preservation of order; for the protection of health or morals; for the **protection** of the rights and freedoms of others. The interests of national security are protected by articles 8, 11, 12 and those of public safety by articles 8, 9, 12. The 'reputations' of others are protected by article 11.

In the face of this list, it is difficult to think of any unprotected interests. The restrictions on rights and freedom are wider than those enjoyed under statute or common law. When therefore an action is brought claiming a breach of the Bill of Rights, the Government or other defendant can resist by establishing that the alleged infringement was provided by law (very few would not be), protective of one of those listed interests (not difficult to show) and necessary in a democratic society. It is on this last that the principal argument is joined. Article 8 declares the right to respect for private and family life, home and correspondence. The present concern over press intrusion and the real difficulties faced in formulating rules that would be protective of privacy but not enable wrongdoings, especially by public persons, to be covered up, demonstrate the social and political nature of the problem. Whether self-regulation by the press or statutory rules laid down by Parliament are the answer, it is clear that individual judges sitting on individual cases with nothing to guide them but the generalities of a Bill of Rights do not provide a workable alternative. Once again, social and political problems require social and political solutions.

Article 11 of the IPPR draft on freedom of expression is based in part on article 10 of ECHR. The European Court, to its credit, albeit by the narrowest majority of 11 judges to 9, overturned the injunction obtained in UK courts banning the publication by the *Sunday Times* of a piece strongly supportive of the thalidomide children in the struggle to obtain compensation from the manufacturers of the drug. But most recently the **European** Court upheld the injunction imposed by UK courts on the *Guardian* and the *Observer* preventing the publication of extracts for Peter Wright's *Spycatcher* until after the book had been published in the USA. In the UK courts, Lord Templeman was of opinion that the ECHR would not have helped the newspaper had the Convention then been part of UK democratic law. Certainly the record of the UK courts on freedom of speech and on protection of journalists' sources is deplorable.

The living conditions of the great majority of people are determined not by the politics of Government but by the economics of corporations. And civil liberties are curtailed more by employers than by the State. The restraints on free speech are imposed more by the threat of demotion or dismissal than by public censorship. Wherever, before expressing criticism, we pause to consider who might be offended by what we say, what might be the result of speaking out, the fear is not likely to be that we shall commit a breach of the peace, or be found guilty of obscenity or blasphemy or of offending the Official Secrets or the Race Relations Acts, or of being sued for defamation of character. What we are likely to be concerned about is whether our job or our career is likely to be imperilled. We may have contracted with our employer not to discuss publicly any matter relating to the corporation and we will under the common law be under an implied obligation to act 'in good faith or fidelity'. This threat is a far greater constraint on activity both inside and outside the workplace especially when the remedy for unfair dismissal is seldom reinstatement and often inadequate compensation. Rules against making public complaints about terms and **conditions** of work even when made to protect others are strict and enforced. Whistle-blowers can, at best, expect their dismissal to be delayed for a short **time**. These powers at the disposal of the employer (who may be a public authority) are in no way challengeable under a Bill of Rights.

Article 12 of the IPPR draft on freedom of association follows article 11 of the ECHR. It includes the right to join a trade union. But an additional restriction on the right excludes members of the armed forces or of the police or persons charged with the administration of the state. The European Commission under this restriction upheld the banning by the UK Prime Minister and the Foreign Secretary of trade union membership at GCHQ in December 1983. The UK courts had refused to interfere with the Ministerial decision.

Keith Ewing in his pamphlet on a Bill of Rights for the Institute of Employment Rights (1990) surveyed the practice overseas. The Privy Council in London, sitting as a court, is composed almost entirely of Law Lords. In *Collymore v Attorney General of Trinidad and Tobago* (1969) the Privy Council held that an Act which effectively removed trade union bargaining rights as well as the right to strike was not unconstitutional although there were guarantees of freedom of association in the Trinidad Tobago constitution. This decision was followed by three Canadian cases in 1987. The legislation suspended the right to collective bargaining, denied the right to strike to public sector employees: and in one case ordered striking workers to return to work. This was upheld, despite freedom of association guarantees in the Canadian Charter of Rights and Freedoms.

The European Convention, says Ewing, 'has been a deep disappointment for British trade unions'. It left the GCHQ staff defenceless and the

Commission and the Court 'appear more concerned with the right not to belong to a union than with the right to belong'.

Article 10 of the IPPR Bill of Rights provides: No person shall be denied the right to education. These words are the same as those used in the ECHR. The IPPR draft article goes on to require public authorities to respect the right of parents to ensure that education and teaching are in conformity with their religious and philosophical convictions. The question has been raised whether this would prevent a Government from abolishing private schools or from denying such schools tax relief.

This brings us to the core of the objections to the adoption of a bill of rights as proposed by the IPPR or to the incorporation into UK domestic law of the ECHR. There is no evidence to suggest that the UK judges would be less inclined to embrace the restrictions than their brethren in the European Court of Human Rights. There is indeed positive evidence to suggest that they would embrace them wholeheartedly.

It is not appreciated how dangerous would be decisions of the UK courts upholding the authorised restrictions in particular cases. These would form binding precedents. The list of these restrictions provides the courts with all the indications they would need on how to prefer the restrictions to the principles. Those listed under article 11, for example, may be used to justify censorship of attacks on politicians or other public persons, may give general protection to official secrets (in conflict with a subsequent article), may open the way to widespread interception of mail, **phonetapping** and other surveillance to ensure that freedom of expression is not threatening public order.

Two hundred years ago, Alexander Hamilton had somewhat similar reservations about the wisdom of inserting a bill of rights into the American constitution maintaining 'that the provisions against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning [the press] was intended to be vested in the national government.'

To repeat the obvious: the only way in which a judicial interpretation of the bill of rights can be reversed is by a contrary and subsequent judicial interpretation on the same matter. Once a series of consistent interpretations is imposed on an article, a code is built up which will be very difficult to unbuild. This is why we would be in a positively worse situation with an entrenched bill of rights. Under our present constitution, Parliament can always overrule judicial interpretation. Not so, under the proposed constitution.

What emerges from Charter 88 and the IPPR is, at first sight, no more than a statement of nineteenth century liberal principles: a Bill of Rights, the rule of law, electoral change, independent judiciary, devolution; plus freedom of information and reform of the House of Lords. Nothing much here to be alarmed about, oh my Bagehot and my Dicey long ago.

But a persistent error in recent days of those on the socialist left has been to underestimate the dangers of liberalism. On 15 January 1981 Tony Benn wrote in his diary 'Roy has made a terrible mistake in returning from Brussels'. But Tony mistook the mistake as twenty-nine Labour MPs joined the SDP.

Remember that the central purpose of the new constitutionalists is to replace 'the supremacy of **Parliament**' with a 'fundamental law which is prior to, independent of and the source of authority for the system of government'. And, as we have seen, that means, as night follows day, the positioning of the judiciary at the centre of politics and the strengthening of the conservative right. Liberals presumably know that this is the natural and inevitable result of their re-drafting of the constitution. This is no game played with and by students. This is adult, hard politics. For behind the front that presents itself as the foolishness and play acting of the House of Lords, or question time in the Commons, or television interviews and chat shows, or select committee interrogations, there is a real world. Most of us, most of the time, laugh

**At gilded butterflies, and hear poor rogues  
Talk of court news; and we'll talk with them too.  
Who loses and who wins, who's in, who's out.**

But the losers are the homeless, the sick, the ill-educated, the mad and the prematurely dead.

There was a time when democracy was supposed to be about to take care of the evil consequences of man's inhumanity to man. The franchise would be greatly extended, the powerful rich would be made (at least) accountable and (at best) sent empty away. This was to be done through the instrumentality of democratic Government which would surely respond to the needs of the general public. We know now that it has not worked out like that. That kind of democracy did not happen. Instead what we have is a political system structured to sustain the powerful rich. A future Gibbon contemplating the characteristics of present-day society will find a fiscal system which progressively favours those with capital assets over those without, a House of Lords whose members can claim over £100 (tax free) for each day they attend, thousands of homeless persons who sleep on the streets or are huddled in bed and breakfast rooms, health provision which sharply distinguishes those who can from those who cannot afford to pay, a public appointments system which promotes nepotism and ensures that first, second and third preference is given to the socially acceptable, a judiciary drawn from amongst the most highly salaried members of the profession, an assured place among positions of power and influence for retired public servants, a medical profession which itself distributes merit awards out of the public purse to its members, leaders of state and private monopolies who are paid grossly inflated salaries. The list of privileges is

endless. Such a capitalist plutocracy needs no dictatorial or totalitarian powers. Nor need the future Gibbon look for a secret conspiracy.

There are those who point to the apparent contradiction of Conservative Governments advocating the rolling back of State power while enforcing centralisation. But this is to confuse ends and means. These Governments have indeed been most active and full of energy. But their deliberate purpose is to weaken irreversibly the structure of government.

For over 150 years, the regulatory powers of government have grown progressively, as we learnt in our schooldays. In the middle years of the last century, the activities of central departments, local authorities and public bodies of many kinds reacted strongly to the laissez-faire tradition, so much so that the very existence of that classical doctrine has become suspect.

The supervision of lunatics from 1832 under the control of the Lord Chancellor; the regulation of employment in factories from 1833; the massive reform of the poor law in 1834 transferring powers from justices, overseers and boards of guardians to commissioners; the beginning of modern local government in 1835; the powers of the Home Secretary over the naturalization of aliens and the administration of prisons from 1835; the powers of the Treasury over the Post Office from 1839; wide powers for the Crown and revenue officers over customs, smuggling and seizure from 1845; powers given to the Treasury and the Board of Trade to deal with the railway boom from 1844; the great reforms in public health begun in 1848; control over harbours from 1851; the reform of patents law and administration from 1852; the comprehensive legislation concerning the superintendence of merchant shipping in 1854 by the Board of Trade; the regulation of telegraph companies from 1863; and the provisions of the Elementary Education Act of 1870 which form a bridge from the more regulatory functions of the State to the provision of services and the beginning of the Welfare State. These lists could be greatly extended.

Separate from these and yet so much involved as a sub-text was the growth of trade unions and their progressive advancement by the replacement of the old criminal illegalities and civil restrictions with new statutory rules (which the judiciary towards the end of the nineteenth and the beginning of the twentieth century sought to subvert).

The threefold growth in major local services between 1890 and 1912 culminated in the Lloyd George budget and the insurance provisions. Despite the economic depressions of the 1920s and 1930s progress was made in slum clearance and extended public health legislation. The Attlee Governments inaugurated the national health service, reformed the poor law and other social services, developed land use planning and through nationalisation greatly improved the production and distribution of coal, gas, electricity and transport. Conservative and Labour Governments during the middle decades of this century stimulated house building and

encouraged the development of all levels of education. The relative reduction of public expenditure in the 1970s largely enforced by the general economic situation was followed by the unforced public expenditure cuts in the 1980s and the end of government in the public interest.

Throughout the span of years from 1832 to 1979, the administration of these numerous activities varied in efficiency and completeness, had its successes and failures, but by the mid twentieth century amounted to a substantial body of achievement. The primary beneficiaries were the general public for the main purpose was to further the public interest. In many matters – especially health, housing and education – those principally responsible for the development of these services were professional men and women in local authorities and other public bodies. Medical officers, surveyors and architects, education officers and schoolteachers, working in the public service, provided much of the driving force, supported in this and other fields by middle grade and senior civil servants in the Departments. One of the most remarkable and calamitous of the changes that have taken place over the last thirty years has been the decline in the status and the influence of these public officers.

Until recently, politicians spoke of the public interest with respect even when they were disregarding it. Public officers believed in it and many spent their lives in its pursuit. They saw themselves as guardians of the common good and resisted the demands of powerful private interest groups. Today that high standard of public service has been prostituted to the wishes of political masters.

The deliberate weakening of the structures of central and local government authorities and the abandonment of their role as protectors of the public interest is being effected in a variety of ways of which the most obvious are the privatisation of public utilities, the creation of separate hospital trusts and the marketing of health services, opting-out for schools, the passing of responsibilities from government departments to Next Steps agencies, the growing pressure on universities to become fee and loan financed institutions. Modern Conservatives do not begin to accept that government has a major role in protecting the public interest. They subscribe to the teaching of those in the USA inelegantly known as public choicists who take the tools of economics and apply them to the material of politics<sup>3</sup> and arrive at anti-governmental pro-market prescriptions.

Public servants are seen as concerned not with the altruistic provision of services but with advancing their own part of the bureaucracy as 'self-interested utility maximisers'. This of course is a popular view and takes strength from the element of truth it contains. But public choicists argue that it is the whole truth. Their view contrasts with those who believe that 'the public interest', however elusive in definition, does exist and stands over against private interests. In public law, one consequence of the adoption by judges and others of protecting the public interest is that

public servants are subjected to scrutiny to ensure that their motives and purposes are properly directed. So also participation, consultation, and accountability form part of a structure designed to maximise involvement of the public in the political process. These may often work poorly, even corruptly, but that is their purpose.

All this is anathema to public choicists who consider these devices simply serve the interests of those who can best manipulate the system. And here again the element of truth intrudes. But again it is only a part of the truth. Politicians are seen as self-seeking as others, perhaps more so, and majoritarianism is rejected in favour of a constitutional democracy where limits on governmental power are imposed.

Officers and councillors in local government can also be seen, especially in the days when they could raise local rates without constraint, in the same light. The poll tax, under which we all paid the same amount for the services we received (just as we would in the market place), can be seen as an aspect of constitutional democracy, and the reversion to a property-based tax becomes (in choicist terms) a regrettable return to majoritarianism.

The development of opportunities for judicial review of Government action over the last 25 years has paid little regard to the public good. The public choicist sees it as an example of judges maximising their own self-interests. Most recently, the newly appointed Master of the Rolls and Lord Chief Justice have come out publicly in favour of a Bill of Rights. Sir Thomas Bingham claimed that the present situation weakened public confidence in the courts. He supported the motion in a debate that 'This house supports the introduction of a judicially-enforceable bill of rights.' Similarly we find leading 'human rights' barristers strongly advocating this extension of the jurisdiction of UK courts.

Nevertheless the American public choicists rely on a reformed Constitution which, inevitably in that country, depends on a Supreme Court. In the UK this leads to the proposals for a written constitution, complete with a Bill of Rights and on this the rightwing public choicists join hands with the UK liberals. Both are distrustful of majoritarian democracy, the former because they believe it lacks constitutional restraints on governmental power, the latter because they fear it might imperil the particular set of values which they espouse.

It is almost superfluous to emphasise that all devices which weaken central and local government by the same token weaken democratic accountability. Already privatisation in its many forms has deprived the House of Commons and elected local authorities of many of their opportunities for scrutiny.

None of the substantial social and personal problems of the late twentieth century is likely to be solved by the market economy and monopoly privatisation.

Today we are faced with problems more serious even than those of the mid-nineteenth century. They concern poverty and unemployment, homelessness, vagrancy, the decline of health care and provision for the old and mentally ill, pollution of the atmosphere, of rivers and beaches, the destruction of natural resources, dilapidated and underfunded schools, escalating rates of crime and of drug taking, AIDS and, beyond our shores, overpopulation, famine and the worsening economies of the poorest nations.

The scale of these problems is so great, both domestically and globally, that only the authority and resources of Governments can begin to solve them. And it is our tragic misfortune that the crisis has occurred at a time when, under the prevailing political and economic philosophy, public and collective action is denigrated. We are supposed to welcome free enterprise, open markets, deregulation, individualism, privatisation, profit-taking, capitalist adventurism, company takeovers, city deals. These activities are not only incapable of resolving the crisis. They are its cause. We are being urged to embrace as solutions the very practices that have created the problems. What is put forward as the way to a prosperous future will accelerate the decline for all but a few.

Today, collectivism and the pursuit of the common good are devalued. Labour leaders seem to have stopped describing themselves as democratic socialists perhaps because they wish to appear as social democrats for electoral purposes. The cult of individualism and the emphasis on individual rights is the cult of Thatcherism.

It is not in the nature of privately owned corporate power to have regard to long-term interests or the common good. Nor is it likely that the major industrial and commercial companies would agree to spend large sums needed markedly to reduce pollution of the atmosphere. And if they did agree, enforcement would be virtually impossible. Only Governments, backed by the force of law and an adequate inspectorate, can begin to reverse the current trends. Only Governments have both the means and the motivation to restore our standards of public health and housing, medical care, transport and education even to their former levels. Public provision and public enterprise at public expense can arrest the present decline. The private sector will never do so.

Weakening of central Government – especially privatisation – creates problems for a future Labour Government. So also does the growth in judicial review which has enlarged the powers of the courts to set aside the fulfilling by Ministers of statutory duties. The line is not always easy to draw. Where Departments deliberately try to extend their powers beyond those given by Act of Parliament – a rare but not unknown occurrence – they should be prevented. But frequently judicial interpretation of the proper limits of those powers is restrictive. There is a danger in the judicialisation of the political process. This is taken to extremes in those

proposals for reform of the Constitution (like that of the IPPR) which would enable the courts to overrule legislation itself. For a **leftwing** government this could be highly damaging and is the political reason – others apart – for resisting such change.

Conservatism is the creed of those who wish to preserve in its essentials the distribution of power in society today. It believes in private capitalism. funded by the large financial institutions and serviced by employees with differing responsibilities from the most menial to the most influential. Responsibility lies with a board of directors who, as individuals, may or may not own much of the capital. It may pursue this purpose in a highly competitive market or in one that is protected by monopoly or cartel. **It** may be a small business, highly dependent on specialist consumers, or a multi-national agglomerate serving many and diverse interests. Those who direct its activities may be considerate to the work force or tyrannical, they may be worried, in their private lives, about the environment and support the Royal Society for the Protection of Birds, or they may have none of the finer instincts commonly attributed to men and women of their social status. They may, in a word, be goodies or baddies. But the corporation they serve is committed by the necessities of its industrial or commercial existence to obtaining the highest possible return on the money invested. And as such it cannot take account of other, more general, interests represented to it by the members of the public at large as beneficial to them but not to it.

Liberals are different, but they can never avoid the central dilemma of their faith. They want many good things to come to pass, like better housing for the working classes, a somewhat more equal distribution of wealth, good schools, less unemployment, contented trade unions, and jam for tea on Sundays. At the same time, they disapprove of State intervention, and above all, they are dedicated to 'the rights of the individual'. These two principles of their faith are then happily joined in a creed that makes the government the enemy of the individual. It follows that State power must be tightly constrained.

Socialists are different again. They believe humanity to be composed of social animals, a collection of individuals who are inseparable from the society in which they live. From conception until death they are an integral part of society. Their problems arise from this. This is the human situation, perhaps the human tragedy. In this society there are no natural rights, only those which society has conferred.

The proposed changes to the constitution, and the incorporation of a Bill of Rights, will enable private interests. of individuals and of corporations, to override measures designed to promote the general welfare. Only through the agency of accountable public institutions and the activities of accountable public servants, will the public interest prevail.

## NOTES

1. The better view is that Dunning referred not to the power of the executive but to 'the influence of the Crown' which in 1780 was a somewhat different complaint. But no matter to present purposes.
2. See Patrick McAuslan 'Public Law and Public Choice' in 51 *Modern Law Review* (1988) 681 to which I am indebted.