What future for human rights?

The fight to defend human rights as we know them may not be over, says Geoffrey Bindman QC

Raab: rights & wrongs

R v the Prime Minister ex parte Miller is a victory in the continuing struggle to uphold the rule of law and parliamentary sovereignty. A related struggle is currently dormant but its revival may not be far off. The Human Rights Act 1998 (HRA 1998) and our adherence to the European Human Rights Convention may both face new challenges. Both struggles reflect an unwelcome isolationist trend.

If we have another Conservative government—and especially if it follows our departure from the EU—we may expect it to renew plans to leave the Convention and repeal HRA 1998. There is no necessary connection between our adherence to the Convention and our membership of the EU but leading Conservative politicians have long disliked both, seeing human rights law, like the EU, as an encroachment on British sovereignty. The Conservative Party manifesto of 2015 commits a future Conservative government to withdraw from the Convention and repeal HRA 1998, replacing both with a British Bill of Rights. I am not aware that this policy has changed though nothing has yet been done to implement it.

Prominent in the present leadership of the party is Dominic Raab, foreign secretary, who in 2009 published a critique of rights legislation. His book was entitled *The Assault on Liberty*. It was subtitled *'What went wrong with rights'*. In the book Raab stops short of advocating withdrawal from the Convention but he attacks what he describes as the 'proliferation of rights'. He too argues for the repeal of HRA 1998 and its replacement by a British Bill of Rights.

It is worth remembering that the Convention was adopted by the member states of the Council of Europe as long ago as 1950. It was drafted largely by British lawyers led by the Conservative Maxwell-Fyfe (later Lord Chancellor). It had the strong support of Sir Winston Churchill and to a large extent was inspired by his vision of a united Europe no longer vulnerable to violent conflict between its component states. Its provisions are derived from the Universal Declaration of Human Rights which in turn adopted principles developed since Magna Carta.

Until HRA 1998, jurisdiction over claims under the European Convention rested with the Court of Human Rights in Strasbourg. The number of British cases pursued there was small. Before applying to Strasbourg, litigants had to exhaust local remedies, usually adequate to resolve any dispute—unsurprisingly given the origin of the Convention. Furthermore, the need to seek a remedy in Strasbourg was a time-consuming and expensive restraint on its accessibility. HRA 1998 dramatically changed this by making Convention rights directly enforceable in the domestic courts of the UK. This was a rational reform, removing the separation between domestic and Convention rights. Jack Straw, the minister introducing the Human Rights Bill described its purpose as 'bringing rights home'.

Its impact, however, was much wider. What HRA 1998 in fact achieved was a new integration of human rights into the fabric of domestic law. Lord Dyson—who retired in 2016 after serving for 23 years as a judge of the High Court, Court of Appeal , and Supreme Court, ending as Master of the Rolls—says in his recently published autobiography, *A Judge's Journey*, that after HRA 1998 became law many of the most important cases in which he was involved for the rest of his career were human rights cases. Though there were those, like Raab, who were sceptical, the strengthening of human rights protection in our law was generally well received.

Those politicians, like Theresa May, who support repeal, have relied on the occasional adverse Strasbourg decision to justify their criticism of what they see as foreign interference, but the Strasbourg court has increasingly minimised disharmony by its 'margin of appreciation' doctrine, which gives weight to the traditions and preferences of individual member states.

Raab's call for a British Bill of Rights was answered in 2011. The government appointed an independent commission to examine whether a UK Bill of Rights should be created which 'incorporates and builds on all our obligations under the European Human Rights Convention, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties'. There was predictably no consensus among the nine members of the Commission when it reported in 2012. Two members advocated withdrawal from the Convention, two opposed any change at all. The remaining views were somewhere between (see my article 'Deadlock & a fudge', 163 *NLJ* 8).

A British Bill of Rights or a written Constitution could indeed tackle some issues which the Convention and HRA 1998 do not deal with, such as the right to vote and the scope of the prerogative. The recent Supreme Court ruling in *Miller* might have been pre-empted. But in reality HRA 1998 is our Bill of Rights—without the inconvenient power to override the legislature which is the most striking feature of the US Constitution. And the Supreme Court has demonstrated its ability to defend our tried and trusted existing constitutional arrangements.

The ambition to deny authority in the UK to European institutions which has motivated Brexit should not apply to the human rights instruments. Yet we may expect our departure from the EU to be followed by the renewal of the campaign to get rid of them. The fight to keep them may not be over. NLJ

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