

TOM WINSOR

A bill that replaces ministerial duties with divine rights

In 1649, Charles I lost his head because he refused to accept that the will of parliament was superior to that of the king. He had insisted on the divine right of kings to dispense with parliament and to rule by autocratic fiat. Parliament would not stand for it and, after much bloodshed in the English civil war, our democracy took a great step forward.

The British constitutional balance – including the interaction of the legislature, the judiciary and the executive – is revered and imitated around the world. That may not be so for much longer if the parliament of 2006 enacts the Legislative and Regulatory Reform Bill, shortly to pass the House of Commons and go to the House of Lords.

The government says that the bill is there to cut red tape, to reduce unnecessary regulation and form filling imposed by petty bureaucrats who are strangling honest, hard-working businesses. And who could dissent from that? The problem – and it is a very big one – is that the bill goes far further than this. It allows a minister, by executive decree after cursory and highly abbreviated consultation and parliamentary process, unilaterally to amend, repeal or replace any legislation – yes, any legislation – if he considers that it is necessary or expedient to do so.

In parliament, the government was asked whether the bill could enable ministers, by order, to curtail or abolish jury trial, permit the home secretary to place citizens under house arrest, allow the prime minister to dismiss judges and reform the Magna Carta. The government's answer was, in effect, yes.

The bill contains safeguards but they are far from sufficient. A minister may not impose or create taxation or create a new criminal offence punishable by more than two years' imprisonment. Nor may he authorise forcible entry, search or seizure. The minister – not a court – must be satisfied that the

change in the law is proportionate to his policy objective (which could be almost anything), that it strikes a fair balance between the public interest and any adversely affected citizens, that it does not “remove any necessary protection”, and it does not prevent a citizen “continuing to exercise any right or freedom which [he] might reasonably expect to continue to exercise”.

Remember that this is a test – subject to judicial review – which the minister is applying to his own proposals. And look at the narrowness of the conditions which have to be met. What is a “necessary protection”? It is one which is essential, not just precious or dearly won. In what circumstances could a citizen reasonably expect to continue to exercise a right which an elected minister wants to diminish or remove? Then look at this in the context of a centralising government which regards itself as our master, not our servant.

Some say the judges will not allow ministers to get away with much under this bill. But the long title of the legislation – a key guide for the courts in ascertaining legislative intention – is about legislative reform, not deregulation. So it is wide open. Ministers have promised not to use these powers for anything controversial. But such undertakings have no legal force and will not trouble determined ministers, especially ones with a track record of breaking them.

When in 2001 the then transport secretary improperly threatened me with legislation to remove my independence as rail regulator, it was the rigour and timescales of the parliamentary process which offered the most potent protection. He simply could not do it in time and had to resort to other equally controversial measures to get his way in the collapse of Railtrack. If the Legislative and Regulatory Reform Bill had been enacted at that time, the juggernaut of executive government would have had considerably more power to be rid of an inconvenient part of the constitution.

The present government's intolerance of independent institutions which have real power – the judiciary, the principal economic regulators and now parliament itself – displays many of the characteristics of the Stuart monarchy. Are the martyrs of Charles I to be repaid now with legislation which in large measure reverses the outcome of the civil war, to watch it sacrificed on the altar of administrative convenience? At the Virginia Convention in 1788, James Madison said: “There are more instances of the abridgement of the freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations.” Why ever would parliament be complicit in this?

The writer was rail regulator 1999-2004