Britain: government seeks wide-ranging powers to bypass parliament

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Under the guise of reducing unnecessary "red tape" and removing the "regulatory burden" on business, the Labour government is seeking to grab powers formerly associated with the rule of an absolute monarch.

The innocuous-sounding "Legislative and Regulatory Reform Bill" concerns what have become known as "Henry VIII" powers, after the 1539 *Statute of Proclamations*, under which the Tudor King's proclamations "shall be obeyed, observed, and kept as though they were made by act of parliament." In the present bill, a similar power is to be granted to ministers, who may reform, repeal and introduce legislation "by order," i.e., without Parliament debating it in the House of Commons. By ministerial fiat, new criminal offences could be created, punishable by up to two years' imprisonment. The Bill could also be used to "reform" itself, for example, removing such an upper limit on a prison term enacted under its provisions.

With the sweep of a minister's pen, fundamental democratic and legal rights could be struck down.

In seeking to abrogate the powers of Parliament, the Labour government is playing fast and loose with constitutional issues that are at the heart of Britain's centuries-old bourgeois political and legal mechanisms.

Somewhat ironically, one of the few voices of caution came from Britain's second chamber, where appointed life peers, hereditary aristocrats and church bishops still hold sway. Lord Holme, chairman of the Constitution Committee in the House of Lords, felt compelled to write to the Lord Chancellor and Secretary of State for Constitutional Affairs expressing the serious disquiet his committee had about the nature of the powers contained in the proposed Bill.

"We are concerned by the potential of the Bill's proposals, if enacted, markedly to alter the respective and long-established roles of Ministers and Parliament in the legislative process. This is because Part 1 of the Bill seeks to confer unprecedentedly wide powers on Ministers to make Orders to amend, repeal and replace any legislation (and to grant powers in respect of rules of the common law in relation to Law Commission recommendations), with only a very restricted role for Parliament in the process."

In conclusion, Lord Holme cautioned, "The reforms thus have the potential to be so far reaching that special consideration will need to be given by the Committee to the risk of inadvertent and ill considered constitutional change."

Writing on the letters page of the *Times*, six professors from Cambridge University Law Faculty, amongst them several senior barristers, noted with alarm that if the bill is passed, "the government could rewrite almost any Act and, in some cases, enact new laws that at present only Parliament can make."

Condemning the limitations within the bill on this power as "few and weak," they highlight the potential for the government to use the bill's delegated powers to: "create a new offence of incitement to religious hatred, punishable with two years' imprisonment; curtail or abolish jury trial; permit the Home Secretary to place citizens under house arrest; allow the Prime Minister to sack judges; rewrite the law on nationality and immigration; 'reform' Magna Carta (or what remains of it)."

They conclude that the bill creates "a major shift of power within the state, which in other countries would require an amendment to the constitution; and one in which the winner would be the executive, and the loser Parliament."

The new bill is set to replace the "Regulatory Reform Act 2001" and considerably extends the powers of ministers compared with Parliament. However, Cabinet

Office Minister Jim Murphy, responsible for introducing the bill, said the legislation would not be used to "do anything that is highly controversial." The government has also "reiterated its commitment not to use Order powers to deliver highly political measures, such as amendments to terrorism law."

At the same time, the government has indicated that what might be considered controversial at one time is not necessarily controversial at another, pledging to assess the degree of controversy associated with any particular proposal on a "case-by-case basis."

Moreover, the bill itself contains no limitations on only implementing measures that are "uncontroversial," leaving the assessment of such criteria to the subjective discretion of ministers and the government.

A research paper published by the House of Commons Library notes that parliamentary sovereignty means that bills cannot be struck down by the courts. "The concept of ultra vires [action outside the agreed powers of a particular body] does not apply to Acts of Parliament nor to parliamentary proceedings by virtue of Article 9 of the Bill of Rights 1688." The paper concludes that there would thus be no mechanism by which the courts could review the use of the powers extended to ministers under Clause 1 of the bill.

Liberal Democrat MP David Howarth, who is also Reader in Law at Cambridge University, wrote, "At its most extreme, in a manoeuvre akin to a legislative Indian rope trick, ministers could use it to transfer all legislative power permanently to themselves."

There is a precedent for such an action. On March 23, 1933, the German parliament passed the Nazi's "Enabling Act" (Ermächtigungsgesetz), allowing Hitler to pass laws without the need to seek parliamentary approval.

The Blair government is not the same as Hitler's regime. However, since Labour came to power in 1997, and especially since the 9/11 attacks and the launch of the "war on terror," there has been a continual erosion of civil liberties and the overturning of long-standing legal norms. The powers of the state have been significantly increased by a raft of legislation that establishes the quasi-legal basis for dictatorial forms of rule.

The Legislative and Regulatory Reform Bill was introduced before an almost deserted Chamber of Commons on February 16, receiving little notice in most of the media. The wide-scale indifference to the far reaching democratic, juridical and constitutional implications of the bill within most of official politics and the media underscores the absence within the political elite of any serious constituency for the defence of fundamental democratic rights.