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Civil Liberties

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The term *civil liberties* refers to the relationship between individual citizens and the government of the country in which they are living. The concept defines those areas of behavior in relation to which the state has no right to interfere with a citizen's freedom or can only do so on the basis of very strong justification. It has a close relationship to the concept of *human rights*, with which it may overlap in some circumstances. Civil liberties narrowly defined, however, relate to the situation within a domestic jurisdiction; they do not have the international element that is a characteristic of human rights. Civil liberties are also generally best expressed as *freedoms* rather than *rights*—as in freedom of expression, freedom of assembly, freedom from arbitrary arrest, or freedom from discrimination. Scholars do not generally agree on a comprehensive list of the freedoms that constitute civil liberties. They usually include the areas that come within what one may term *political* or *first-generation* human rights, such as those listed above, but not *socioeconomic* or *second-generation* rights, such as the right to housing, employment, or education, or *third-generation* collective rights, such as the right to self-determination.

Issues about Civil Liberties

Disputes about civil liberties often fall within one of two areas. First, there is much case law on freedom of speech or expression. Issues tend to concern the extent to which restrictions on this freedom can be justified based on, for example, national security, the protection of morality, or the protection of the rights of other individuals (defamation, privacy). Governments often wish to control the publication of information about their operation on the first ground; religious groups may wish to press for controls on the publication of sexually explicit books, plays, or films on the second; individuals may seek restrictions to protect their reputations or privacy on the third. There may also be issues about what actually constitutes “speech” or “expression”—does it extend, for example, to burning **[p. 199 ↓]** the national flag or nude dancing? The prime civil libertarian argument against restriction tends to be that the answer to “bad speech” should be “good speech”; suppression of speech does not in the end lead to a healthy society. One can trace many of the arguments used in this context back to the work of John Stuart Mill (1806–1873), whose essay “On Liberty,” first published in 1859, contains powerful support for the greatest possible freedom in this area.

The second main area of contention relates to police powers to prevent or detect crime or to prevent and control public disorder. To what extent can the state justifiably limit the freedoms of an individual, not convicted of any offense, in the interest of furthering these objectives? When can they detain, and when can they search the person or her property without her consent? People generally accept some limitation of individual freedom in this context, even the most ardent supporters of civil liberties, but the problem is to find the correct “balance” between freedom and intervention. Many jurisdictions place a hurdle of “reasonable suspicion” or “reasonable cause” on the police before they can initiate any action, such as arrest or search. In the United States, the tendency has been to control police misbehavior by making evidence obtained in breach of correct procedures inadmissible in subsequent judicial proceedings, as shown by the landmark Supreme Court decisions in *Mapp v. Ohio* (367 U.S. 643, 1961) and *Miranda v. Arizona* (384 U.S. 436, 1966). By contrast, in the United Kingdom, the focus has been on requiring the police to follow strict statutory procedures (as, for example, in the Police and Criminal Evidence Act of 1984) but not on applying any strong exclusionary rule other than in relation to the most blatant misuse of powers.

Civil Liberties in the United Kingdom

Most jurisdictions today have written constitutions, and these will generally include a section on the rights of the citizen against the state. In the United States, for example, one finds this as a group of amendments to the Constitution, collectively known as the Bill of Rights. The United Kingdom (composed of the three legal jurisdictions of England and Wales, Scotland, and Northern Ireland) is different in that its constitution is not set out in any one document, but is found in a selection of statutes, court decisions, and parliamentary conventions. Consequently, the United Kingdom has not had until very recently within its domestic legal system any constitutional document setting out a citizen's civil liberties. As with the general constitutional rules, the state defined such liberties by ordinary law.

People sometimes refer to two documents as establishing a citizen's rights and freedoms: Magna Carta (1215) and the Bill of Rights (1688). Neither document, in fact, contains much that one would recognize as relating to civil liberties in modern times. Magna Carta was primarily concerned with the relationships between the king (that is,

King John, ruled 1199–1216) and the church, and between the king and the leading barons (particularly in relation to land and taxes). However, one clause does state,

> No free man shall be seized or imprisoned, or stripped of any of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we [the crown] proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

This clearly has resonance with modern concepts of freedom from arbitrary arrest or search, and of "due process" in relation to legal proceedings. The Bill of Rights was part of the settlement that led to William and Mary (ruled 1689–1694, then William III to 1702) acceding to the throne in place of James II. It was primarily concerned with the relationship between the crown and Parliament. For example, on the issue of free speech, the Bill of Rights simply states, "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." There can be no challenge in the courts to what members of Parliament say in the course of debates (for example, by an action for defamation or criminal prosecution), but this says nothing about more general freedom of expression.

The lack of any clear constitutional statement of British civil liberties has in the past led to problems in **[p. 200 ↓]** their protection, compounded by judicial deference to Parliament, under the doctrine of parliamentary sovereignty. Courts would be prepared to recognize, for example, freedom of speech or freedom from search and seizure as valuable, and they would as far as possible interpret the law to protect such freedoms. If Parliament enacted a law, however, that clearly and unambiguously impinged on the freedom, the courts would be obliged to give it effect. The position is different in jurisdictions containing clear, documented, constitutional guarantees of civil liberties. A supreme or constitutional court often has the power to strike down legislation. In the United States, a publisher who is threatened with censorship prior to publication or legal action after publication can rely on the First Amendment, which the Supreme Court has interpreted as giving very strong protection, permitting government control of expression in only a very limited range of circumstances. In the United Kingdom, by contrast, the publisher faced with a statute that clearly authorized censorship or prosecution could not argue, prior to 2000, that it was unlawful as infringing on his civil liberties. The courts

would not listen to such arguments, though they would require the law to be clear and unequivocal. They recognized freedom on the liberal basis: what is not prohibited, is allowed. Nevertheless, once legislation was in place, the courts would not intervene.

One can take another example from the area of state powers of entry, search, and seizure. In *Entick v. Carrington* (19 State Trials 1029, 1765), the Lord Chief Justice ruled that general search warrants were unlawful. From then on, the authorities had to point to specific statutory powers to justify entry under warrant onto private premises. If Parliament had legislated for such a power, however, the court would not intervene. Thus, in *R v. IRC, ex p Rossminster* (A.C. 952, 1980), the Appellate Committee of the House of Lords felt obliged to uphold the power of the Inland Revenue to enter business and domestic premises under warrant and to seize extensive quantities of material —leading to the almost certain collapse of the business concerned. The power was clearly there in the relevant legislation, and although some members of the court were clearly unhappy about the way in which the government used the power in that case, they were bound to give effect to the law as enacted by Parliament. By contrast, the Canadian Supreme Court was able in *Hunter v. Southam* (11 D.L.R. [4th] 641, 1984) to strike down a law relating to search powers of the Combines Investigation Branch on the basis that it constituted an “unreasonable” search contrary to section 8 of the newly enacted Charter of Rights and Freedoms.

The Human Rights Act 1998

The position in the United Kingdom changed significantly in October 2000, when the Human Rights Act (HRA) 1998 came into force. One can trace the origins of the change, however, to the European Convention on Human Rights (ECHR), which first came into effect for eight European countries, including the United Kingdom, in 1953 in the wake of the Second World War. Drafted by members of the Council of Europe in 1950, the ECHR contained a list of fundamental rights. It built on the United Nations Universal Declaration of Human Rights in 1948 but had the distinguishing feature that it provided a mechanism for the enforcement of the rights through a commission (since dissolved) and a court (which sits at Strasbourg). The ECHR, with 46 member states in 2006, constitutes a system of regional protection similar to the American Convention on Human Rights or the African Charter on Human and People's Rights.

Originally, the United Kingdom, which had played a leading role in the drafting of the ECHR, recognized only the rights of other states to bring proceedings under it. From 1966, however, it subscribed to the part of the ECHR that allows individuals to take action when they feel that the state has infringed on their rights. Over the next thirty years, there were many such actions, with a significant number resulting in a decision against the United Kingdom. As far as the United Kingdom courts were concerned, however, such decisions had no direct effect. The British government had not incorporated the ECHR into domestic law, and its effect was simply that of a treaty imposing obligations on the government. An adverse decision put an international obligation on the government to amend the **[p. 201 ↓]** law but did not have in itself any legal significance within the domestic law. Litigants attempted to raise arguments based on the ECHR in cases before U.K. courts, but these had little success.

The situation changed in 1997 with the election of a Labour government committed to "bringing rights home," that is, incorporating the European Convention into U.K. law. They fulfilled this commitment with the passage of the HRA. It does not, in fact, fully incorporate the ECHR, and parliamentary sovereignty is still retained, but it was nevertheless a very significant development in the protection of civil liberties.

Under the HRA, "public authorities," which include the courts but not Parliament, are obliged to act in a way that is compatible with ECHR rights. In reaching decisions on cases before them, whether involving the common law or the interpretation of legislation, the courts must take account of any potential for incompatibility. U.K. courts have adopted their new powers under the HRA with some enthusiasm. As regards the development of the common law, this has not caused problems. However, the interpretation of legislation has been more controversial. The courts' powers in this area are regulated by sections 3 and 4 of the HRA. Section 3 requires courts to interpret all legislation "so far as it is possible to do so" in a way that is ECHR-compatible. Section 4 gives the higher courts a power, where a compatible interpretation is impossible, to issue a "declaration of incompatibility." This does not place any direct obligation on Parliament or the government, but triggers the possible use of streamlined procedure for amending the relevant legislation.

However, courts do not have the power, available to courts in many jurisdictions with a written constitution, to strike down primary legislation as "unconstitutional." In

practice, appellate courts in the United Kingdom, in particular the House of Lords, have been prepared to use the power of "interpretation" in a very strong way: reading the words of a statute against their most obvious meaning to achieve compatibility. In *Sheldrake v. DPP* (2004, UKHL 43), for example, the House of Lords ruled that a provision of the Terrorism Act 2000, which required a defendant to "prove" something to avoid conviction, should be interpreted as merely requiring the defendant to provide some relevant evidence, with the burden of proof remaining on the prosecution. In a different context, in *Ghaidan v. Mendoza* (2004, UKHL 30), the House held that the word "spouse" in a housing statute could be interpreted to mean "same-sex partner."

Some commentators have criticized this inventive use of the interpretation power; they see its use as a method to undermine the clear intention of Parliament. They argue that courts should make greater use of the declaration of incompatibility, which leaves the final decision on whether to amend the law with Parliament. In fact, courts made such declarations in eleven cases between 2000 and 2005—most notably in *A v. Secretary of State for the Home Department* (2004, UKHL 56). The court held that a power to detain those suspected of being international terrorists indefinitely without trial was discriminatory, in that it applied only to those who were not United Kingdom citizens.

Future Developments

At the beginning of the twenty-first century, there are two particular challenges to civil liberties. First, there is growth in the possibilities for surveillance of individuals through technological developments, including the Internet. Increasingly, it will be possible for governments to keep track of an individual's activities through monitoring phone calls (particularly cell phones), use of the Internet, credit card payments, closed-circuit television (CCTV) footage, and so forth. Those concerned with the protection of civil liberties want to make sure that appropriate protection is in place related to gathering and use of information obtained in such ways.

Second, there is the threat imposed by international terrorism. Events such as the attacks on the United States, September 11, 2001, or the London bombings of July 2005 make it easy for governments to argue that we must sacrifice individual liberty for the greater good. Those who argue against increased restrictions in this situation

run the risk of others claiming that they make things easier for terrorists. Nevertheless, courts in both the United States (regarding the Guantanamo Bay detainment camp in Cuba) and in **[p. 202 ↓]** the United Kingdom (regarding detention without trial) have been prepared to rule that the government's actions were not justifiable under the circumstances. It is a necessary part of the constitutional balance within democracies that the courts should be vigilant in scrutinizing attempts by the executive and legislature to restrict freedom, even when external threats call for exceptional measures.

Conclusion

The concept of “civil liberties” has played and continues to play an important part in ensuring that state authorities give appropriate weight to the freedom of the individual citizen. It faces challenges in the modern world, but courts have generally responded confidently. In particular, the House of Lords in the United Kingdom has demonstrated that the Human Rights Act 1998 has given it the power to challenge legislation in a way that was not previously possible under the British constitution.

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See also

- Cause Lawyers
- Constitutional Courts
- Constitutional Law, Doctrinal Issues in
- Courts, Lawmaking by
- Expression, Freedom of
- Human Rights, International
- Political Dissent
- Religion, Law and
- Terrorism

Further Readings

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