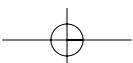
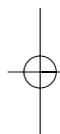
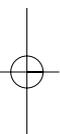


Part I

Introduction: General Principles



I

Renewing Civil Liberties

This book has a particular perspective on the law and practice of civil liberties. It sees the subject as inextricably bound up with representative government. On this account, civil liberties is another name for the political freedoms that we must have available to us all if it is to be true to say of us that we live in a society that adheres to the principle of representative, or democratic, government. It follows that the subject as developed here is concerned with the right to vote, which as I shall argue presently (and perhaps, at first glance, surprisingly) is the core civil liberty, and also with those other basic freedoms—life, liberty, thought, expression, assembly, and association—that help give full meaning to that right. The prohibition on politically motivated ill-treatment (at its most extreme, torture and other inhuman and degrading treatment) is also within the book's remit. These are the freedoms which are essential to the proper functioning of our contemporary political community; they are the oil without which our democratic engine would grind to a halt. An alternative way of describing this book, therefore, would be to say that it is about the law and practice of political freedom.

The book is not neutral about its subject: civil liberties are not just another branch of law, or discourse, or system to be delineated and explained; the standing of civil liberties as a series of vital prerequisites for political freedom inevitably make the chapters that follow partisan on their behalf, applauding as well as describing, and criticizing gaps in their protection when these are encountered. The book is primarily about civil liberties in the UK but it is not content to allow itself to be entirely restricted to British shores. It follows governmental power where it takes it, and in the modern era that requires brief trips abroad, to Brussels, Strasbourg and—further afield—to Washington, New York and to whatever other seats of international power impact on British society and law. While it is true that the nation state has surprised many with its durability, the fact remains that questions of democratic representation and of civil liberties arise in these places as well as in the (for the British lawyer) more familiar worlds of Westminster and the Royal Courts of Justice.

The approach to civil liberties taken here might be thought to be narrow—but a deliberate preference is being made to promote the interests of clarity over the claims of breadth. Few branches of legal knowledge are as perplexing in their scope, uncertain in their reach, or downright confusing in their application as that of civil liberties. The precision of the book's remit derives from a desire to impose order on potential chaos. The tensions in the subject go far beyond the usual stresses and strains of a phrase that has been popping in and out of the case law and the political and legal literature for generations; they go to its very core, pulling it not only in different but very often also in apparently opposite directions. Is the subject about protecting the citizen from the state or about enabling him or her to participate in government? Many of the textbooks suggest one or the other of these approaches; sometimes they manage to propose both at the same time. Or is it concerned, as practitioner guides have often assumed, with controls on police power: law suits for assault, false imprisonment and the like, access to a solicitor when in custody, and to a jury when on trial for a crime? But if this is what it is about, where do these first two meanings fit: is the rallying cry to be 'criminal justice', 'individual liberty' or 'democracy', or some variation of all three? And what of the relationship between civil liberties and human rights? Does not the latter term stand in relation to the former as lively offspring to aged and befuddled parent, and if so has the time now come for euthanasia, with the result that this book should be an extended obituary notice rather than an aspiring-to-be-contemporary legal text?

All of these versions of civil liberties—including that which now calls it a branch of human rights—have their own justifications embedded in our law, our history, and our political practice. They are incapable of complete reconciliation; to forge a common meaning from such disparate ascriptions would be to choose vacuity in the name of unity. The point can be made by way of a couple of extreme assertions. A subject cannot be simultaneously about *both* facilitating representative government *and* insulating individuals entirely from the reach of that government, about empowering and disempowering the people (or the state) at one and the same time. Nor can it sensibly expect easily to move from discussion of high political principle into the application of paragraph this of police code that on some technical issue of post-arrest, pre-charge police power. A subject that tries to do all these things achieves none of them, and deserves the decline into conceptual redundancy that is sure to follow. Of course, good arguments can be made that, thought through properly, a fair measure of individual liberty is essential to democratic governance, and that democratic freedom depends on exactly the sort of empowerment that flows from the

enjoyment (by each member of the community) of a highly individual kind of personal liberty. It is equally obvious that the concretization in the law of various general democratic insights necessarily requires a plunge into the particular. While appreciating these various blurrings on the edges of its argument, this book seeks through its deliberate focus on the political to give fresh life to the subject.

Slimmed down and rid of the burden of extraneous demands from other fields (radical libertarianism; controls on police powers; due process; jury trial; criminal justice; etc), the study of civil liberties can be restored to where our democratic culture suggests it can be very well located: right at the centre of our public law, at the intersection between law and democratic politics, giving life to the latter and an ethical focus to the former. And positioned thus, it can connect effectively with its voracious progeny human rights, drawing for support from that term's remit insofar as it flows with the grain of civil liberties while sifting out the less community-oriented entitlements that have sometimes led the idea of human rights into an ambiguous relationship with democratic politics. I start this work on human rights in Chapter 2 and it then runs as a theme throughout the book. There is a daunting generality to the idea of human rights which the connection with democratic politics via the complementary ideas of civil liberties and civil and political rights can go a long way towards reducing into a more manageable intellectual form. However, this does require us boldly to say of important elements of human rights law that, vital though they are, they do not fit within a book on civil liberties, or at least such a book constructed in the way that this one is. The most obvious of these is the role of that law in protecting the foreigner from abuse outside the jurisdiction:¹ to be beyond our community is not to be beyond our moral responsibility (especially if it is us who have put the person there) but it is to engage issues other than those of our domestic political freedom, the topic of this book.

Human rights law, at least in its Strasbourg manifestation,² also supplies a substantive content to the idea of democracy, locating its meaning not only in the designing of a mechanism for producing a representative government but also in requiring of that legislative assembly that it reflect in its actions 'the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'.³ True to its procedural foundations, this book resists the temptation to expand its version of

¹ The line of cases begun by *Soering v United Kingdom* (1989) 11 EHRR 439.

² A leading example being *Lingens v Austria* (1986) 8 EHRR 407.

³ *Ibid*, para [41] (footnote omitted).

democracy to the point where it would turn itself into a report on the ethical content of the laws that Parliament produces: this would be to provide a commentary on the driving as well as oil for the engine. Of course I do not say that assessing laws from this ethical perspective is not important, it is just that it is something that another field—human rights law—can more confidently do. A further self-imposed limitation is suggested by this quotation from the Strasbourg authorities: the book takes the ‘society’ that makes up ‘democratic society’ to be that of the UK across which the laws of the elected Parliament at Westminster range. Inevitably, there are issues about the unity of this society, and about its fragmentation into different national, ethnic, religious, and even cultural identities. The currency of contemporary discussions about multi-culturalism and how this fits within the concept of a democratic society are not the less important for being judged to be outside the scope of this book. Here I understand the ‘political’ to be the range of conduct engaged in by those who seek power or to influence the exercise of power in our democratic polity. Critical assessment of the nature of that polity and how it might be reformed to improve its democratic credentials belong to an important—but different—discussion.

Perhaps I ought, at this juncture, to repeat that this book is certainly not intended to imply by some kind of strategy of suggestive omission that the established system of democratic rule in the UK is beyond reproach or that the broader issues with which human rights law is also concerned are unimportant—far from it. It is equally clear that it would be wrong to deny that versions of civil liberties different from the one chosen here, those based on individual freedom or on the dictates of criminal justice, for example, do not have an important role to play in law’s contemporary story, or that properly controlled and explained they, too, can be brought under the umbrella of civil liberties, differently defined. It is just that these are not part of this segment of that long narrative. The view taken in this book, that civil liberties as we understand them best today are the living manifestation on the ground of our state’s commitment to the principle of representative government, certainly reflects a core societal value, but it is also clear that there are other values as well—such as the principle of fairness in the administration of the state, and the freedom of every person to thrive as best he or she can — and that these have in the past and can still today be described as part of the world of ‘civil liberties’. However, it is these other values that are more clearly reflected in the versions of civil liberties that I am *not* pursuing in this book. The vital importance our legal and political culture accords to safeguards on the abuse of police power, for example, clearly flows from our belief in procedural fairness and is reflected in our extensive administrative law, of which both human rights

legislation and more specific provisions on the police form a part. As we shall see in the next chapter, the concept of individual freedom (to secure human flourishing) is also a significant value, one which has long underpinned much of what remains valuable about the UK's culture of tolerance. The rallying cry of 'live and let live' is certainly part of the political version of the civil liberties story I am telling in this book, a good thing in itself which effective democratic government both encourages and facilitates—but it must never on the view of the subject embraced here develop a life of its own, be permitted to collapse into 'everyman (and women) for him (and her) self'. The full fleshing out of these versions of our subject, reflecting other values that make us the successful society that we largely are, is better found in other, more appropriate works of specialization, whether they are called by the name of 'civil liberties' or by some other appellation.

It is the origin of civil liberties in a variety of our overlapping core values that gives the subject the uncertainty which it has been the first task of this book to tackle: it is almost as though the idea has too rich an intellectual heritage, and has too many claims imposed on it by the better parts of our past. Identifying the essential meaning of civil liberties is like embarking on an archaeological dig knowing that the 'truth' can never be found because it has never really existed, that the best that can be uncovered are the different layers of meanings put down by past generations, each compelling in its own time perhaps, but at the same time leaving residues of apparent incoherence to bewilder later generations. In the dig that follows in the next chapter, the narrative has two goals in its sights: to explain where certain ideas come from for which the law and practice of civil liberties in the form developed here should, as has already been suggested, have no further use, and to identify those layers of meaning to be found in the past to which we need now to pay especial attention if our subject is to thrive in the way that this book argues it should. With this ground cleared, the next task is to move from theory to practice and to show how the model of civil liberties to which this book commits itself has evolved over time, which institutions have been vigilant on their behalf, which negligent, and how the subject has ebbed and flowed under the pressure of events. Chapter 3 tells this story of civil liberties but also introduces the counter-narrative of national security, one that is as old as democracy itself, and which has over time placed huge strains on our commitment to political freedom and our attitude to the rights to be accorded both to those within and those outside our community. The chapter ends with information from the British Social Attitudes Survey of 2005, which allows us to consider contemporary attitudes to civil liberties and how these have been

affected by the anxiety induced by the current national security scare, the growing fear about subversive violence and how this has given impetus to state action against terrorism.

In Part Two, which makes up the bulk of the book, the focus shifts to the substance of civil liberties protection, looking both at how the rights and freedoms essential to the democratic health of the nation are secured in Britain today, and also at how the national security concern identified in Chapter 3 impacts on those rights. In Chapter 4, I address what, right at the start of the book (and it will be remembered with modest trepidation), I declared to be the primary civil liberty of them all, the right to vote; in so doing, I critically assess how much our current system of government is now in need of a change so as to achieve afresh the equality of voter-power that is the essence of the democratic system of government. The point is an important one in a book like this because so much civil libertarian protest takes place quite separately from the parliamentary process, drawing angry strength from the belief of many of those involved that Parliament as a democratic chamber has been irredeemably corrupted by power and wealth. Many of the flashpoints in the law and practice of civil liberties, engaging the rights to life, liberty, due process, expression, assembly, and association (dealt with in turn in Chapters 5, 6, 7 and 8, respectively) take place on these margins of our parliamentary democracy, with protestors justifying themselves by saying they have no option other than aggressive public protest and the government and the mainstream politicians replying by asserting (or thinking even if they do not say) that our democratic system has now made such extra-parliamentary action—at least in any kind of extreme form—unnecessary. This mismatch of perspectives explains many of the tensions in our subject today, the anxiety about terrorism, direct action and intimidatory protest in one quarter, the belief in the impotence of Parliament and the failure of our democratic system in the other. The law and practice of civil liberties has to stay a consistent and principled course between these two opposing views.

In the single chapter making up Part Three, the book goes beyond the nation state to test from a civil libertarian perspective the validity of the laws and practices of those entities beyond our shores that exercise governmental and governmental-style power over us. In the final, concluding chapter, however, the book confirms its over-arching purpose as being somewhat closer to home: to set down a theoretical understanding of civil liberties which gives the subject a better chance of performing the role for which it is best suited, namely the provision of the legal framework within which Britain's system of representative democracy can operate most effectively. There can be little doubt that recent large-scale trends in world

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affairs, from the end of the Cold War, through globalization to our current concerns with environmental degradation and international terrorism, have put many traditional ideas and values under severe strain. Not the least of the societal assumptions to have been subjected to critical appraisal recently has been our belief in the value of civil liberties. Our commitment to political freedom, indeed on some accounts to representative democracy itself, has seemed at best jaded and 'old hat', at worst positively unhelpful to our efforts to address current problems. Properly focused, the law and practice of civil liberties can assist once again in the renewal of our democratic political culture, as important a task now as it has ever been in the past.