Protecting liberties, advancing rights

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Liberties and rights are of especial concern in liberal democracies, which claim to provide a broad range of them. The word liberalism is associated with the primacy of the individual. Historically, liberal thinkers have been committed to personal freedom, believing that men and women flourish and progress when they are able to express their creative personalities without undue restrictions. In democracies, governments are empowered by the people. They are given office on trust, and their power should not be abused. There are occasions when there is a need to deploy the powers of the police or security services, and to impose other limitations on freedom. But those restrictions must be capable of justification on grounds of the common good. The more the citizens know of the reasoning behind them, the better. They can then assess whether essential values have been preserved.

For many years the rights which were emphasised tended not to require the government to act (freedom of expression, for example), whereas in recent years more importance has been attached to the passage into law of entitlements which do need positive governmental intervention. In Britain and America, anti-discriminatory legislation has been enacted to allow for the protection of minorities and other disadvantaged groups.

In this chapter, we examine the protection of liberties in both countries, in particular the right of freedom of expression. We move on to compare the positive benefits which have been conferred upon various groups in society.

POINTS TO CONSIDER

- Distinguish between civil liberties and civil rights.
- How well are the liberties of the citizen protected in Britain?
- To what extent is the Human Rights Act an adequate alternative to an entrenched Bill of Rights?
- Does Britain need a home-grown Bill of Rights?
- Do civil liberties need to be entrenched?
- How much tolerance should be extended to extreme minority groups whose opinions are generally out of step with contemporary thinking?

- 'Democracy requires the fullest freedom of expression'. To what extent is freedom of expression recognised in Britain and the United States?
- How effective is the protection against discrimination towards women and ethnic minorities in the two countries?
- Is the idea of affirmative action a good thing?
- Should Britain follow the American example of 'open government' and 'freedom of information'?

Most Western democracies have a constitution which sets out the relationship between the state and the individual. Such documents mark out the respective spheres of governmental authority and personal freedom. They do this by defining civil liberties and rights, often in a Bill of Rights. The American Bill has been around for a long time, and is the oldest in the world. The ideas of those who helped to formulate it were an inspiration to the French Revolutionaries in the years at the end of the eighteenth century. The spirit and tone of the early revolutionaries was set in the Declaration of the Rights of Man and Citizens, adopted by the National Assembly at Versailles. The document reflected the thinking of the eighteenth-century Enlightenment. Among its foremost notions was the observation that: 'Men are born free and equal in rights . . . the aim of every political association is the preservation of the natural and undoubted rights of men. These rights are liberty, property, security and resistance to oppression.'

The Declaration became a charter for European liberals over the next half-century. Lord Acton, a Liberal philosopher of the nineteenth century, commented that it was in its impact 'stronger than all the armies of Napoleon'. The principles laid down in 1789 were to enthral and divide the continent, and few European countries remained unaffected by them. Some states incorporated statements of human rights into their own constitutions, as did the Swedes in 1809 and Holland in 1815. In the twentieth century, and especially in the years since 1945, many old-established countries have adopted new constitutions, and new nations have devised their own written statements. Most of these make some provision for the protection of basic rights.

Britain has long been out of step with the rest of the continent, and with the Commonwealth, in not having a Bill of Rights of its own. Indeed, until the passage of the Human Rights Act of 1998, it had not incorporated the European Convention on Human Rights (ECHR) – or any other human rights treaty – into British law. Such isolation is particularly apparent when it is realised that some dependent territories, and most of the African and Caribbean countries, have provision for protecting rights in their constitutions. In the last two decades, the issue of human rights has been one of much

Types of rights

By rights, we mean entitlements. Identifying those to which we are entitled has been a source of controversy over many centuries. Many writers distinguish between **natural or inalienable rights** which derive from people's common humanity and should not be infringed, and **legal rights**, those which are granted to citizens by the governments of different states. Many would further distinguish between those legal rights which are **civil and political**, and those which are **social and economic** in character. Inalienable rights have a moral dimension, as is recognised by Article I of the United Nations Universal Declaration of Human Rights (1948): 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood.'

Legal rights of the civil and political variety include freedom of worship and freedom of expression. They are sometimes referred to as **civil liberties** or **negative rights**, in that they mark out areas of social life where the Constitution restricts or prohibits governmental intrusion on individuals' free choice. They restrain the interference of government, delineating a sphere of governmental inactivity. Social and economic rights are often described as **positive rights**. They extend the role and responsibilities of government into areas such as education, health provision and the right to work. They are more controversial because they expand the activities of government and are also dependent on the availability of resources.

Any listing of positive rights may be disputed. Many would claim the right to education, but what about the right to private education? The same applies to health care and the right to strike (or not to). Particularly controversial is the issue of abortion, on which 'pro-choicers' argue the right of a woman to have total control over her own body whereas the 'pro-lifers' argue for the right to life of the unborn foetus.

interest, and groups around the world have been active in campaigning for more generous provision and better enforcement.

The protection of liberties in Britain and the United States in theory and practice

There was no Bill of Rights in the original American Constitution, not least because the federalists who dominated the gathering felt that it was unnecessary. In their view, liberty would be protected by procedures such as federalism and the checks and balances built into the proposals. They doubted the value of a special document defending personal rights, for federalists claimed that the maintenance of basic freedoms would depend primarily upon the balance of forces set out in the document and on the tolerance or otherwise of the age.

For anti-federalists, the Bill of Rights was a proclamation of their fundamental belief in the natural rights of all Americans. Whether or not another generation

sought to deny them, it was crucial to proclaim their existence. Any government resting on the consent of the people must acknowledge them and include them in any constitution. Anti-federalists may have lost much of the battle over the form of government, but they won the debate over the Bill of Rights, which were adopted as the first ten amendments to the Constitution, on 15 December 1791 (see below).

The first ten amendments to the Constitution and their purpose

Protections afforded fundamental rights and freedoms

Amendment 1: Freedom of religion, speech, press, and assembly; the right to petition the government.

Protections against arbitrary military arrest

Amendment 2: Right to bear arms and maintain state militias (National Guard).

Amendment 3: Troops may not be quartered in homes in peace time.

Protection against arbitrary police and court action

Amendment 4: No unreasonable searches or seizures.

Amendment 5: Grand jury indictment required to prosecute a person for a serious crime. No 'double jeopardy' – being tried twice for the same offence. Forcing a person to testify against himself or herself prohibited. No loss of life, liberty or property without due process.

Amendment 6: Right to speedy, public, impartial trial with defence counsel, and right to cross-examine witnesses.

Amendment 7: Jury trials in civil suits where value exceeds 20 dollars.

Amendment 8: No excessive bail or fines, no cruel and unusual punishments.

Protections of states rights and un-named rights of the people

Amendment 9: Unlisted rights are not necessarily denied.

Amendment 10: Powers not delegated to the United States or denied to states are reserved to the states or to the people.

First Amendment freedoms – freedoms of speech, assembly, association, petition and religion – are at the heart of a healthy constitutional democracy. The Amendment explicitly acknowledges freedom of expression. In Britain, by contrast, the traditional protection available in this area has been very different. There was no clear legal presumption in favour of free expression, although judges have in recent years tried to interpret laws and other rules which inhibit free expression as narrowly as possible. People have been free to say what they like, as long as they did not break any existing law such as the law of defamation or the legislation on race relations. In the absence of any law proclaiming the right of free speech, the British relied on what A V Dicey, constitutional theorist of the late nineteenth and early twentieth century, , labelled 'the three pillars of liberty'.[1] He argued that between them Parliament, a culture of liberty and the courts offered adequate protection,

operating as they did against a background of respect for the rule of law. The commitment to freedom of expression is now much clearer because Britain has passed the Human Rights Act (1998), incorporating the European Convention into British law. Article 10 of the Convention acknowledges the right of freedom of expression and this can now be cited in British courts. Much now depends on the interpretation of freedom of expression by the judges.

The European Convention on Human Rights and its protocols

Article 2: Right to life
Article 3: Prohibition of torture
Article 4: Prohibition of slavery and forced labour
Article 5: Right to liberty and security
Article 6: Right to a fair trial
Article 7: No punishment without law
Article 8: Right to respect for private and family life
Article 9: Freedom of thought, conscience and religion
Article 10: Freedom of expression
Article 11: Freedom of assembly and association
Article 12: Right to marry
Article 13: Right to an effective remedy
Article 14: Prohibition of discrimination
Article 25: Applications by persons, non-governmental organisations or groups of individuals
Article 28: Report of the Commission in case of friendly settlement
Article 31: Report of the Commission 'if a solution is not reached'

Protocol No. 1
Article 1: Protection of property
Article 2: Right to education
Article 3: Right to free elections

Protocol No. 4
Article 1: Prohibition of imprisonment for debt
Article 2: Freedom of movement
Article 3: Prohibition of expulsion of nationals
Article 4: Prohibition of collective expulsion of aliens

Protocol No. 6
Article 1: Abolition of the death penalty

Protocol No. 7
Article 1: Procedural safeguards relating to expulsion of aliens
Article 2: Right of appeal in criminal matters
Article 3: Compensation for wrongful conviction
Article 4: Right not to be tried or punished twice
Article 5: Equality between spouses

The First Amendment requires judicial interpretation for it is brief and needs to be applied to particular circumstances. This is true of other amendments as well. The Convention contains vague, all-embracing phrases such as the 'right to liberty and security of person' and 'freedom of expression', a deliberate choice on the part of those who drafted it. If the terminology were more precise, it would automatically exclude many issues from consideration. However, unlike the American Bill of Rights, it qualifies the substantial right expressed in the first paragraph of each article. The qualifications list the exceptions to the application of the right. For instance, in Article 10 the right to freedom of expression is modified by the first paragraph:

> **This right shall include freedom to hold opinion and receive and impart information and ideas, without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.**

Perhaps more controversially, it is modified by a second paragraph which contains other important limitations as

> **necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.**

Finally, under Article 15, a state can derogate from its obligations in circumstances of national emergency. This let-out has enabled Britain to pass its anti-terrorist legislation (1998 and 2001) without fear that it falls foul of the Convention.

In America, the Supreme Court has been the primary branch of government charged with giving meaning to these freedoms and ensuring that they are observed. It has generally adopted a practical approach, refusing to make them absolute rights beyond any kind of governmental regulation or to say that they must be observed at any price. The Amendment has never been interpreted in such absolute terms, so that the rights to freedom of the speech and of the press are limited (see, for example p. 55 below). But the nine justices on the Court have recognised that a constitutional democracy tampers with such freedoms at its peril and have generally insisted upon compelling justification before allowing the rights to be infringed.

Because essential freedoms are given constitutional status, they are not easy to override and many groups – however unpopular in the country – have been able to cite the clause in their defence. Those who would desecrate the flag or who have adopted extremist right-wing views have often been tolerated in its name. By contrast, in Britain, the Human Rights Act is not entrenched, but part of the ordinary law of the land. If any existing law is incompatible with

the Convention, there is a fast-track procedure for its amendment. But it can be expressly overridden. In that sense, American protection is more secure.

The role of judges in interpreting the Bill of Rights and the European Convention

The task of interpreting the broad phrases of the American Constitution and the Human Rights Act in Britain is performed by appointed judges. As we see on pp. 144, 149, justices on the Supreme Court have been much involved in issues concerning civil liberties in the postwar era. The decisions of the Warren Court were notably liberal in their judgements concerning the rights of individuals (especially minorities), equal representation and equality before the law. The Burger Court which followed was more liberal than anticipated, although its decisions on the criminal law were more cautious and it leaned towards more powers for the police.

By incorporating the Convention, Britain has taken a step in the American direction. Previously, especially on the political left, there was much fear of judicial power and an unwillingness to trust the judges to get it right. Some critics of the idea of a home-grown and up-to-date British Bill of Rights worry about the backgrounds, attitudes and method of selection of those in the judiciary. Ewing and Gearty questioned whether it is

> **legitimate or justifiable to have the final political decision, on say a woman's right to abortion, to be determined by a group of men appointed by the Prime Minister from a small and unrepresentative pool . . . Difficult ethical, social and political questions would be subject to judicial preference, rather than the shared or compromised community morality.**[2]

Incorporation of the European Convention has troubled those who argue that it is at Westminster that issues should be decided. It is up to Parliament to defend the people against injustice and to legislate for the type of society the government of the day favours. MPs are elected; judges are not. Moreover, in the Labour Party, there is a long history of doubts about judicial conservatism. Many have argued that judges are more interested in preserving rights of property than in safeguarding the liberties of trade unions, or racial or other minority groups. Some have pointed out that judges tend to be wealthy, conservative in their thinking and out of touch with the lives of people from less comfortable backgrounds. Moreover, their training and the character of their task tends to give them a preference for traditional standards of behaviour, a respect for family and property, an emphasis on the importance of maintaining order and a distaste for minorities – especially if they are strident in their approach as they search for justice.

The tolerance extended to minority opinions

For all of the protection afforded by the Constitution, some groups have not been able to enjoy their full rights. Mark Twain once remarked that God gave the American people 'the three precious gifts of freedom of speech, freedom of religion and the prudence never to exercise either of them'. Justice Oliver Wendell Holmes recognised that there are times when it is not appropriate to exercise First Amendment rights, in his observation that 'the most stringent

protection of free speech would not protect a man in falsely shouting "fire" in a crowded theatre'.

Tolerance has been extended in cases where people have engaged in **symbolic speech**. In 1965, Mary Beth Tinker and her brother John were suspended from their school in Iowa for wearing black armbands in protest against the Vietnam War. This was adjudged to have been a violation of the First Amendment, because the right to freedom of speech went beyond the spoken word. Similarly, when Gregory Johnson set a national flag on fire to protest against the build-up of nuclear arms, a state law banning such desecration was overturned because the law fell foul of the same Amendment. It was held that the act was not just a dramatic action, but was in effect an expression of speech.

symbolic speech

Non-verbal communication or speech-related acts, such as burning a flag or wearing an armband, that are protected by the Constitution because they involved the communication of ideas.

However, there have been occasions when these freedoms have had to yield to societal pressures from the majority. If in theory most Americans believe in freedom of expression, many would have more doubts about extending that freedom to the **Ku Klux Klan** or some other extremist group. Neither would they be keen to allow schools in their neighbourhood to inform schoolchildren about homosexuality or atheism.

Ku Klux Klan

A secret organisation of white protestant southerners formed after the American Civil War to fight black emancipation. The group has terrorised blacks, Jews and immigrants, among others, resorting to lynchings and shootings. At times, its influence in American life has been considerable – in the 1920s, for example.

At times, anti-communism has been a powerful force in American politics. The Smith Act of 1940 forbade advocacy of the violent overthrow of the government and in 1951 (*Dennis v the United States)* the Supreme Court upheld prison sentences for those leaders of the Communist Party who were said to have supported such action. This might seem more like shouting fire in an empty rather than a crowded theatre, but the Court saw the danger presented by seditious left-wing activity as so great that important rights must be denied. During the early 1950s, in the **McCarthy** era, those alleged to be socialists or communists (even if in reality they were liberal progressives) found themselves in difficulty with the courts who seemed unwilling to defend their constitutional rights. Both in the 1920s and the 1950s, free speech was under threat in America in a way that was not the case in Britain, even though the American protection of freedom of expression was much more explicit.

McCarthyism

The fear, prevalent in the early 1950s, that America was under great threat from international communism, adherents of which were said to be infiltrating government, institutions and society at many levels. It was named after Senator Joseph McCarthy, the prominent witch-hunter of communists, who led unscrupulous investigations into the lives of those accused of subversion.

In Britain, there is no such thing as the First Amendment. No British court would overturn an act of Parliament for violating someone's freedom of speech, although incorporation of the European Convention might pave the way for change via the fast-track procedure. There is nothing like the same certainty of protection. Freedom of expression in Britain is well established, but there are restrictions which are stronger than those in the United States. These have been evident in the handling of security cases.

In the 1980s, there were many anxieties about the protection of liberties in the Thatcher years. Critics felt that there was an increase in governmental power at the expense of personal freedom. The pressure group Liberty felt inspired to launch an advertising campaign enumerating countless ways in which its members believed that the Conservatives in office were trampling on people's rights, alleging that ministers had

> **overseen a major increase in central government and police power. It has curtailed our right to peaceful assembly, to join a trade union, to elect our own local government, to receive information, to be free from discrimination. When these rights are taken from some, the freedom of all is threatened.**

In particular, in the 1980s state security became something of an obsession. In the *Spycatcher* case, Peter Wright's book on the security services caused a furore, for his memoirs provided a frank account of his earlier work as a security officer. Ministers took out an injunction to restrain broadsheet newspapers from commenting on aspects of the affair, although they eventually lost a case at the European Court in Strasbourg where it was found that the government was breaching Article 10 of the Convention.

The relationship between security and the media's overage of events in Ireland was a particular theme of that decade. There was an obvious security implication in discussion of events in the province, and coverage often caused problems for broadcasters whose instinct was to probe controversial and dramatic occurrences and find out what really happened. In 1988 the British government imposed a ban on the broadcasting of free speech by representatives of certain organisations, notably Sinn Fein, the Ulster Defence Association and the paramilitaries. Programmes could in future included the 'reported speech' of such supporters or an actor's voice could read a quotation, but they could not speak for themselves. The ban was challenged in the British courts and at the European Court in Strasbourg, but was maintained.

Pentagon Papers
Classified documents which detailed the history of American involvement in Vietnam.

In comparison to the Thatcher gags, which were generally upheld in the British courts, the American administration of President Nixon had no such success when it went to court in an attempt to stop the publication of the illegally obtained **Pentagon Papers** in the *New York Times v United*

States case, 1971. The Supreme Court refused to stop publication of these classified documents by the *New York Times* and the *Washington Post*, noting the heavy presumption against 'prior restraint' (any limitation on publication requiring that permission be secured or approval granted prior to publication).

In another way, freedom to express controversial views is more clearly protected in the United States. It is unusual for someone to win a libel case in America. The courts tend to err on the side of freedom of expression, taking the view that if public debate is not free there can be no democracy. The Supreme Court has allowed considerable latitude to those who make derogatory comments which damage or bruise public reputations. (Libel is not protected under the First Amendment.) In Britain, **libel** laws are stricter than in America or most European countries, and some judges have been severe on those found guilty of defamation. Klug *et al* stress the 'rigidity' of the present law and note that 'it runs contrary to the trend in international law which has placed greater emphasis on the right to free expression'.[3] Under the British law of defamation, it is an offence to make any statement calculated to bring a person into hatred, ridicule or contempt, or which may cause a person to be ostracised. Libel is more serious than **slander**, for it is recorded in a more permanent form. If the observation can be proved true or comes into the category of fair comment, there is no legal liability. The Human Rights Act may make a difference, for in interpreting the Convention the European Court has normally taken the view that defamation has not occurred provided that the facts are reasonably accurate, that the opinion was expressed in good faith and that there was no intent to defame.

libel
Defamation by printed word or in broadcast form and therefore a permanent attack; defamation refers to comment which is malicious and damaging to a person's reputation.

slander
Defamation by word or gesture and therefore a temporary attack.

Yet if Britain has lacked the formal protection of freedom of expression possessed by the United States, nonetheless it has generally been less harsh on the expression of minority views of a left-wing variety. The hysteria against communists which characterised the McCarthyite era has no British equivalent.

The degree of protection given to basic freedom depends to some extent on the political climate of the times. In the 1960s, the constitutional meaning of free speech was expanded in America, and courts were generally more supportive of a variety of forms of protest. However, in the United States – and in Britain as well – the terrorist threat posed by the events of September 11th challenged the tolerance of many citizens. In both countries, draconian legislation was introduced, much to the alarm of supporters of civil liberties.

Anti-terrorist legislation

Almost every American could agree on the need to ensure greater security of the person, by rooting out terrorists and preventing the danger of further attacks. But critics of the Bush administration claimed that its package of anti-terrorist measures ('Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism' – more usually known as 'the USA PATRIOT Act') went far beyond what was necessary to achieve these objectives. They detected signs of a serious erosion of accepted freedoms.

Criticism centred mainly on three broad aspects of the Act:

1 The dedication to secrecy which made it difficult to find out information relating to the 600 or so detainees held in federal prisons.

2 The way in which new powers tilted the balance towards the executive branch and removed from the judicial system some of its power to review the actions of the administration. (For instance, immigration judges now have less opportunity to prevent unlawful detention or deportation of non-citizens.)

3 The traditional distinction between foreign intelligence gathering and criminal investigation at home has been undermined. For instance, information gathered by domestic law enforcement agencies can now be handed to bodies such as the CIA.

In addition, reports concerning a number of individual cases indicated a new spirit of intolerance of dissent. In November 2001, a member of the Green Party USA's committee was surrounded by military personnel as she tried to board a plane in Bangor, Maine, to attend a Chicago meeting on the use of pesticides in war. She was told that because her name had been 'flagged in the computer', the airport was closed to her. Her flight fare was not refunded and she found that her hotel reservation in Chicago had already mysteriously been cancelled. There were also complaints from some academics opposed to the war in Afghanistan of harassment by university and other authorities.

In Britain too, there were allegations from civil libertarians that the restraints on freedom were excessive, not least because the Labour government had already introduced a measure tackling terrorist threats a year or so before. Of course, many people on either side of the Atlantic might point out that, by their actions, the terrorists involved had destroyed the most basic right of all – the right to life – of nearly 4000 people, mainly Americans, but also including British and other people as well. They had threatened the 'life, liberty and pursuit of happiness' of many more people who either lost members of their families or for some time feared such a loss.

The proclamation of positive rights in recent years in Britain and the United States

On p. 48, we made the distinction between negative and positive rights, the former limiting governmental intrusion on the free choice of individuals and the latter extending the role and responsibilities of government into areas such as education, health provision and the right to work, in order to expand the opportunities available to all citizens. The negative rights are often referred to as civil liberties, which are essential if individuals are to be allowed to communicate freely with each other and with the government. Positive rights are sometimes known as civil rights. In postwar Britain and America, governments have acted to ensure the equal treatment of individuals and to give them a better, more satisfying life.

Civil rights are a set of protections from something which could otherwise greatly affect people's lives, such as freedom from arbitrary arrest and imprisonment, and from discrimination on such grounds as disability, gender, race, religion or sexual orientation.

The rights of criminal suspects and those detained in prison

America has always taken a tougher stand on matters of law and order than prevails in Britain. In their attitude to law-breakers, those charged with enforcing the law have been keen to make it clear that 'crime does not pay'. Whether in the matter of the sentences passed, the conditions under which prisoners are detained or the use of the death penalty, the emphasis has generally been on firm punishment rather than on the rights of those charged committing offences. At times, a more liberal attitude has been apparent, as under the Warren Court (see pp. 144, 149) which in the Miranda ruling required police officers to inform suspects of their constitutional rights and created specific guidelines for police interrogations. But exceptions to the so-called **Miranda rules** have been allowed. For instance, in 1991 the Rehnquist Court (see pp. 149–50) in *Arizona v Fuliminante* decided that the admission at a trial of an illegally coerced confession does not mean that a conviction must be overturned, as long as the impact of the confession was in itself harmless.

Miranda rules

In the *Miranda v Arizona* judgement (1966), the Supreme Court decided that no conviction in a federal or state court could stand if evidence introduced at the trial had been obtained as a result of suspects being denied their constitutional rights. The justices laid down the *Miranda rules* which among other things stipulated that suspects must be notified that they are free to remain silent, warned that what they say may be used against them in court and told that they have a right to have attorneys present during questioning.

The Eighth Amendment in the Bill of Rights forbids cruel and unusual punishments, although it leaves the phrase undefined. In recent years, there has been

much discussion about the increasing use of the death penalty in states such as Florida and Texas. The Supreme Court tackled the issue of whether the death penalty is inherently cruel and unusual as a form of punishment, in the case of *Furman v Georgia*, 1972. It overturned the law enforced in Georgia, finding that its imposition was 'freakish' and 'random', but in subsequent decisions it has been more sympathetic in its judgements to the use of the capital punishment. In 1976 in the case of *Gregg v Georgia* the nine justices argued that it 'is an expression of society's outrage at particular offensive conduct . . . an extreme sanction, suitable to the most extreme of crimes'. There has been much criticism by opponents of the death penalty of the methods employed to implement it in different states, some of which have been condemned as particularly cruel and unusual. There has also been concern at the execution of teenagers over 16 and of mentally retarded individuals, and of the way in which black Americans seem much more likely to attract the ultimate punishment than do white people.

As for the detention of criminals, there has been widespread experimentation with boot-camps and other tough regimes inside American prisons. But what has attracted particular attention is the issue of the treatment of non-American terrorist suspects after the attack on the twin towers in 2001. Instead of establishing prisoner-of-war camps in the Afghan territory it had freed from Taliban control, the US arranged for their transport, in small groups, to a naval base at Guantanamo Bay, in Cuba, instead of to the American mainland. Here, they were not subject to the jurisdiction of the American courts, and critics have complained that basic rights have been denied. As yet, they have not been brought to trial and their detention in crowded conditions has provoked controversy.

At times, Britain has also adopted stronger measures against criminals, most notably in recent years. There is a growing concern among ministers that the rights of suspects and defendants have been unduly emphasised, and that it has proved hard for the police to obtain convictions. But the toughness on crime has been balanced by some interest in the causes of crime and an attempt to ensure that those detained in custody are granted their rights. Moreover, the death penalty was abolished in 1965 and in recent decades there has been no substantial move to reintroduce it.

The extension of rights to disadvantaged groups

The full rights of women and ethnic minority groups were only slowly recognised on both sides of the Atlantic. As in many parts of Europe, in the nineteenth century women in America experienced unequal treatment for centuries. They were seen as goods and chattels, dependants of their fathers and husbands, and denied a range of legal rights, including the right to vote.

In the twentieth century, the 19th Amendment extended the right to vote across the country and once women had a voice in political life they were able to use it to campaign for other rights.

Yet women were slow to benefit from the 'equal protection under the law', as promised by the 14th Amendment. Even the Warren Court, which did much to advance the cause of racial minorities, was less willing to show the same concern for women, Chief Justice Warren noting that 'woman is still regarded as the centre of home and family life'. In other words, they were viewed as having a limited role in society and their anxieties did not receive the same scrutiny as matters of race and national origin. However, in the 1960s a national commitment to civil rights came meaningfully to the fore. The passage of the Equal Pay Act (1963), requiring equal pay for equal work, and the Civil Rights Act (1964), which prohibited discrimination on the grounds of sex (among other things), were important steps forward, and showed a willingness to use the law to advance women's rights a few years before similar steps followed in Britain (1970 and 1975 respectively).

In both countries, the legal position of women has improved substantially and their rights in the work-place have been expanded. However, in politics they have found it difficult to achieve a major breakthrough in the national legislature, until the last few years (see pp. 126–9). This is in spite of the fact that the women's movement for female liberation developed in the United States.

Civil rights for ethnic minorities

The early twentieth century was a bleak time for civil rights in America and it was not until the 1950s and 1960s that the rights of black Americans began to be secured. The decision in the 1954 case of *Brown v Board of Education* (Topeka, Kansas) was a landmark judgement in bringing about the ending of segregation, but it was another decade before they achieved 'equal protection under the law'. The Civil Rights Act laid it clearly down that 'no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance'. This was but one of several measures which advanced the cause of black Americans, most notably including the Voting Rights Act of 1965 which prohibited literacy tests and other practices which had a discriminatory impact.

Civil rights activists demanded non-discrimination and equality of opportunity. To achieve the necessary breakthrough for women and members of ethnic minorities, Democratic Presidents were keen to introduce a policy of **affirmative action**, to compensate for the effects of past discrimination.

affirmative action
A policy designed to give special attention or compensatory treatment to members of some previously disadvantaged group.

This provided special benefits to those in the community such as blacks, women and other disadvantaged groups, often involving a special effort to recruit and promote members of these groups.

In its anti-discriminatory measures, America gave a lead which was followed in other countries such as Britain. Segregation had never been a British problem, but the issues surrounding immigration and race relations were becoming a matter of controversy by the 1960s. Several reports pointed to the unfair treatment of the growing number of people from the New Commonwealth, so that in a succession of measures Labour passed legislation to outlaw racial discrimination (1964, 1968, 1976 and 2000). In particular, the 1968 Act was much influenced by American experience. In both countries, the laws might be in place, but there are many examples of discriminatory practices, police harassment and of controversy concerning the position of ethnic minorities in society.

In both countries, there has been strong suspicion of any legislation which confers a seemingly privileged position on some disadvantaged group, whatever the scale of injustice that group may have suffered in the past. Affirmative action ran into political difficulties and has been much challenged in the courts since the early 1990s. Positive discrimination, the preferred British term for such remedial action, has always been controversial in Britain, with critics suggesting that 'reverse discrimination' involving quotas or preference to minority groups is unacceptable.

Open government and freedom of information

In a liberal democracy, the public need to be able to evaluate the performance of a government, in order to decide whether it merits their support. To do this, they need to be 'in the know' about how government works and to have access to information about the basis on which policies are made. **Open government** and **freedom of information** are for many people basic requirements of any democracy. Limits are sometimes placed on this 'right to know', usually because of fears for national security and in order to protect unwarranted intrusion into individual privacy.

open government
The relatively free flow of information about government to the general public, the media and other representative bodies.

freedom of information
Free public access to government information and records. Freedom of information is regarded by many people as a prerequisite for more open government.

America has always had a culture of openness, as befits a country in which there is a suspicion of government and a wish to ensure that those who exercise power do so in an appropriate manner. Its freedom of information (FoI) legislation of 1966 and 1974 provided citizens and interest groups with the right to inspect most federal records. In general,

the assumption is that records are subject to disclosure, unless they involve personnel records, court records, national security issues, or business and trade secrets. Access to some information may be initially denied, but appeal to the courts may secure the production of the documents previously unavailable. Such access is a considerable aid to the activities of investigative journalists.

In addition, the so-called 'sunshine laws' adopted by many states are designed to let the sun shine on all governmental deliberations. These laws apply to both legislative and executive officials, and are designed to ensure that policy discussions and decisions occur in full public view and not in closed-door sessions.

In contrast to American experience, Britain has a reputation for secretive government. It is frequently alleged that information kept secret in Britain goes far beyond what is necessary to preserve public safety and often includes material which, if published, would cause political embarrassment. The major legislation which underpinned the British obsession with secrecy was the Official Secrets Act (OSA) of 1911. The measure was draconian in its clampdown. The notorious Section 2 was a catch-all clause which forbade any unauthorised disclosure of information by anyone who had in his possession data obtained whilst that person was holding a position under the Crown. There was no distinction between sensitive information relating to national security, and more harmless trivia. This meant that even the leaking of a Ministry of Defence luncheon menu was against the rules! Clause 2 gave Ministers an arbitrary weapon with which to silence those who would blow the whistle on what happened in government, and could be used to silence anyone who might embarrass those in office.

In 1989, a new Official Secrets Act was passed by the Thatcher government. Ministers claimed that it was more liberal than the previous one and that it abandoned the catch-all clause – which was true. But although the 'reform' narrowed the definition of official secrecy, it tightened it within these narrower confines. Even a disclosure of information about fraud, neglect or unlawful activity cannot now be defended as being in the public interest. Convictions are therefore easier. Some liberalisation has occurred since then, but critics continue to call for greater transparency in the British system of government. They believe that more openness is desirable and necessary, and that democracy works best when citizens are well-informed.

Unlike most countries, Britain had no Freedom of Information Act until the year 2000. Many states had freedom of information enshrined in law. guaranteeing citizens the right to see a wide variety of documents, both state and personal. But in Britain, the right of access to information remained patchy. New Labour, in opposition, talked of reform of the OSA and the introduction of a FoI bill. The former has yet to come, and many observers feel that in office

ministers are at one with their predecessors in using security and secrecy in their own interests. The legislation on freedom of information was slow to materialise, but it passed into law in 2000 and will become effective after the next election.

The passage of the Freedom of Information Act is an historic step. But to many observers – including those sympathetic to ministers – it is a watered-down version of what is required. Canada, Ireland, Sweden and the United States all provide considerably greater openness.

The instinct of governments in Britain is to keep secret much that in the United States would be revealed by a vigilant press protected by First Amendment guarantees. There is no tradition of openness and in all of the debate in recent years it has been clear that ministers of either party are concerned to set clear limits to the information that can be made available.

Conclusion

America provides greater formal protection for individual liberty than does Great Britain. The Constitution, via the Bill of Rights, sets out guarantees of essential freedoms, and Americans frequently argue their rights under the First Amendment to express their feelings on any issues of public importance. But such protection has not always been extended to all groups, particularly those belonging to unpopular minorities. In contrast, until the passage of the Human Rights Act, Britain lacked such clearly proclaimed protection, but this did not mean that rights were not recognised.

A bill of rights is not the panacea for all problems arising in the relationship between the individual and the state. History is littered with examples of countries in which formal statements of rights have not proved to be worth the paper upon they were written on. The American document did not stop President Franklin Roosevelt from depriving thousands of native-born Japanese Americans of their liberty in World War Two, and for generations its provisions were not applied to black Americans.

Views have differed across the Atlantic. Thomas Jefferson could not understand why anyone should resist the idea of a bill of rights, seeing it as 'what the people are entitled to against every government on earth, general or particular, and what no just government should refuse or rest on inference'. A British Conservative and former minister, John Patten, sees it differently. He takes the traditional view on this side of the Atlantic that:

> **Such documents are meaningless unless they exist within a country which has a political culture that renders them viable . . . The greatest protector of citizens' rights in the UK are citizens themselves . . . The protector of freedom in the end is the political culture, not some document, however weighty.**[4]

Women and ethnic minorities on either side of the Atlantic have campaigned strongly for their rights in recent decades. In the United States, the 14th Amendment gives formal recognition of the rights of all Americans to 'equal protection', but the attempt to pass an Equal Rights Amendment to benefit women by providing that 'equality of rights under the law' could not be denied 'on account of sex' proved unsuccessful and eventually founded in 1982. In both countries, legislation has conferred a range of benefits upon groups seeking greater opportunities and fuller recognition of their rights.

The civil rights umbrella is a large one, with increasing numbers of groups seeking protection for their rights, be they old, young, disabled, gay or victims

The liberties and rights of people in Britain and the United States of America: a summary

Issue	*Britain*	*United States*
Existence of Bill of Rights?	No, but Human Rights Act (HRA): protection of the law, but no entrenchment.	Yes, many rights guaranteed by Constitution.
Language and interpretation	Articles of HRA require interpretation: several qualifications to articles of European Convention. Much depends on judicial interpretation.	Broad phraseology of Constitution, but terms not qualified. Much depends on judicial interpretation.
Freedom of expression	Now protected by HRA, Article 10, but traditionally more restricted than in US, e.g. libel.	Guaranteed by 1st Amendment: much toleration of symbolic speech, but not always towards minority rights – e.g. communists.
Punishment: rights of suspects, defendants and detainees	Power of police strengthened in recent years, concern over criminals 'going free'. But also concern for right of accused and over causes of crime. No death penalty.	Err on side of police powers. Rights of accused often questioned, tougher regime for many detainees, especially terrorists at Guantanamo Bay. Many states employ the death penalty.
Rights of women	Gained vote in 1918 and 1928. Anti-discrimination measures passed from 1970 onwards.	Vote via 19th Amendment, 1920. Anti-discrimination legislation (1964), before Britain. Women's Liberation Movement developed here.
Rights of ethnic minorities	Anti-discriminatory laws on race relations passed from 1960s. Much still to do.	Anti-discriminatory legislation (1964) earlier than in Britain. Much still to do.

of Aids. Those categorised as belonging to disadvantaged minorities, particularly the elderly, now constitute a significant section of the voting population, and in the new century they are sure to be active in demanding greater recognition of their rights.

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1 A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, 1885.
2 K. Ewing and C. Gearty, *Freedom under Thatcher*, Clarendon Press, 1990.
3 F. Klug, K. Starmer and S. Weir, *The Three Pillars of Liberty*, Routledge, 1996.
4 J. Patten, Conservative Political Centre Lecture on 'Political Culture, Conservatism and Rolling Constitutional Changes', July 1991.

USEFUL WEB SITES

For the UK

www.coe.fr Council of Europe. Access to information on European Convention.

www.echr.coe.int European Convention on Human Rights.

www.lcd.gov.uk Lord Chancellor's departmental site. Coverage of human rights legislation.

www.charter88.org.uk Charter 88. Information relating to protection of rights.

For the USA

www.heritage.org The Heritage Foundation, a conservative group which campaigns to preserve liberties and rights. Has useful links to other conservative organisations with a similar agenda.

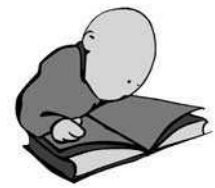
www.aclu.org The American Civil Liberties Union, a more liberal campaigning group on rights. Links to other more liberal organisations.

www.findlaw.com FindLaw provides an index of US Supreme Court rulings.

www.ifex.org The International Freedom of Expression Exchange represents more than 50 groups committed to human rights and civil liberties. It describes cases of current concern.

http://nsi.org/terrorism.html Web site of the National Security Institute. Provides links regarding terrorism, including details of policy and legislation in that area.

SAMPLE QUESTIONS



1 Is the passage of the Human Rights Act the first step towards the introduction of a written constitution in Britain?

2 Examine the ways in which liberties and rights are protected in Britain and the United States. In which country is there a greater degree of protection?

3 Is it true that to say that constitutions are meaningless without recognition of basic civil liberties and rights?