

POLITICAL FREEDOM

in BRITAIN

‘Britain was once the leader in recognising and enforcing human and civil rights. It has now fallen behind other nations, but the culture of liberty is still lively here, and what is most needed to engage it is thorough information and clear, calm analysis. The Three Pillars of Liberty is exactly that. It may turn out to be one of those few documents that makes a difference and helps to mark a turning point’

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The Three Pillars of Liberty,

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sets out the results of the first objective and systematic ‘audit’ of Britain’s arrangements for protecting political rights and freedoms. This audit was conducted by the Democratic Audit of the United Kingdom, which is based at the Human Rights Centre, University of Essex. The auditors used a Human Rights Index, constructed from the major international human rights treaties and their ‘jurisprudence’, to measure political freedom in this country.

Britain is a liberal democracy, free from widespread and gross violations of human rights. But the Democratic Audit finds that our governing arrangements do not effectively protect our political rights and freedoms. This failure is systemic. In other words, no single group of people or officials – judges, politicians or civil servants – are to blame. It is our traditional legal, constitutional and political arrangements which collectively fail to protect or strengthen our most fundamental rights.

This was also the verdict in July 1995 of the authoritative UN Human Rights Committee. This committee of 18 international legal experts found that Britain fails both to protect political and civil rights adequately and ‘does not fully ensure that an effective remedy is provided for all violations’ of such rights.



BRITAIN'S SYSTEM for PROTECTING FREEDOMS

The three traditional 'pillars of liberty' in the United Kingdom are Parliament, the courts and public opinion. They are held to protect civil liberties more effectively than a written constitution, or legally inscribed rights, could hope to do so.

Yet the Democratic Audit finds 42 violations of international human rights standards in Britain today, and a further 22 examples of UK law or practice which come close to infringing those standards, or give cause for concern. In five areas, like the use of lethal force by the security forces in Northern Ireland, the Audit judges that actual practice subverts laws which do meet international standards.

The main cause of this country's failure to meet international standards is the political and legal system in the United Kingdom. The doctrine of 'Parliamentary sovereignty' – under which Parliament may make, or un-make, any law – delivers full law-making (as well as executive) powers to majority party government in Parliament. The traditional 'three pillars of liberty' are generally powerless against any government with a secure majority in the House of Commons.

Further, Britain's unwritten constitution provides no legal safeguard – through a Bill of Rights or constitutional guarantees – to protect fundamental rights against the wide and flexible powers which government ministers and bureaucrats possess. In detail, the Democratic Audit finds that:

Government and Parliament

The governing party's majority in the House of Commons is secured by party discipline and the government is generally able to get its legislation through Parliament. Governments dominate Parliament and Britain's secretive regime severely limits MPs' powers to hold ministers accountable. Scrutiny of new legislation is partisan and largely nominal.

Parliament has neither the will nor the resources to check the mass of secondary legislation – codes, guidance, quasi-legislation – which pours through every year and continuously extends ministerial and official power.

MPs and peers are generally ignorant of this country's obligations under international human rights treaties. But even when they are minded to hold governments to their human rights obligations, they do not prevail. The European Court found 37 violations of human rights in Britain (up to September 1995). Of these, 22 were the result of primary legislation, nine of secondary or quasi legislation.

'Ministerial responsibility to Parliament' is supposed to ensure that MPs control the government. But the Scott Report showed that this concept is extremely unreliable. Ministers and officials are prepared to mislead Parliament to protect government policies.

The House of Lords lacks democratic legitimacy and very rarely exercises its powers even to delay legislation. Yet no party has ever won power in Parliament on a majority of the popular vote.

The rule of law

The courts are bound to apply any legislation which has passed properly through Parliament, even if it clearly violates political rights and freedoms. They do possess limited powers to review the government's actions, through 'judicial review'. These powers are almost wholly procedural and are not designed to protect political rights and freedoms.

The judiciary has been able on occasion to use its powers designedly to protect basic freedoms (as in the 1996 case of asylum-seekers' entitlement to social security). However, the prevailing rule remains that the courts cannot review the contents of Acts of Parliament nor consider the merits of executive actions.

The common law does protect some basic rights (e.g., the right to life and liberty), but not others (e.g., privacy). Any government with a secure majority can un-make common law protections through new statutory laws.

The courts are able creatively to extend the common law and could in theory do so to offer further protection of political rights and freedoms. They have largely failed to do so over the whole postwar period.

The culture of liberty

Ultimately, human rights in any country are defended by the will of the people. The 'culture of liberty' in the United Kingdom is a proud and long-standing tradition.

But public opinion is a diverse and shifting phenomenon. Currently, fear of crime is pushing opinion in an illiberal direction. While serious inroads into liberties which matter to the majority may well be whole-heartedly opposed by public opinion, more abstract political rights and freedoms, especially those bearing on minorities, do not generally become matters of public concern.

DEMOCRACY *and* FREEDOM

The Democratic Audit concentrates on the rights and freedoms which make democracy work. Two basic principles underpin democracy in modern nations – the principles of popular control and political equality. This means broadly that citizens of any country must be able to exercise effective control over their elected representatives; and that they must be equally able to exercise that control.

Regular and free elections are the most obvious means of exerting control over elected representatives. But to exercise their votes satisfactorily, people must have access to information about the policies and performance of their elected representatives and their opponents. They must be free to form political parties or interest groups and to demonstrate their views through their writings, protests and demonstrations.

The principle of political equality cannot be satisfied if some citizens live in fear of the authorities or of others, or are deterred by arbitrary interference by the state. The equal protection of the law and anti-discrimination measures are essential to make a living reality of political equality.

So, the rights which enable democracy and political freedom to work hand-in-hand are:

- the equal protection of the law;
- the freedoms of information and expression;
- freedom of assembly and public protest;
- freedom of association and trade union activity;
- the right to life and personal liberty;
- protection against state interference and surveillance; and
- the rights to vote and stand for election.

Human rights findings against Britain

1 The European Court of Human Rights has so far (at September 1995) found against the UK in 37 cases which gave rise to at least one violation. Of these, 22 were the result of primary legislation and nine secondary legislation.

This count is arbitrary and incomplete. It leaves out of the reckoning cases decided by the European Commission, which acts as a filter for the Court. These are often serious, as in the case of Labour's Commonwealth Immigrants Act 1968, which breached three Articles of the European Convention. Sometimes the UK government settles cases through 'friendly settlements' to avoid an adverse Court judgment. For example, in 1987, the widow of an innocent, and unarmed, man shot dead by the security forces in Northern Ireland accepted a large sum of compensation and the case (Farrell v UK) did not reach the Court.

2 After studying a government report and hearing government and expert witnesses in July 1995, the United Nations Human Rights Committee, the expert authority which enforces the International Covenant of Civil and Political Rights, decided that the whole system for protecting political and civil rights in the UK is deficient. The Committee also issued a series of detailed 'concerns' about restrictions on the 'right to silence', harassment of young black men, strip searches, the arrests and prolonged detention of deportees, etc. The Committee also urged the government to undertake major campaigns to tackle racial and gender discrimination.

3 The Democratic Audit of the United Kingdom measures UK law and practice against the Human Rights Index of international human rights standards. The Audit finds 42 violations of those standards, and a further 22 examples where UK law or practice come close to infringing those standards, or give cause for concern. In five cases, the Audit found that while British law conforms to international standards, current practice can fall short of those standards. An alarming example of this has been the use of 'lethal force' in Northern Ireland.

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The Democratic Audit discloses a series of breaches of international standards rights across the spectrum of 'democratic' rights. These are not random pockets of non-compliance, but examples of systemic weakness. This weakness calls into question the health of British democracy itself. The Audit's principal findings are:

The Equal Protection of the Law

Britain's inability to afford all citizens the equal protection of the law is the most serious and damaging failure to meet international standards. No general right of equality exists. Weak and narrow laws against discrimination on grounds of race, sex, religion and disability exist in different parts of the country, but do not apply uniformly throughout the UK. Religious, but not racial, discrimination is prohibited in Northern Ireland; racial, but not religious, elsewhere. People are not protected against discrimination in other significant areas of their lives, including old age, health and sexual orientation.

Government officials – such as immigration officers – are actually exempt from major anti-discrimination laws. Some government legislation and practice actually promotes intolerance towards homosexuals.

Freedom of Information

No right of access to official documents exists. Instead, there is a voluntary code of disclosure of government information, inadequately policed by the Parliamentary Commissioner (ombudsman). Generally, freedom of information is suffocated by the demands of official secrecy, national security, and political convenience. Local government is more open.

Freedom of Expression

Freedom of expression can be severely compromised by the use of temporary injunctions, exercising a form of 'prior restraint', the rigid law of defamation, criminal laws of official secrecy, blasphemy and indecency, and other forms of official restriction.

Freedom of Assembly

The cumulative effect of trespass and traffic laws, minor criminal offences, bye-laws, etc., means that British citizens effectively do not enjoy freedom of assembly or the right to public protest. Every public protest depends ultimately on the 'good grace' or 'common sense' of the authorities.

Freedom of Association

The 'hands-off' approach of UK law to freedom of association complies in almost every respect with international human rights standards.

Trade Union Rights

Most recent inroads into trade union autonomy – e.g., balloting requirements for executive members and industrial action – do not breach international standards, but aspects of the law governing collective action by trade unions do. The ability of employers to dismiss anyone taking part in strike action is a violation. So too are restrictions on the right of public servants to join a trade union of their choice.

The Right to Life and Liberty:

Laws governing the use of 'lethal force' and the powers of the police and security forces generally meet international standards. But there are significant exceptions, including detention powers under the Prevention of Terrorism Acts (which have given rise to the UK's one derogation from its human rights obligations). But abuses in practice from fatal shootings to discriminatory use of 'stop and search' powers do violate international standards of conduct.

The Right of Privacy

Does not exist in its own right.

Protection against State Surveillance

Acts of Parliament in 1989 and 1994 put the secret services on a statutory footing and created a complaints procedure. But the secret nature of the controlling mechanisms put in place cause concern – especially in view of their new role in strategic policing functions.. The law still fails to regulate surveillance by the police and Special Branch and their use of secret listening devices. This violation could easily be remedied.

The Right to Vote

Elections broadly meet international standards, even though they are not protected by constitutional guarantees. There are significant defects, however, such as the absence of precise rules governing the description of candidates on ballot papers, the restrictive and confused nature of the conditions for proxy and postal votes, the exclusion of most prisoners from the vote, and others.

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CONCLUSIONS

British people believe that they are among the freest in the world. They live in a democracy and value political freedom as one of democracy's central values. But the United Kingdom offers less effective protection of fundamental political rights and freedoms than international standards require and ordinary citizens are entitled to expect.

Britain could protect basic rights by introducing a Bill of Rights, by writing guarantees of basic rights into a constitution, or by incorporating the European Convention or International Covenant, or both, into domestic law.

But as the UN Human Rights Committee has repeatedly acknowledged, other courses of action are open to signatory states. The UK could, for example, conduct a thorough review of its law and practice to ensure compliance with its international human rights obligations under the Convention and Covenant, and other treaties. It would, of course, also have to put in place mechanisms for regular and effective scrutiny, especially of new legislation, to ensure continuing good behaviour. It would also have to establish a means for giving its citizens a readily available and effective domestic remedy when their rights are violated.

The trouble is, the United Kingdom has done none of these things. This is why British citizens, denied basic rights by Parliament and the courts in their own country, must undertake the long and costly trek to the European Court.

There is also a problem of political culture. The governing traditions of Britain are inimical to full legal or political protection of human rights. For the undoubted tradition of personal freedom – once described by Margaret Thatcher as 'always our glory' – is linked to another powerful tradition – that of public order and 'strong' government.

Britain's constitution remains unwritten because it facilitates 'strong' government. British politicians relish the freedom from constraints which they experience in government. Ministers possess wide discretionary powers to legislate and act, subject only to largely procedural legal restraint. These powers are most frequently deployed, of course, not by ministers themselves, but by officials at every layer of government.

In the name of the 'flexibility' which facilitates this wide disbursement of powers ministers reject statutory and legal rules as 'rigid'. But this 'flexibility' is the enemy of secure political rights and freedoms. Thus, the very idea of secure rights strikes at the heart of the governing system of the United Kingdom and its dominant principle – that of parliamentary sovereignty.

Applying international standards to Britain

Britain has accepted many important human rights treaties since 1945. Two of the most significant are the United Nations International Covenant on Civil and Political Rights and the European Convention on Human Rights. The United Kingdom ratified the International Covenant in 1976 and the European Convention in 1951 – and so is bound by both.

But postwar governments have been indifferent to their obligations under these treaties. They have knowingly violated them on occasion. Parliament is generally ignorant of the terms of these treaties and the government's obligations under them.

Because neither the UN International Covenant nor the European Convention have been incorporated into domestic law, they have no force in cases involving human rights.. The courts scarcely ever pay any attention to the Convention or other treaties, other than lip service. In only 4 cases since 197x have either the European Convention or International Covenant actually influenced a judicial decision.

The European Convention and the International Covenant require all governments to review their law and practice to ensure that they conform to their standards. British governments have never undertaken such a review.

In *The Three Pillars of Liberty*, the Democratic Audit makes good this omission. The Audit employs the body of international and European human rights treaties, law, texts and standards, created since 1945, to provide the empirical and authoritative base for its 'audit' of political rights and freedoms.

This body of international standards has been continuously evolved by the comments, decisions and judgments of the various supervisory authorities. The European Court alone has decided over 300 carefully-argued cases. From this rich jurisprudence, the Audit has extracted a set of clear indices for assessing how effectively any state protects individual rights and freedoms and offers aggrieved citizens remedies where their rights are violated. These indices are the Audit's *performance indicators*.

The International Covenant and European Convention do not set out ideal standards. They simply provide a floor on which states can build. But they insist on two overriding safeguards. The political and civil rights of citizens must be *effectively* protected; and if they are violated, citizens must have an *effective* right to a domestic remedy.

