"Subject" or "Citizen"? The Freedom of the Individual under the British Constitution

Roland Sturm

Introduction

The topic of individual freedoms and civil liberties in Britain, just as the wider field of constitutional reform, is - as Donald Shell has aptly put it - "not a subject which quickens the pulse in the same way as the state of the economy, interest rates, the health service or education" (Shell 1993: 2)[1]. Why then should political scientists and, as I would argue, also individual members of the British polity worry or even think about problems of this kind? Has experience not proven, as many authors have argued[2], that British political culture has an unbroken history of success in defending individual freedom and civil liberties? Is there not a broad consensus on the present constitution, which expresses itself in "the relative lack of citizen participation in national-level issues"? (Parry, Moyser, Day 1992: 430)

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1 The same argument is given by Ross when he insists that institutional sclerosis is the underlying reason for economic decline (Ross 1991: 151ff.).

2 A French admirer stressed in the mid-fifties: "Individual freedom in its broadest sense is securely established in Great Britain. Its importance is manifest in every sphere of human activity, where the implications of this abstract idea have been worked out in application to all kinds of concrete situations." (Mathiot 1958: 330). For the view of a contemporary German admirer of this tradition see Dahrendorf 1986: 737-746. In 1991 Lord Hailsham, who invented the term "elective dictatorship" to characterize the British political system when his Conservative party was in opposition, praised the British political system by claiming that "we are probably the most successful political society that has ever existed"; see Mount 1992: 3.

The first answer to these questions is that assumptions of continuity and stability, the phenomenon Ferdinand Mount has criticized as "continuity myth" (1992: 15ff.), have to pass the test of change. This test is more difficult when elusive concepts, such as "freedom" and "liberty", are to be investigated. The British constitution has no central document which summarizes the British understanding of the basic rights of the individual. As a consequence, incremental change in one direction or another attracts (too) little attention.

This leads to a second reaction, to the opinion that individual freedom and civil liberties are non-issues in British politics. Maybe the low profile of these topics is to some degree the result of a lack of institutionalisation. In other words, if there were a codified constitution which would allow the individual to take matters to the courts, a watchdog role for the House of Lords, or a Constitutional Court, public interest in individual rights issues might be more prominent. This is, however, certainly not to say that institutionalisation would automatically safeguard the rights of the individual.

A third remark is the obvious one, namely that the last twenty years have seen a renaissance of the public awareness of civil rights and liberties issues. Prime Minister Margaret Thatcher's conviction politics and her policy style (see Sturm 1991) have focussed interest on norm-based politics and on such questions as to where the limits of state intervention into the (economic and social) freedom of the individual are, or how strong the state has to be to provide a framework for a successful economy and to defend economic change against individual and collective resistance. The argument has been made that Margaret Thatcher's support for economic libertarianism has not been accompanied by an equally strong commitment to the libertarian ideals of individual rights, but by a traditional Conservative orientation towards strong government (Gamble 1988: 158ff.). The latter did, however, include the promotion of a sense of citizenship "as individual voluntary social or charitable work" (Crick 1992: 275f.) to heal the wounds caused by anti-welfare state policies. These inconsistencies make it even more important to fathom the practical importance of individual rights in the eighties.

Prime Minister John Major has certainly not tried to bring more transparency to the fundamental issue of economic versus personal freedom. He has moved attention away from defining the relationship between the economy and the society, focussing instead on the role of the state as service provider, and has discovered a new brand of "citizen". In this new

perspective, the individual, politically still subject to the Queen and still under the rule of parliamentary sovereignty, suddenly gets endowed with a slice of popular sovereignty, namely consumer sovereignty, to be guaranteed by citizen's charters.

However, not only the question of how change affects the understanding and the practical limits of civil liberties and individual freedom is of interest in this context. The more systematic problem is the basic constitutional one: Are there alternatives to the present way the freedom of the individual is safeguarded in Britain? Would a Bill of Rights be able to fulfil this function, and, above all, would it be compatible with the doctrine of parliamentary sovereignty?

A Tradition of Individual Freedom?

Civil liberties have been traditionally regarded as self-evident qualities of the British policy. So self-evident indeed that guarantees for their survival could be minimal. As one recent commentator put it, "No one felt seriously threatened by anybody else, or by government, so there was no call for a Constitution or a Bill of Rights as formal protection against oppression" (Jones 1990: 29). No matter what institutional realities were created by Acts of Parliament, the commitment to liberty was expected "to seep unconsciously and effortlessly through the British system of government" (Ewing and Gearty 1990: 1). The protection of civil liberties has therefore been characterized by a negative approach: 1) There is no statement of a general principle such freedoms are based on, no reference to the natural human rights of the individual. 2) Individual rights are treated as residual.[3] After Parliament has spoken, what then remains of civil liberties is to be protected. The logic of such an arrangement is obvious; the more interventionism the political system produces, the more individual liberties are in danger. 3) The individual has the right to bring cases before the independent courts of justice and by doing so can fend off every wrongful encroachment upon her or his liberty (de Smith and Brazier 1989: 423f.). The latter doctrine ignores the fact that in practice this has given judges, not bound by any written general statement, a

3 A strict interpretation which looks at the totality of the common law tradition may argue that some rights, like property rights, are explicitely protected. See Koch 1991: 61ff. Koch has to admit, however, that there is no absolute protection from decisions by Parliament.

wide range of possibilities to interpret the limits of civil liberties in the special cases they review. Even disregarding the fact that they may be biased in their judgement, because of the narrow social strata they used to represent and to some extent are still recruited from, judges have regularly had their problems with the distinction between the common good and the interests of the government of the day.

In 1953, the European Convention on Human Rights, which Britain had ratified, came into force. This did not mean that the British courts were given a new legal framework to work in with regard to civil liberties. The Convention remained outside United Kingdom law. But after the United Kingdom had recognized the individual right to petition the European Commission of Human Rights in 1966, this - although very indirectly (after all legal remedies at home have been exhausted, and after the Commission fails to achieve a friendly settlement) - allows British subjects to defend individual rights by reference to a more general and more stable interpretation of the preconditions for individual freedom on the European level. It is debatable what importance it has when, as Mount (1992: 230) argues, today "English judges, so to speak, 'shadow' the provisions of the Convention - not relying on them to direct their judgements, but taking full account of them and trying as far as possible to establish a kind of consonance between the provisions of the Convention and the law of England." The Convention itself is rather vague in its wording, and the number of times judges have to expect that court cases will end up in Strasbourg is fairly limited. Debate on constitutional reform has often centered on the proposal of an incorporation of the provisions of the European Convention on Human Rights into domestic law. So far without any political consequences. Still, the frequent use made of the Strasbourg option indicates that, compared to other Western European countries, Britain lacks adequate provisions for human rights guarantees. As Jones (1990: 34) has summarized, "there are now more individual complaints to the European Commission by British citizens than from any other signatory to the Convention, about 800 a year, and no other country has lost so many cases: about one third of the decisions against governments have been against the British government. ... About 80 British laws and regulations have been repealed or amended as result of proceedings under the European Convention."

It is impossible to investigate all aspects of the civil liberties problem here. Three of its aspects, which have recently been bones of contention, deserve special attention:

1) The individual's right to know versus official secrecy;
2) the power of the police and
3) legal responses to terrorism.

It is debatable whether one should distinguish between "high" and "low" politics of civil liberties by arguing that what really counts are challenges to the functioning of British government. As long as under the British constitution the individual (in theory) does not have any rights which no government can ever take away, the defence of individual rights against the intrusion of the state will automatically have further-reaching consequences for the constitution.

1) In Britain, the traditional view of individual freedom has always co-existed with government information control. But by international standards the ability of the citizen to participate in the democratic process is seriously restricted by an excessive amount of secrecy. Not without criticism: "Without freedom of information - subject to the standard set of exceptions in the interests of, for example, national security - democratic government is a contradiction in terms" (Harden and Lewis 1986: 262). Official information is regulated by government information policies and the Official Secrets Act. The former culminate in the elaborate Lobby system. The parliamentary Lobby is an exclusive club of around 150 accredited journalists who are allowed to attend the daily "confidential" press briefings of the government. In return for their privileged access to official information, the Lobby agrees to treat everything that was said as being off-the-record and never to attribute any source of the information they use. This kind of government information is not only secretive in itself, it also denies the public to a great extent the right to know. Governments can select information, they can put plans to an unofficial publicity test, and - more generally speaking - they can manipulate the news.

The cornerstone of government secrecy in the twentieth century has always been the Official Secrets Acts (above all in its 1911 version) (Hooper 1988). Its section 2 did not allow any "unauthorized" disclosure (neither to the general public, nor even to Parliament[4].

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4 The Belgrano affair (the case of the civil servant Clive Ponting who leaked information relating to an Argentine ship of this name in the Falklands War to the Labour MP, Tom Dalyell) reminded the general public of the second-class role Parliament is restricted to when it has to accept lies. (Ponting 1985; Norton-Taylor 1985).

This not only left the British citizen in the dark, but also prevented efficient parliamentary scrutiny. Paradoxically, the government has defended its exclusive control of information by citing the very principle this control undermines, namely ministerial responsibility (Austin 1985: 335). As long as ministers have been ready to back them, civil servants, too, have been in no danger of being made accountable for their actions by the people who actually pay them, the taxpayers. The Official Secrets Act also has provided an opportunity for tactical political moves using strategic information leaks: for example, either to test the acceptability of political programmes or to stop them; either to do harm to a political opponent or to mislead the opposition. It is estimated that in addition to the Official Secrets Act there are over 100 statutes in place which make the disclosure of official information by civil servants a criminal offence (Hillyard and Percy-Smith 1988: 115).

Efforts to reform the Official Secrets Act (Wright 1986: 414-425) in the seventies, originally initiated by the Conservative Heath government and given additional emphasis by the Franks Report (Franks 1972), remained without result, although by July 1978, James Callaghan's Labour government had published a White Paper on this topic. The Private Member's Bill of the Liberal MP Clement Freud on freedom of information, which in 1979 had moved through its committee stages in the House of Commons, was stopped by the general election that brought the Thatcher government to power. It was not until much later, after the notorious *Spycatcher* affair, that these reform efforts were continued (see below).

2) The evolution of the British police force has often been cited as an indicator for the historic strength of civil society in Britain. To the present day, the unarmed bobby is the symbol for voluntary compliance. The impartiality of the police is regarded as decisive for giving meaning to the rule of law in everyday life. Organisationally this means that "all police officers have a degree of independence guaranteed by the law that is enjoyed by no other central or local executive officer" (Marshall 1985: 250ff.). Independence also means independence from central government control and a local responsibility for the police. The 1964 Police Act was the first major effort to define the task of the police forces. For dealing with complaints against members of the police, a supervisory body, the Police Complaints Board, was installed in 1976.

3) Legal responses to terrorism have concentrated on the developments in Northern Ireland. 'Terrorism' has been the political redefinition of the violence in Northern Ireland, after every constitutional settlement tried out in the early seventies had failed. However, the politics of extra-legal action against violent opposition began in 1971 with internment (which lasted until 1975). In 1978, the European Court in Strasbourg argued that internment violated article 3 of the European Convention on Human Rights because it was "inhuman and degrading". Northern Ireland has remained, however, a grey area for civil rights[5]. In a way its situation has always seemed to be so special ("Neither the people nor the territory of Northern Ireland are regarded by the rest of the United Kingdom as 'belonging' in the way in which England, Scotland, and Wales, and their peoples 'belong'"; Lester 1985: 277) that changes in the legal framework governing judicial policies and police action have had a lower threshold to overcome in Northern Ireland than they would have had in Britain.

The eagerness of the judicial system to produce successes in its fight against IRA terrorism led to the wrongful, lengthy imprisonment of the Guildford Four, released in 1989, and of the Birmingham Six, released in 1990. The worrying aspect of these cases is not only the fact that the police felt justified in producing false evidence by illegal means, but also that the judiciary hesitated to correct mistakes, although fresh evidence had been brought to its attention more than ten years before. Powerful members of the judiciary defended their passivity with *raison d'état* arguments: the British people would lose confidence in the police and the judiciary if misconduct and major errors were to be admitted in these cases (Savage 1992: 197).

Thatcherism: From a Complacent to a Coercive State?

As with other features of Thatcherism (cf. Sturm 1991), it is true that policies of the Thatcher government with regard to civil liberties found fertile ground in the British constitution. Margaret Thatcher to some extent "perfected" or radicalized constitutional realities by making the fullest use of them. To cite Fred F. Ridley (1992: 111): "the British constitution was always a poor defender of democracy. Democrats didn't abuse it. A new breed of politicians did." Whereas a greater part of the British public in the pre-Thatcher

5 Another example is the Northern Ireland (Emergency Provisions) Act of 1973, which introduced the system of no-jury Diplock courts. For details see Dickson 1992: 130ff.

years tolerated the sporadic intrusion of the state into what was commonly regarded as the rights of every individual when the occasional scandal surfaced, under Margaret Thatcher the quantity, quality and direction of social control seemed to have become so distinctive that some observers felt that Britain had developed into a "coercive state" (Hillyard and Percy-Smith 1988: 15).

1) Civil rights problems in the era of Labour Party governments in the seventies were dealt with in an ad-hoc fashion, lacking any decision in principle. For the New Conservatism which the Thatcher government represented, the issues at stake were of a much more fundamental nature. There has always been a tradition of paternalism in Tory politics which allows for firm views on "reasonable" behaviour. In the field of economics reasonable behaviour of the individual could easily be defined as economically "rational" behaviour accompanied by the reassertion of the individual's responsibility for her or his fate. In the field of civil liberties this was translated into support for law and order (Gamble 1988: 134). Though Margaret Thatcher failed in her efforts to restore capital punishment (there were two free votes in the House of Commons in 1979 and 1983 which the opponents won by large majorities), she successfully strengthened the power of the state over the individual.

With regard to the right of the citizen to be informed about her or his government, Margaret Thatcher saw no need to return to the Heath era's reform ideas - on the contrary. Right away, in autumn of 1979, the Home Office's Protection of Information Bill was introduced. This Bill, which eventually failed, was meant to reform the Official Secrets Act not by opening up government, but by strengthening government control of secrecy. It would have made ministers the sole judges of the availability of information and would "have enabled journalists to be prosecuted retrospectively for publication of material even when that material was not classified at the time it was obtained."[6] The failure of this reform did not change Margaret Thatcher's attitude towards official secrecy, which after all, as Tant[7] argues, was based on traditional constitutional norms. How restrictively

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6 Hillyard and Percy-Smith 1988: 117f. It was withdrawn when it became obvious that the revelation that Anthony Blunt was a Russian spy in MI5 could not have been made under the new bill.

7 Official information is 'owned' by governmental 'office', the proper custodians being the government of the day. The release of information to the general public must be

Margaret Thatcher thought she could handle the old Official Secrets Act was demonstrated by the Belgrano affair (cf. Ponting 1985; Norton-Taylor 1985) and also by the case of Peter Wright (cf. Austin 1987: 287-301), a former MI5 agent, who had published politically embarrassing details about MI5 activities in a book called "Spycatcher" in Australia in 1986. The Thatcher government unsuccessfully sought an injunction in the Australian courts to prevent the publication of the book. British newspapers had to present white pages to their readers instead of excerpts of a book which could be bought in every English-speaking country except Britain. In October 1988, the House of Lords finally decided that injunctions against the British press should be lifted, as the wide availability of Wright's book had destroyed any argument that its content was secret.

In 1989, in the aftermath of the embarrassing Spycatcher affair, in the course of which the government failed to impose its wishes on publishers worldwide, the Official Secrets Act was finally reformed. The result of the reform is, however, - so the "almost unanimous extra-governmental consensus" (Tant 1990: 478) - a tightening rather than a relaxation of official secrecy. The catch-all provision of section 2 of the Act, which protected every piece of government information from public access, was replaced by a list of six categories of classified information: security and intelligence; damaging disclosure by a Crown servant or government contractor of any information relating to defence, damaging disclosure by the same group of persons of any information relating to international relations or any confidential information which was obtained from another state or international organization; information which results in the commission of an offence, facilitates an escape from legal custody, or impedes the prevention or detection of offences or the arrest or prosecution of suspected offenders; information gathered under the Interception of Communications Act 1985 and under the Security Service Act 1989; information entrusted in confidence by the British government to other states or international organizations.

Without going into too many details of the reformed Official Secrets Act, it should be noted that the categories it uses are vague and can be interpreted very broadly. It remains illegal to inform Parliament of many types of government activities which are accessible to the general public in other democracies. Liability resulting from disclosure is not restricted to

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'authorized', and government may authorize or not as it sees fit. There is therefore no public 'right' to access that government would need to challenge in order to restrict information. On the contrary, the individual must justify why he or she should have access, rather than the public authorities needing to justify why not (Tant 1990: 481).

the discloser her- or himself, but also extends, for example, to newspaper editors[8] who have reasonable cause to suspect that the material they publish is protected. The argument that a disclosure could possibly be in the public interest is nowhere accepted.

Government information policy under Thatcher was radically modernized, but without an improvement of public access to official information. As Cockerell and others (1985: 11) observed, "no predecessor of Mrs Thatcher at Number Ten has been so conscious of image and its construction. She has brought in a breed of advertising agent and public relations executive not seen before in British politics. She has become presidential in her use of American techniques of presentation and news management."

2) In the 1980s the British police, in an unprecedented way, became the subject of public interest. More than anywhere else in Europe, "police studies" have become a sub-discipline of the social sciences. The reason for this lies in the dramatic role change the police seem to have experienced.[9] Not only were they made an instrument of central government policies to achieve a political goal in the miner's strike of 1984/85 [10] or the Wapping dispute of 1986/87 (Budge 1988: 183ff.), but they also lost public support. Whereas in 1959, 83% of the people interviewed said that they had a great deal of respect for the police (16% had mixed feelings), in 1989 that percentage had dropped to 43% (41% with mixed feelings) (The Economist Jan 23, 1993: 37). The loss of public support occurred above all in the eighties, at a time when the police force, despite public expenditure cuts in other areas, enjoyed a real increase in spending of 68% (1979/80 - 1992/93) (The Economist Jan 23,

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8 In addition, there are a number of other possibilities for the government-of-the-day to influence media coverage ranging from censorship in times of war (the Falklands War is a very recent example), e.g. the use of the Prevention Of Terrorism Act to limit reporting on Northern Ireland, and pressure put on IBA and BBC by the system of D-notices (Ridley 1992: 119; for examples see also Hillyard and Percy-Smith 1989: 538f.). The latter inform editors what they should not publish, because the information would be detrimental to national security. A more recent danger for the freedom of the press may lie in the cabinet's decision of January 14th, 1993, to legislate to protect individual privacy.

9 The hypothesis that this role change was necessary to provide the repressive force needed to sustain class rule which was endangered by the economic attacks of Thatcherism is, however, too simplistic (for this argument see Hall 1986).

10 Ewing and Gearty (1990: 112) summarize the major lesson of the strike: "the law was flexible enough, and the courts were deferential enough, to allow the police almost unrestrained freedom of manoeuvre."

1993: 37). According to a rough estimate there is now one police or other type of security officer for every 250 people in the population (Hillyard and Percy-Smith 1988: 237). The police in the Thatcher era became better coordinated (a greater role for the National Reporting Centre, established in 1972, and the introduction of computerized command and control systems) and more militarized (with regard to training and equipment), adopted new types of tactics (saturation policing), and acquired greater powers.[11]

New powers were given to the police by the Police and Criminal Evidence Act of 1984. This Act extended the police powers of stop, search, entry, arrest and detention. It was criticized for the vague terms it uses ("reasonable grounds" for police suspicion, "serious harm" to the "security of the state" or to "public order"), which allows police officers wide discretion, to the disadvantage of the individual (Hillyard and Percy-Smith 1988: 253ff.). The policing of participatory rights was the main aim of the 1986 Public Order Act (Hillyard and Percy-Smith 1988: 260ff.). If the police believe that a demonstration leads, for example, to a "serious disruption to the normal life of the community" or to "serious public disorder", it can now impose conditions on marches or ban them. The same is true with regard to public meetings, vigils, and pickets. The police can restrict the place, size, and duration of demonstrations. In addition to other new offences, the offence of disorderly conduct has been introduced, which is defined as using in public threatening, abusive or insulting words or behaviour or displaying any writing, sign or visible representation which is threatening, abusive or insulting. The Act provides no interpretation of what is threatening, abusive, or insulting, of what is a serious disruption etc. and can therefore easily be used to criminalize all kinds of non-violent nonconformity (Ewing and Gearty 1990: 123).

3) Margaret Thatcher's policies did not principally change the British civil rights policies regarding Northern Ireland. Her new approach was felt above all in the field of implementation and can be summarized as priority for strength over concessions. She did not give in to the Rupublican hunger strikers (for details cf. Coogan 1980), who wanted to be treated as prisoners of war, nor to the Unionist protesters against the Anglo-Irish

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11 Paul Wiles warns against an overinterpretation which would portray the police as part of a pseudo-fascist plot: "Portraying the police as willing dupes of 'Thatcherism' just won't do: the evidence is there, if you look for it, of examples of the police resisting government instruction..." (Wiles 1988: 169).

Agreement (cf. Connolly and Loughlin 1986: 146-160; O'Leary 1987: 5-32), who felt they had been denied the right of democratic participation in decisions affecting their political future.

The reforms of the Prevention of Terrorism (Temporary Provisions) Act in 1984 and 1989 were not major policy innovations either, but did give the Act more teeth. The Act, although from inception limited in its duration, has essentially been in force since 1974 and is either ritualistically renewed or replaced by a very similar Act whenever it expires. The 1984 Act included the offence of "international terrorism" for the first time and extended the Act's lifetime by five years. The 1989 Act greatly expanded the previous one and has no expiry date. By annual renewal it can remain in force perpetually (for details cf. Ewing and Gearty 1990: 213ff.). The Act, *firstly*, makes the support of terrorist organisations illegal (which includes restriction of the right of association and the freedom of expression) and, *secondly*, allows the Secretary of State to prohibit persons from "being in, or entering, Great Britain" who have given reason for the suspicion that they support violence. In practice this provision is directed above all against the Irish in Britain for whom ordinary immigration law does not apply, but who now can be exiled or expelled. The threat of exclusion can be used to make "suspicious" people cooperate, especially because the authorities at no stage need to inform the suspect of any of the reasons for his or her imminent exile. It seems difficult to justify this banishment of merely suspicious people in a Europe of the Single Market with its four freedoms. In the British case the freedom of movement may even be denied to citizens in their own country.[12] *Thirdly*, the Act allows in practice a seven-day detention of suspects the validity of which cannot be challenged in any British court (Ewing and Gearty 1990: 223). In 1989 the European Court of Human Rights, in Brogan vs. United Kingdom (referring to an arrest under a similar provision of the 1984 Act), ruled that this detention period violated human rights. The Thatcher government reacted with the announcement that Britain refused to accept the judgement and

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12 "The most notorious example of this was in 1982, when the then Home Secretary, Mr Whitelaw, excluded Gerry Adams, Martin McGuinness, and Danny Morrison, all prominent leaders of the Belfast-based Provisional Sinn Fein, from Britain. They were to visit London at the invitation of the leader of the Greater London Council, Mr Ken Livingstone. The Prime Minister later claimed that the exclusion was based on 'intelligence about the men's involvement in terrorist activity'. No other evidence was forthcoming, the ban was not challenged in court, and the order against Mr Adams was immediately lifted when he was elected to Parliament in 1983" (Ewing and Gearty 1990: 220).

consequently derogated from the relevant provisions of the European convention and the International Covenant on Civil and Political Rights.

Terrorism has seemed to justify the violation of rights, including the risk of violating the rights of innocent people. Suspicion has grown that this neglect of individual rights might also have been extended to the right to life, when evidence was presented for an unofficial "shoot to kill" policy to fight terrorism (for an investigation into special cases, see Asmal 1985). A spectacular case which attracted media attention was the killing of three unarmed IRA members by SAS soldiers in plain clothes on Gibraltar in March 1988 (for details see Ewing and Gearty 1990: 235ff.).

The Individual as Customer: John Major's Charterism

In principle John Major's government has not reversed the Thatcherite subordination of personal to economic freedom. The greater degree of openness he has brought to government has been largely cosmetic and has only eliminated some obsolete features of governmental practice, above all some of the manifestations of an exaggerated obsession with secrecy. The British government officially mentioned its espionage service MI6 for the first time in 1992 (the very existence of its national security service, MI5, was finally acknowledged in 1988/89, when it was given its first statutory basis in the Security Service Act). It also confirmed the location of secret service headquarters in London and for the first time published the names of the heads of the services. Moreover, the names and the membership of cabinet committees were published for the first time (unofficially they have always been known)[13], and the memorandum of guidance for ministers entitled "Questions of Procedure for Ministers" was made available to the public. Also in 1992, individuals were given greater rights to inspect computer data held on them and to insist on corrections (Shell 1993: 11). Yet this is still a far cry from a Freedom of Information Act[14], for which

13 See for example Hennessy 1986: 27ff. Margaret Thatcher had been the first Prime Minister to admit that four main Cabinet committees existed, but she did not go so far to say who was on the committees or to give any other details (Cockerell et al. 1985: 129).

14 For Freedom of Information legislation in a comparative context see Birkinshaw 1988. On pp. 91ff. the 1985 Local Government (Access to Information) Act, which granted greater public access to the meetings and documents of principal councils, is discussed. The introduction of freedom of information on the local level by a government opposed

the government sees no need. When, for the first time in 14 years, a group of MPs tried to guide legislation aiming at more open government through Parliament in 1993, the government emphasized that the Official Secrets Act would not be re-opened to debate (Davies 1993).

Yet the civil liberties question has become in a certain, some would say distorted way a central topic for John Major's style of government. His discovery of citizens' rights, as documented by the 1991 White Paper on the Citizens' Charter, was very much the result of the Prime Minister's inclinations and past experience. As he repeatedly stressed, the charter's main purpose should be to empower the citizen "who sits on the wrong side of the desk" (Shell 1993: 9). It should apply to all public services and revitalize them by making them more responsive to the needs of their clients (for a more detailed discussion see Doern 1993: 17-29). By mid-July 1992, the 20th charter (by London Underground) had already been launched. An award for excellence in the delivery of public services, the Chartermark, has been announced.

The Charter has an unusual degree of institutionalized support. It is the responsibility of a newly created ministry headed by William Waldegrave, the "Office of Public Service and Science", and there is support for the Charter on the Cabinet level. In the Cabinet Office a Charter Unit has been established. John Major has very much relied on the Charter to create the impression that he has brought new ideas and a new momentum to government, but a look behind the scenes shows that the charter issue is more complex. Whether it will successfully reform public administration remains to be seen. As Doern (1993: 28) observes, "New uniforms, name tags, and a more pleasant ambience can undoubtedly help in fostering greater pride of service but it can also become a way of putting a pleasant face on an unpleasant reality." And an evaluation of the first year of "charterism" resulted in "a distinct impression that the charter is losing some of its cachet".[15]

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to freedom of information on the national level only seems to be paradoxical when one ignores the fact that the Thatcher government could use this new Act as an additional tool in its efforts to undermine local government.

15 John Willman/Alison Smith, *Mixed Blessings for the three Ps*, in: Financial Times, 21.7.1992: 13. The Economist, 19.9.92: 41, remarked: "So far the Citizen's Charter, John Major's grand idea for making government more accountable, has caused little trouble. Indeed, it has had almost no effect on anybody."

From the point of view of civil liberties, the broader implications of "charterism" are more important. Five should be mentioned here:

1) The Charter movement was always defined and legitimized as the logical and natural complement to privatisation policies. Just as privatisation, it was supposed to reduce the state's influence on the performance of its services by orienting them towards the consumer.

2) How close charterism is to privatisation, especially in its form of competitive tendering, is shown by the contracting out of public sector services and by the fact that the Minister in charge of the Charter was also given the responsibility for the managerial reforms in the public sector (the Efficiency Unit and the "Next Steps"-initiative). Doern's analysis shows that evaluation of the effects of certain charters on the performance of public administration is made difficult by overlapping effects originating from the "Next Steps"-initiative.

3) The charters have a regulatory quality comparable to the growing number of regulatory agencies which shadow the privatised sector of the British economy. Instead of an agency, the individual citizen is supposed to become the watchdog over the quality of service, value-for-money, and accessibility.

4) The paradoxical situation is, however, that the charter rights do not provide for more expenditure in those cases in which services underperform. This is completely in the logic of John Major's (and Margaret Thatcher's) financial cutbacks in the public sector. What is disturbing is the fact that citizen participation is strictly limited by financial considerations beyond citizen's direct financial control. There is, therefore, the real danger of the "pleasant face, unpleasant realities" syndrome mentioned above.

5) All this leads to the conclusion that the charter is not only an element of genuinely Thatcherite economic policies, it is also based on a very limited notion of civil liberties. Shell (1993: 11) characterizes what he calls "a fraudulent concept of citizenship" in the following way: "It is based on the view that people are consumers and clients, passive servants of the state, entitled only to handle the outputs of government. This replaces a concept based on equal entitlements to fundamental freedoms and the opportunity genuinely to participate through handling the inputs to government decision-making."

The latter has been the concept behind Charter 88, a constitutional initiative. John Major's government took up the Charter idea, but without its original intent, namely to defend civil liberties in Britain (such as the right to peaceful assembly, to freedom of association, to freedom from discrimination, to freedom from detention without trial, to trial by jury, to privacy and to freedom of expression).[16]

A New Bill of Rights and the Westminster Model of Government

The question whether individual rights ought to be safeguarded in Britain by some kind of constitutional framework should not only be seen in terms of an "abstract" desirability. The introduction of a constitutional document to which individuals and perhaps groups can refer would also have consequences for the way British democracy works. The Westminster model is based on parliamentary sovereignty. Individual and group rights, however, are based on the notion of popular sovereignty. This conflict can temporarily be glossed over, but it exists, and it is most visible in the fact that such rights, if there were genuine constitutional guarantees for them, would be of a permanent character, thus restricting Parliament's ability to infringe on them.

A recent example of how ambiguously a democracy organized along the lines of the Westminster model has coped with this conflict is the Canadian case. The inclusion of a "Charter of Rights and Freedoms" in the Canadian Constitution in 1982 changed the terms of the political debate. As R. Kent Weaver has observed, "the charter has given rise to notions of individualism, popular sovereignty, and constitutionally recognized group rights (for women, aboriginals, language minorities, multicultural groups, and the disabled), expanding both the cast of participants demanding a role in policymaking and the policy agenda" (Weaver 1992: 50f.). This new[17] direction in Canadian politics should have dramatically strengthened the role of courts as institutional buffers between parliament and the individual or groups, even to the extent of restrictions for policy-making in both federal and provincial parliaments. In practice, however, parliament in Canada did not suffer from

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16 A facsimile of the full text of Charter 88 can be found in Kingdom 1991: 49.

17 A Bill of Right had existed before (passed by parliament in 1960), but it only applied to federal government action and could be changed by simple parliamentary majorities - in other words, it did not have the status of genuine constitutional law.

dramatic restraints on its room to manoeuvre, because the Charter's provisions had significant loopholes[18]. On the one hand, section 1 subjects all charter rights to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." On the other hand, section 33 permits federal and provincial governments to use a "notwithstanding clause" in their legislation, which allows them to override Charter provisions notwithstanding their protection under the Charter.

Seymour Martin Lipset summarized the Canadian constitutional dilemma in the following way: "Thus Canada now has a constitution that both empowers the judiciary to overrule Parliament by ruling that legislation is inconsistent with the Charter and allows the legislative body to limit the authority of the courts to do so" (Lipset 1990: 104). There is a very real danger that such a compromise, which undermines a Bill of Rights and reintroduces parliamentary sovereignty by the back door, may also be found for a future constitutional settlement in Britain. The Canadian conflict of principles demonstrates the incompatibility of popular and parliamentary sovereignty. A separate decision in favour of a Bill of Rights only, without further-reaching constitutional reform, either leads to a downgrading of individual and group rights or to a process of slow but efficient erosion of the old constitutional realities based on the Westminster model. In the British case, changes in the latter direction (though certainly far from dramatic ones) have resulted from decisions by the European Court of Human Rights.

Conclusion

Peter Riddell (1989: 180) has argued that whereas the 1980s in Britain have witnessed a tendency towards a more centralist and a more authoritarian form of government, "the liberties and freedoms of the ordinary citizen have not been altered dramatically". His opinion is certainly representative for the views of the greater part of the British people. This perception is, however, as the examples have shown, to a certain degree superficial;

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18 In a broader (Canadian) context: Stark 1992: 123-158. The decisive variable seems to have been the judicial activism of the Supreme Court, who left it to the government to prove that "reasonable limits" for rights and freedoms had been ignored. See for a brief overview Thunert 1990: 241-256; in greater detail Thunert 1992.

the safeguarding of individual rights and civil liberties in Britain can easily be reduced to the status of a non-issue by at least four arguments:

1) One is that the issue is nothing but a party political invention, a trick, especially by the Liberal party, to gain public acceptance in times of repeated electoral defeats. Was it not Paddy Ashdown, the Liberal Democrat's leader, who published a pamphlet entitled "Citizen's Britain" in 1989? Did not Charter 88 have most of its supporters among the opposition parties? And was it not the literature critical of Thatcherism which most loudly complained about the new authoritarianism of the British state in the 1980s?

2) The second argument is that Margaret Thatcher's policies, which provoked the Charter 88 reaction, were not challenging traditional liberties but were trying to restore them. Vernon Bogdanor explains that Mrs Thatcher "saw herself living in a society undermined by the permissive 'adversary culture' of the 1960s and saturated with values which were far from conservative. If the measures taken to correct this situation happened to invade what liberals of the left chose to think of as civil liberties, that had to be accepted in the interests of the broader goal" (Bogdanor 1989: 136).

3) A third argument, also summarized by Bogdanor, stresses that the major problem with civil rights demands is the misperception of human nature which inspires them. To participate in government is not a basic human need: "For the only participation that is worth the name is participation in the market-place; and political freedom is nothing but the withdrawal of the state from all but its most essential tasks" (Bogdanor 1989: 140).

4) A fourth argument is that criticism of the civil rights situation in Britain is invalid because it is based on a wrong understanding of British exceptionalism. Even worse, the major arguments of the critics are said to be based on foreign (continental) philosophical thought and are therefore completely inadequate for an understanding of British individualism.[19] As Shirley Robin Letwin stresses with regard to Britain's traditional "unidentified morality":

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19 Mount cites a 1948 article by Oakeshott in this context: "What went abroad as the concrete rights of the Englishman have returned home as the abstract Rights of Man, and they have returned to confound our politics and corrupt our minds" (1992: 231).

It has enabled the British to cultivate over many centuries a combination of qualities which was greatly admired by other Europeans but regarded by them as a miracle. For Britain had managed to combine freedom with order. ... But so unselfconsciously was this moral outlook taken for granted in Britian that it began to disappear without ever having been identified. By the end of the nineteenth century, it was being displaced by a quite different morality imported from France and Germany. And as this foreign morality gained more influence, the British grew increasingly well disposed to collectivism, which consequently dominated British politics until the appearance of Thatcherism (Letwin 1992: 336f.).

According to Letwin, Thatcherism finally reversed the trend and brought back the traditional British understanding of freedom based on the rule of law.

Even left-wing critics of Thatcherism would agree that Letwin has a point when she insists that constitutional realities in Britain do have a less tangible component in "shared expectations and understandings of its (the constitution's) basic presuppositions" (Graham and Prosser 1988: 5).[20] The systematic (and social science) problem is to discover where at a given point in time such a consensus on the constitution has moved to. From a Thatcherite point of view it is right where the last government moved it to and where the present government finds it; critics of the currently dominant approach to civil liberties - which in their view neglects participatory rights while emphasizing economic empowerment, and has led to a crisis of confidence in the political system (McAuslan and McEldowney 1986: 496-516) - still believe that such an approach is not shared by a majority of the British public. A Bill of Rights would certainly neither be the ideal solution for the problem of promoting a broadly-based constitutional consensus, which is so important as a binding element for every society, nor would it automatically guarantee "better government" (as hoped by Holme 1987: 433-448). Such a Bill might help to limit the government's power of constant redefinition of the preferred social consensus, but it could not guarantee a general consensus on codification, nor a certain interpretation of constitutional rights by the courts. The United States and many other European countries with a written constitution are suffering from a similar crisis of confidence, and there are complaints about their "political classes" prospering by rules for which there does not seem to be much consensus left.

But a minimalist solution, at least guaranteeing basic human rights without "notwithstanding" clauses, would give individual liberties in Britain a more secure base and would

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20 In a comparative study, David G. Barnum and John L. Sullivan conclude "that two of the key factors protecting political freedom in Britain and the United States are elite tolerance and institutional organization." (1990: 734).

remove the need for the individual to go to Strasbourg as a last resort for help. This kind of change may be, as Ewing and Gearty have argued, "like treating a heart attack with a used Band-aid" (1990: 275), but they themselves doubt that they will live to see the far-reaching commitment to liberty in Britain they would prefer and "which will have to be as great as that which brought down the Stuart despots in the seventeenth century." With a Bill of Rights, Parliament would lose sovereignty, and "non-elected and unaccountable judges" (Jones 1990: 36ff.)[21], an argument also popular in Canada (see Lipset 1990: 104), would be able to override its decisions. Given the fact that of the traditional five sources of the British constitution: royal prerogative, common law, convention, authoritative opinion, and statutes, only the last originates in Parliament, and given the broad consensus that Parliament has lost its ability to effectively control the government of the day, the fear of un-elected intrusion into constitutional realities is hard to understand.

The loss of parliamentary sovereignty in itself may be defined as unconstitutional if one accepts that absolute parliamentary sovereignty is the only institutional arrangement compatible with the British constitution. It can be convincingly argued, however,[22] that such a notion of absolute parliamentary sovereignty is merely an abstract principle corrupted quite a while ago both by internal changes, such as the development of Prime Ministerial government or the reduction of powers of the House of Lords, and by international treaties and memberships of the country with general legal consequences, such as the country's membership in the EEC (see Bradley 1985: 32ff. and Mount 1992: 233).

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21 An even obscurer argument portrays the whole debate about civil liberties as a desperate effort of rent-seeking, both by the legal profession eager to secure for itself more work and higher fees and by academics seeking new fields of study.

22 As Koch (1991) has done in great detail. His analysis shows that the introduction of a modern Bill of Rights is not a legal but only a political problem. For those who fear that this is a typical continental misunderstanding of British constitutional realities, it should be added that the British constitutional lawyer Rodney Brazier (1991: 130ff.) has come to the same conclusion.

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