THE ABUSE OF POWER

Civil Liberties in the United Kingdom

Patricia Hewitt

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Foreword

This book is about the struggle to protect and preserve civil liberties in Britain. The author has almost unrivalled authority to write about the threats to existing rights and freedom. She has a unique insight into the debates and developments, progress and failures of recent years; this is combined with practical experience in resisting these threats and constructing adequate and workable solutions to newly pressing problems.

It is interesting how struggles about the defence of liberties and rights for people have so often, in the past, reflected lessons first learnt elsewhere. In the 1960s the fight by black people in the United States of America for civil rights became a touchstone for similar struggles in other countries, and ultimately in the arena of international politics. The tactics and ideals of that movement were studied and transplanted into different contexts and used to tackle different issues. Nowadays it is sometimes difficult to remember the origins of the civil rights movement in Northern Ireland, and the reactionary response to the claims then made; they are worth recalling all the same, since they were the opening scene for the tragic saga of horror and violence which continues even now.

It is sad to have to admit that the contemporary period in Britain may prove to be a similar focus for civil rights struggles elsewhere. If ideas and tactics are, in important ways, forged in struggle and during conflict, then Britain today has many of the necessary ingredients to influence the opposing responses to turmoil elsewhere. No Western state has so much experience of urban terrorism nor has any developed to such a degree the technology of counter-force and control. Few European countries have the same explosive mixture of indigenous black citizens facing ingrained racial prejudice and structural discrimination. No other advanced industrial society has suffered the same wild gyrations in its

political economy as a result of trying to redevelop a rapidly declining industrial base while stubbornly clinging to dreams of former power and glory. The instability of high inflation and then of mass unemployment has strained the social order in alarming ways. The danger is that the threats to the political order produced by these stresses will not, or not always, be met in a liberal way. A state under threat is not the best guardian of civil liberties. There is a constant temptation to try to decipher and adopt the easy or quick or expedient solution. The negotiation and resolution of conflict through political processes could come to be replaced by control based upon suppression. The borderline is narrow, difficult to perceive and subtle; severe oppression can spring from folly and misjudgement just as readily as from wickedness and hatred.

The challenges now presented to the enjoyment of civil liberties in Britain represent a formidable list. The judgements called for, and the decisions made, will be of great significance. Patricia Hewitt is General Secretary of the National Council for Civil Liberties. She has had to steer and mobilize its activities during this very testing period. Her knowledge and insight are based on practical experience. How civil rights campaigners act and what success they achieve will be important to all living in Britain. Their actions could also provide a model for others in the future. Let us hope it is a good model.

Colin Campbell
Paul Wiles
1981

Introduction

It is still widely believed that Britain leads the world in civil liberties. 'It's a free country,' people say, sceptical about evidence to the contrary. This book explores the gulf between this myth – the myth that this is a tolerant country, respectful of the rights of minorities, watchful of the principles of justice, ever-ready to challenge and restrict the growth of state power – and the reality.

Three examples illustrate the point. *Habeas corpus* is the most famous symbol of British liberty. But it has failed to protect black migrants settled in this country from arbitrary power. Under Labour and Conservative Governments alike, the Home Office has asserted – and the courts have upheld – a power to arrest without warrant an immigrant settled in this country; the power to imprison him on suspicion of being an illegal entrant; the power to deny him bail, to detain him for an indefinite period and to deport him without ever having laid charges against him or brought him before a court. In 1980 alone, over a thousand people were the victims of this abuse of power.

A similar excess of executive power, sanctioned this time by Parliament itself, is to be found in the system of exclusion orders created by the 1976 Prevention of Terrorism Act, under which a citizen of the United Kingdom born in Northern Ireland may be arrested, detained, deported to Belfast and banned from ever re-entering Great Britain – all without any criminal charge being made against him and with no right to a court hearing. Over two hundred people have already been exiled through the use of a power which resembles closely the system of internment without trial that defaced the administration of law in Northern Ireland between 1971 and 1975.

The rule of law, whose principles are supposedly central to this country's unwritten constitution, demands that power should be

accountable. In the case of exclusion orders, Parliament – which should itself be holding government to account – has instead placed government above the law. In the case of the removal of suspected illegal immigrants, the courts have refused to enforce the law against the government. My third example is the impotence of elected representatives and the courts to ensure that the police are answerable to the law that they are meant to enforce. It is not yet true that a police officer who has broken the law always escapes with impunity. But it has happened so often, and in such serious cases, that we are now witnessing a general breakdown of the system of accountability and not the occasional failure. The police officer who killed a New Zealand teacher, Blair Peach, at a demonstration in Southall in 1979 has never been prosecuted or disciplined. Other officers responsible for serious assaults on members of the public on the same day have not been prosecuted or disciplined. The senior police officers in charge on that day have not been called to account publicly for the breakdown of police behaviour. When an investigation was ordered into the use by the Merseyside police of CS gas canisters designed to punch through barricades against a crowd of rioters in July 1981, the investigation was headed by Merseyside's own Chief Constable, Ken Oxford. The massive development of the police surveillance capability over the last decade has taken place with no legal restraint, no public supervision whatsoever, and the police have denied to the public the information about their activities which could make such supervision effective.

Of course, it is true that this is not the Argentine, where thousands of the regime's opponents have disappeared, or the Soviet Union, where dissidents have been confined to psychiatric hospitals, or South Africa, with its system or white supremacy. But that is hardly a proud boast. The claim of the British establishment – a claim generally believed to be true – is not that this country is better than the worst excesses of repressive government, but that we set the standards of freedom by which we judge others.

It is not to be expected that abuses of power will never occur. The issue is whether those abuses are sanctioned or whether they are stopped. Detention without trial, internal exile, forcible expulsions and a police force which can break the law with impunity – all of which exist in the United Kingdom today – are the characteristics of a police state. And although civil and political rights have not been extinguished, although Britain is not a police state, neither Parliament, nor the courts, nor governments supposedly dedicated

to strengthening human rights have shown themselves capable in the last decade of recognizing, let alone checking, the abuse of power. There have been honourable exceptions, of course: MPs, for instance, who have fought to bring Ministers under their control; local councillors who have tried to assert their authority over the police; journalists who have stood out against threat of imprisonment. Some battles have been won, but the real struggle against the extension of state power has barely been engaged.

There is in this country no Bill of Rights which sets a limit to the powers of government, Parliament and the courts. Nor (as I argue in chapter 10) would proposals recently made for a new Bill of Rights necessarily improve matters. There is thus no limit to what new incursions may be sanctioned by a majority in Parliament or in a court. Our freedoms exist in the gap between prohibitions – and the prohibitions are rapidly closing the gap. In chapters 4 and 5 I examine the growing restrictions on freedom of expression and peaceful protest, and in chapter 6 the system of emergency powers which has spread from Northern Ireland to the rest of the country. But our freedoms are not defined only by the absence of restrictions on what the citizen may lawfully do: even more important, they are defined by restrictions on the power of the authorities. And when it comes to the police (whose position is examined in chapters 1, 2 and 3) and the treatment of black minorities (the subject of chapter 8) we find that the absence of effective restrictions on those in power is an even more serious threat than the restrictions directly imposed on our own freedom of action. Finally, as I argue in chapters 7 and 9, this country has failed to develop anything resembling an adequate system of protection for women and for minorities who suffer from discrimination.

This book deals with civil and political rights and not with the economic and social rights which are also an integral part of any full conception of 'human rights'. I have not tried to write a history of how civil and political rights have been fought for in this country: but I have written always in the knowledge that civil liberties are fought for, not given. It is fashionable among some sections of the left to dismiss civil liberties as bourgeois, liberal ideals – a notion which seriously misunderstands the struggles of the working class for political power and for curbs on the power of government. The right to *habeas corpus,* the right to jury trial, freedom of the press from the more overt forms of censorship and real advances in the rights of women have been carved out through centuries of political struggle – and it would be folly to pretend that the struggle was over.

I have written *The Abuse of Power* during a period of concerted attacks on our freedoms: when Government intransigence threatens to drive Northern Ireland into even more violent sectarian conflict; when protest marches are being banned with frightening regularity, and new criminal restrictions on demonstrations and pickets are threatened; when a Royal Commission has proposed to extend the powers of the police and to reduce already inadequate safeguards for the suspect; when new Immigration Rules have further undermined the right to family life of black citizens, and a new Nationality Act has further entrenched the racial discrimination of previous immigration laws; when many of the rights won by women are being dismantled; when the surveillance of those who criticize is being stepped up; and when the rioting in the cities during the summer of 1981 – the predicted response to bad policing, growing unemployment and often appalling living conditions – has led to the authorization of CS gas and water cannon, the threat of a new Riot Act and the operation of 'special courts' with scant regard for the defendants' rights to bail and legal representation.

This book has grown out of the years I have spent with the National Council for Civil Liberties (NCCL) in day-to-day defence of people's rights and freedoms. It therefore reflects the priorities and preoccupations of NCCL over the last decade, although it does not necessarily reflect NCCL policy. There are, of course, omissions, and I particularly regret that I have not been able to include a discussion of the rights of patients in mental hospitals. Nor have I tried to provide a theoretical account of civil liberties principles or to write an academic textbook. Instead I have set out to provide a map to the state of civil liberties in the United Kingdom today, a map which, I hope, will be used by those who wish to explore the erosion of our freedoms and to join the struggle in their defence.

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I

The Police and Civil Liberties

1

Justice and the Criminal Law

The central aim of a criminal justice system should be the impartial enforcement of just laws. The process of law enforcement raises directly the issue of the relationship between the individual and the coercive powers of the state. The measures taken to reduce crime and to convict the guilty must not be allowed to destroy the limits placed on the state's right to interfere with the citizen's liberty; nor must the aim of detecting and convicting the guilty be pursued at the cost of the conviction or imprisonment of the innocent. A perfectly efficient system, one that always detects and punishes the guilty but never infringes the rights of the innocent, is impossible to achieve. Inefficiency that involves the conviction and punishment of the innocent destroys the integrity of the system: some tolerance of inefficiency in respect of those who are probably guilty is essential for the protection of all.

Unfortunately, the Royal Commission on Criminal Procedure – whose report,[1] published in January 1981, will form the basis of debate in this area for the next decade or more – was directed by its terms of reference towards a fallacious view of the 'balance' which must be struck by the criminal justice system. Asked to consider 'the interests of the community in bringing offenders to justice' on the one hand and 'the rights and liberties of persons suspected or accused of crime' on the other, the Commission failed to spell out the interests of the *community* in ensuring justice to the individual. The community as a whole has an even greater interest in avoiding the wrongful conviction of an innocent person that in securing the conviction of the guilty. The wrongful conviction of the innocent is a double danger to the community, not only because all risk suffering the same injustice but also because the conviction of an innocent suspect inevitably leaves the true culprit free. It is easy to make proposals which would increase the rate of convictions, but

the price of such proposals – generally made without regard to the quality of the convictions secured – would be an intolerable increase in the risk of punishing innocent people.

Discussion about the administration of justice is usually concerned with the methods of enforcing laws rather than with the content of those laws. But an unjust law cannot be improved by fair methods of enforcement. Indeed, it is an additional argument against laws that are unjust because of their vagueness or the scope they offer for capriciousness that they can never be fairly enforced. Before turning to the question of enforcement, therefore, I shall consider briefly what standards we should expect of the criminal law itself.

It is easy to understand why laws should be clear in their meaning and certain in their scope. Vague, open-ended laws, which make it impossible for the ordinary individual to know whether what he wants to do is criminal or not and which allow the authorities arbitrarily to select those whom they wish to accuse, are the stuff of which tyranny is made. Dicey argued[2] that the chief requirement of the rule of law is certainty: no one should be punished unless he has infringed a specific rule established before the offence was committed. Since the legitimacy of the law depends on its origins as well as on its substance, a further requirement should be added: that the law be made by those elected to make it and not by those appointed to enforce it. And yet the English law of conspiracy – established, reinterpreted and often dramatically extended by the judges – continues to offend on both counts.

Conspiracy charges starred in all of the major prosecutions against those whose politics or lifestyle offended conventional wisdom during the 1960s and early 1970s. Conspiracy to commit a criminal offence offered a convenient method of side-stepping maximum sentences laid down by Parliament; as a common law offence, conspiracy carried no maximum sentence, with the absurd result that a higher sentence could be imposed for agreeing to do something than for actually carrying out the plan. The conviction of Dennis Warren and Eric Tomlinson in 1974, who received sentences of three years' and two years' imprisonment respectively for conspiracy to intimidate (even though intimidation itself carried a maximum of three months' imprisonment under the 1875 Conspiracy and Protection of Property Act), eventually persuaded the Labour Government in 1977 to pass the Criminal Law Act, which restricted the maximum sentence on a conspiracy charge to the

maximum that could be imposed for the substantive offence itself. But other evils of criminal conspiracy charges were left untouched, in particular the peculiar rules of evidence, which permit hearsay and details of the defendant's lifestyle and associates to be used by the prosecution.

In 1972 the Court of Appeal, in an extraordinary display of judicial creativity, decided that conspiracy to commit an unlawful act extended beyond criminal offences to all *civil* wrongs, including trespass. Its reason for rushing in where Parliament had never thought to tread was a sit-in by a number of students from Sierra Leone at their High Commission in London, protesting against their Government's policies. For nine months, until the House of Lords reversed the conviction, it was a criminal offence for two people taking a walk in the country to agree to take a short cut across a field![3] But the House of Lords decision still allowed charges for conspiracy to trepass or to commit any other tort if, in Lord Hailsham's words, the object of the agreement was 'the invasion of the public domain', or if the defendants intended to inflict on the property owner 'something more than purely nominal damage'. The 1977 Act finally killed off conspiracy to trespass, but only by replacing it with a number of more specific offences directed against student sit-ins, worker occupations of a factory, squatters and so on. In fact, civil procedures for eviction in such cases had already been dramatically extended (so that, for instance, the occupiers no longer need be named on the court summons), and it is not surprising that little use seems to have been made of the criminal offences created in 1977.

But the conspiracy laws are not confined to conspiracies to break the criminal law or to commit a civil wrong. Early in 1974 it was possible for a leading writer to comment: 'It is now beyond all doubt that the offences of conspiracy to effect a public mischief, conspiracy to corrupt public morals and conspiracy to outrage public decency are all crimes recognized by English law.'[4] By November the same year the Law Lords had changed the law again and held that conspiracy to effect a public mischief was no longer a crime known to the law. Their decision, although welcome for pruning the blossoming law of conspiracy, left a gap in the legal protection of privacy that has still not been filled. The case concerned two private detectives who placed a bugging device in a hotel bedroom. Although similar behaviour had been successfully charged as conspiracy to effect a public mischief in earlier cases, and despite the fact that in 1970 the House of Lords itself had

referred to 'the established categories of public mischief',[5] the same court this time took the view that the offence was dangerously and unjustifiably broad.

Conspiracy to corrupt public morals or to outrage public decency, although previously regarded as a subdivision of conspiracy to effect a public mischief, continue to thrive. The Labour Government refused to add its abolition to other reforms of conspiracy law, and the recommendation by the Williams Committee on Obscenity for its abolition[6] is unlikely to be implemented. Prosecutions may still, therefore, be brought against the publisher or author of advertisements for homosexual friendships or for prostitution (whether homosexual or heterosexual) even though neither prostitution nor private homosexual activity between two adults is a criminal offence. In 1981 Tom O'Carroll was convicted and sentenced to two years' imprisonment for conspiracy to corrupt public morals, although his co-conspirators had been acquitted in a previous trial, at which the jury had also failed to agree on the charge against O'Carroll. The considerable controversy aroused by the case – O'Carroll was the secretary of the Paedophile Information Exchange (PIE) and had assisted in the publication of contact advertisements between adults who shared a sexual interest in children – overshadowed the deplorable nature of the conspiracy charge used by the prosecution. Conspiring to corrupt public morals is an offence incapable of definition or precise proof. Assisting adults to meet each other is not a crime, even if the purpose of the meeting is to exchange pornographic material. (Although the exchange of obscene material through the post is itself a criminal offence, it is the policy of the Director of Public Prosecutions – as revealed in this trial – not necessarily to prosecute in such cases when the material is solicited and no financial gain is involved.) If the purpose of the contact advertisements was, in fact, to facilitate sexual encounters between adults and those under age, then the adults involved could have been charged with specific offences and those who assisted them with inciting, or aiding and abetting, such offences. But a specific criminal charge would have required specific proof and would not have allowed the prosecution to rely on the general offensiveness of the material whose exchange apparently resulted from the PIE advertisements.

The particular targets of the conspiracy laws are political and sexual dissidents. The 'sus' law, although introduced for use against vagrants, was until recently used to a large extent against the young members of black communities of London and some