

Research Paper

The Imperative of a Deeply Ingrained Liberal Political Culture to the Protection of Civil Liberties

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Abstract: Civil liberties encompass a broad range of human values that bolster individual freedom and human dignity. The indispensability of vibrant civil liberties to a healthy and well-functioning society lies in the grounds that they provided for citizens to participate in the democratic process, criticize their respective governments, and hold their governments accountable. Civil liberties are not luxuries but inalienable entitlements that are essential and imperative for human development and society's socioeconomic progress. Consequently, civil liberties protection has emerged as the most fundamental and cherished human aspiration in developed, developing, and underdeveloped countries. Within the existing literature on human rights protection, it has been the conventional wisdom that effective protection of civil liberties requires the entrenchment of a Bill or the Charter of Rights in the constitution. In addition to signing or ratifying the UN Universal Declaration of Human Rights, almost all countries across the world have with varying degree entrenched civil liberty protection mechanisms in their respective constitutions. While constitutional protection of civil liberties is believed to be a necessary mechanism to safeguard individual rights, it can be argued that it is society's political culture shaped by deeply ingrained liberal values and principles fostering constitutionalism, not mere written words of the constitution, that can effectively function as a bulwark against state encroachment of civil liberties.

Keywords: Civil Liberty, Constitutionalism, Constitutional Convention, Entrenched Charter, Political Culture.



1. Introduction

Civil liberties are not only conducive to individual growth and human development but are also essential conditions for socioeconomic development. Civil liberty protection is a striking symbol through which a given country signals its democratic nature to the rest of the world. Strong civil liberty protection is often used as a yardstick to measure a country's political commitment to uphold democratic values and principles. Therefore, the protection of civil liberties has become a fundamental human aspiration in both liberal democratic and non-liberal democratic societies. Across countries, various mechanisms ranging from human rights codes to an entrenched Bill or Charter of rights, are harnessed to protect civil liberties. In this paper, it will be demonstrated that while an entrenched Bill or Charter of Rights is necessary to safeguard individual freedoms, such a written mechanism is not necessarily sufficient to effectively protect civil liberties from state encroachment. It is the ingrained liberal political culture and democratic commitment that fosters constitutionalism, not written words in the constitution which can forcefully safeguard civil liberties from state infringement.

This paper is organized into five parts. Part one provides a brief explanation of the methodology used for this paper. Part two discusses the range of civil liberties and the rationale for their protection. Part three highlights a variety of devices and mechanisms that are put in place to protect civil liberties. Part four demonstrates how an entrenched Bill or Charter of rights is insufficient to prevent state encroachment on individual rights. Part five analyses the centrality of consolidated constitutionalism in safeguarding individual rights. In this section, references will be made to selected countries. In conclusion, the main themes and findings will be recapitulated.

2. Literature Review

Generally speaking, civil liberties encompass values, principles, and norms that support individual freedom and dignity. The exact origin of civil liberties is shrouded in history. According to John Locke, many contemporary Civil liberties are inalienable rights in the state of nature [1]. Despite their long history, the root of the formalization of civil liberties is traced back to Britain's Magna Carta in the 12th century. Analysts and students of human rights have utilized different categories to outline the range of civil liberties that are given recognition in the law in both liberal democratic and non-liberal democratic countries. First, Political civil liberties include the most fundamental rights such as freedom of religion, freedom of expression, freedom of assembly and association, and the right to vote and stand for office. Second, Legal civil liberties refer to freedom from unreasonable search and seizure, arbitrary arrest and fair trial. More specifically, legal civil liberties entail those rights that individuals have whenever they come into contact with law enforcement. Third, Egalitarian civil liberties include equality of access to employment, accommodation, education, and other social services provided by the state, implying the basis of illegitimate criteria of discrimination [2]. There is also another category of individual rights which includes social and economic rights that unlike the other three categories are not recognized in the law. However, social and economic rights, including the right to food, shelter, health care, and meaningful employment are entrenched in UN Conventions [3].

The 1966 International Covenant on Economic, Social, and Cultural Rights calls on the states parties to the Covenant to promote the full realization of these rights [3]. However, these social and economic rights articulated by the international conventions are not binding on the states. In order for such rights to become binding, they must be incorporated into the domestic legislation. Even advanced liberal democratic countries such as the United States and Canada, have not formally integrated these rights into their constitutional law. However, despite the absence of entrenching social rights in their constitutions, liberal democratic countries nonetheless extended the right to social welfare assistance in the 1960s which came under heavy and incisive criticisms in the 1970s and 1980s [4].

Within the existing literature on the interplay of civil liberties and democracy, three compelling and plausible arguments have been made in favor of the constitutional protection of the freedom of expression which as a residuary right is sine quo non to other fundamental rights such as the right to vote and rights to assembly and association. The first argument revolves around the indispensability of freedom of expression to the preservation of a democratic government. It is beyond human imagination to think of a democratic government without the protection of the freedom of expression which is a prerequisite for exercising certain fundamental rights such as freedom of assembly, association, and press that are essential conditions for forming a democratic government. The natural

affinity between freedom of expression and the preservation of a democratic government was articulated by Justice Rand J. in the case of *Switzman vs. Elbbbling* (1957). In his reflection on the case, Justice Rand pointed out that the parliamentary government is ultimately government by the free public opinion of an open society which requires the condition of a “virtually unobstructed access to and diffusion of ideas” [5]. As pointed out by Supreme Court justices in this case, free expression of opinion and criticism of all matters of public policy and public administration “is essential to the working of a parliamentary democracy [5].

The second argument in favor of the protection of freedom of expression was meticulously articulated by John Stuart Mill who hailed freedom of expression as an instrument of the truth. According to Mill, the truth can be discovered through the collision of opposing ideas. This argument. In Chapter II of *On the Liberty*, Mill aptly pointed out the indispensability and imperative of the protection of the freedom of expression to the discovery of the truth:

The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it; If the opinion is right, they are deprived of the opportunity of exchanging error for the truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error [6].

The third argument deployed in defense of freedom of expression hinges on asserting that freedom of expression is an indispensable condition for preserving individual autonomy and self-development. According to this line of argumentation, fostering self-growth, self-actualization, and human creativity requires the creation of a marketplace of ideas where individuals can express and exchange ideas without fear of reprisal [7]. This rationale for the constitutional protection of freedom of expression rests on American judicial decisions. According to this line of reasoning, free expression of ideas should be protected not because it contributes to democratic polity or facilitates the discovery of truth but rather because it enlarges the prospects for individual self-fulfillment, personal growth, and self-realization. This conception of expression goes beyond mere speech and therefore, it covers activities such as art, dance, and music that convey communicative purposes [2].

Civil liberties are so central to both human and societal development that their protection has gained momentum around the globe. Within the existing literature on human rights, compelling arguments have been deployed to signify the crucial contribution of freedom of expression or speech to the preservation of human dignity and society’s moral advancement. Since its integration in Article 19 of the 1948 Universal Declaration of Human Rights, freedom of speech as the most treasured civil right in democratic societies has been recognized in all international Conventions [8].

Thus, protecting civil liberties is imperative not only to human development but also to economic growth, which a healthy society requires. Despite conflicting findings on the correlation between democracy and economic growth, it is undeniable that basic human rights protection fosters economic growth. As Wade Cole has pointed out:

Protection from egregious human rights abuse reduces generalized levels of fear, increases security, boosts investment, and results in a higher rate of economic growth. Conversely, economic growth suffers when citizens fear that their governments will imprison them without cause or threaten their lives and livelihood with impunity [9].

The significance of rationales for the protection of civil liberties as democratic ideals radiates with enormous intensity across diverse political systems. The appeal of these democratic ideals is so strong that democratic government has become the only acceptable form of political regime across the nations. In order to put a human face on their political system and legitimize their repressive regimes, even dictatorial regimes insert elements of civil liberty into their respective constitutions. Written constitutional protection of civil liberties is a prelude to governmental respect for those morally uplifting civil liberties, but it is not sufficient to guarantee the enjoyment of those civil liberties. More specifically, the written words in countries’ constitutions do not necessarily guarantee human rights protection. It is not necessarily the entrenched Bill of Rights or the Charter but rather an ingrained liberal political culture fostering constitutionalism that provides a strong bulwark against governmental encroachment of civil liberties. Political culture refers to “a pattern of orientation,

beliefs, values, feelings, assumptions, and understanding about political phenomena that exist in any given collectivity” [10]. Thus, political culture is the language of political discourse that conditions political action and how societal issues and problems are dealt with. In the next section, the link between democracy, liberal political culture, and constitutionalism is explained.

3. Methodology

The methodological approaches in this paper focus on content analysis of secondary sources and constitutional documents of selected countries. In addition to content analysis of relevant literature on civil liberties and human rights, the constitutions of selected countries from developed and developing worlds are compared.

4. Finding and Discussion

4.1. Democracy, Liberalism, and Constitutionalism

There is a structural affinity between the flourishing of civil liberties and democracy. Civil liberties are in fact, democratic ideals. It is almost beyond imagination to conceptualize democracy without vibrant civil liberties. Defined as the rule by people which in practice has come to manifest itself as the rule by a government elected by people, democracy is not confined to the free and fair election of public authority. A vibrant democracy requires effective mechanisms for maintaining governmental accountability and citizens’ enjoyment of civil liberties. Democracy would undoubtedly cease to exist when a specific powerful group or a political party deliberately monopolizes political influence and is not open to the entry of new political competition [11].

However, democracy can thrive in a socio-political environment where liberal principles and values are paramount [12]. More specifically, there is a natural affinity between democracy and liberalism. As an ideology and political philosophy, liberalism envisions individuals as fundamental and irreducible parts of society with certain inalienable rights and freedoms including the right to private property. While liberalism sees government as a necessary mechanism to protect these inalienable rights of individuals, it nonetheless envisages government as a threat to individual liberty. Hence the government must be subject to effective constraints and limitations.

Democracy has been successful in those societies where liberalism had already taken root. The success of democracy in Western industrialized countries is due to the fact that by the time democracy arrived in the West (England), the liberal state had already consolidated its foothold [13]. As Greene has meticulously asserted, “Modern democracy not only absorbs the principles of constitutionalism but also it embraces and springs out of a body of liberal thought [12]. Liberalism promotes a liberated individual free from the shackles of unquestioned traditionalism, censorship, dogmatic authoritarianism, and regimenting controls [12]. Liberalism is all about individual freedoms and rejection of all forms of supersession. Liberalism strives to promote equal opportunities and equality before the law, human dignity, constitutionalism, rule of the law which are also embraced by democracy [14]. Liberalism promotes constitutionalism since liberal values and principles are geared to reinforce justification of the constraints on government and majoritarian decision-making procedures [15]. Constitutionalism simply refers to a set of ideas or doctrines describing and espousing a constitution that includes a system of effective restraints upon political power. However, constraints on government need not be written into law. A state may have a system of constitutional restraints none of which have been expressly set forth or ratified [11]. The best example is Britain which does not have a single codified document called constitution, but Britain is a constitutional democracy. Restraints on governmental power may be merely traditional or expressed in the Common law. However, as long as those restraints on government are deeply ingrained in the country’s political culture and are internalized by people and the public authority as an effective check on government, they can form the basis of a constitutional state [11].

What can be extrapolated from the interplay of constitution, democracy, and liberalism is that a mere written constitution does not necessarily guarantee the protection of civil liberties. All countries have constitutions. However, only a limited number of countries adhere to the principles of constitutionalism. Therefore, the concept of constitutionalism is preserved to characterize a government that is subject to formal and informal limitations and operates in accordance with general rules rather than arbitrarily. Constitutionalism which provides effective safeguards against state encroachment on civil liberties is generally fostered in a society where liberal values and principles are deeply engraved in the minds of people and public authorities and there is a consensus on

commitment to upholding democratic principles. This assertion can be corroborated by comparing certain countries in the following section.

4.2. Constitutionalism and Civil Liberties: Cases

Unlike almost all liberal democratic and non-democratic countries, Britain is the only country that does not have a single codified formal constitutional document. Most of the principles and concepts of the British constitution are written in ordinary statutes (such as the Magna Carta of 1215, the Bill of Rights of 1689 and the Human Rights Act 1998) which can be easily repealed or amended by the British Parliament. As the ultimate center of power, the British parliament can curtail all those cherished civil liberties mentioned in the Bill of Rights or Human Rights Act [11]. In Britain, the limit to the king's power was first established in the Magna Carta of 1215. The rule of the law was established through the judicial ruling in *Entick vs. Carrington* (1765). The ruling in this case had significant constitutional and political implications. The court expressly stated that the prerogative power of government and the executive are subordinate to the rule of the law. In *Entick vs. Carrington*, it was established that government officials "cannot exercise power unless such exercise of it is authorized by some specific rule of the law" [16]. In this case, the break into the plaintiff's premises and seizure of his papers and pamphlets were found to be illegal and he was compensated for the violation of his privacy [2]. Thus, the independence of the judiciary, the practice of Common law which is conducive to enhancing civil liberty protection (under common law individuals enjoy absolute freedom and liberty as long as those freedoms and liberties are not curtailed by positive law; that is the law passed by parliament), deepened liberal values in British political culture, and galvanized the commitment to upholding democratic principles which were all geared to reinforce constitutionalism in Britain [2].

Canada has a tenacious historical tie to Britain, and it has followed British tradition. As a federal state with a parliamentary political system, Canada was born from the amalgamation of British North American colonies in 1867. Canada commenced its political life as a country through the British North American Act (BNA) passed by the British parliament in 1867. The BNA Act did not include any mechanism for civil liberty protection. Alan Cairns meticulously described the BNA Act "... as a document of monumental dullness which enshrines no eternal principles and is devoid of inspirational content" [17]. However, despite the absence of any reference to individual rights in the BNA Act (since 1982, it is referred to as the Constitutional Act of 1867), civil liberties were to some degree respected by the Canadian government. If tolerance of religious and political dissent, protection of racial and minority linguistic rights, freedom of movement, free election, control of police power, and open trials are utilized as criteria to measure and judge a country's record of respect for civil liberties, then Canada was better than many countries with Bill of rights. As Peter Hoggs has pointed out, "Canada's record, while far from perfect, seems to be much better than that of most of the countries of the world although nearly all countries have bills of rights in their constitution" [2]. In other words, in the absence of an entrenched Charter of Rights, there were certain pre-Charter mechanisms of civil liberties protection in Canada. In the preamble of the BNA Act, it is stated that Canada wishes to have a constitution similar to that of Britain. The tradition of common law, independence of the judiciary, and Canada's political commitment to democracy are all conducive to fostering principles of constitutionalism, which act as the indispensable prerequisite to civil liberty protection.

It was through the patriation of the Canadian constitution in 1982 that the Canadian constitution was Canadianized. The 1982 Constitutional Act contains both an amending formula and the Charter of Rights and Freedoms. As a radical departure from British tradition, civil liberties in Canada are now entrenched in the Charter of Rights and Freedoms which is part of the Constitution Act of 1982. However, these Charter-protected rights are not absolute. Two clauses in the Charter allow both federal parliament and provincial legislature to take away or curtail those rights. Section 1 (Reasonable Limit) states that Charter rights are subject to "such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society". In other words, the federal or provincial legislature can pass a law that may violate any of these Charter-protected rights as long as the impugned law pursues a sufficiently important objective, there is a rational connection between the challenged law and the objective, care is taken to affect the claimant's right minimally, and the challenged law does not have a disproportionately severe impact on the claimant [2].

Section 33 (notwithstanding clause) of the Charter allows the federal parliament and provincial legislature to pass legislation that may violate Section 2 (fundamental freedom, Sections 7-14 (legal rights), and Section 15 (equality rights). In other words, by inserting the notwithstanding clause in the

legislation that violates these rights, the government can protect the challenged legislation from judicial review for 5 years, after which it ceases to have any effect unless it is re-enacted.

Even though federal and provincial governments can invoke section 33 of the Charter to preemptively shield a law violating specified rights in sections 2,7-15 from judicial invalidation, federal and the majority of provincial governments have eschewed its invocation. The Notwithstanding clause has only been used a few times mainly by the Quebec provincial government though some other provinces have threatened to invoke it [18]. This raises a crucial question. Why is there a lack of political will by federal and the majority of provincial governments to utilize the notwithstanding clause when the Charter itself grants such an opportunity to both levels of government to take away those Charter-protected rights? The overriding explanation lies in the consolidation of constitutionalism which is reflected in the country's political commitment to upholding democracy and respect for cherished civil liberties. Constitutionalism so strong in Canada that political authorities eschew breaching civil liberties even when written words of the constitution permit such an opportunity to take away civil liberties.

In sharp contrast to liberal democratic societies where deeply rooted liberal values and norms have contributed to the consolidation of constitutionalism that functions as a bulwark against state encroachment of civil liberties, the absence of ingrained liberal principles and values in the political culture of nonliberal democratic countries has culminated in the absence of constitutionalism in these countries which generally happen to be developing, less developed and underdeveloped. In nonliberal democratic countries, the locus of effective power (the actual pattern of governmental operation) often departs sharply from the formal constitution (written law and statute or Charter or other authoritative sources). Political institutions in these countries may perform radically different functions from those they serve in modern societies. For example, their parliamentary institutions only serve to rubber-stamp legislative proposals of the executive or the ruling party [11]. In these nonliberal democratic countries, there is a conspicuous discrepancy between formal power (written constitution) and effective power (actual operation of the government).

If countries' democratic character is measured by the range of rights entrenched in their respective constitutions, then it can be asserted that Mexico has the most progressive constitution. In addition to those general civil liberties such as freedom of expression, assembly and association, freedom of religion, and equality before the law, the Mexican constitution also protects individual rights to health care services, healthy environment, clean water, decent and respectable housing, cultural rights, and "... the right to nutritional, sufficient and quality nourishment ...". All these rights are specified in Chapter I (Human Rights and Guarantees) of the Mexican constitution and the state is obliged to facilitate the enjoyment of these rights by Mexicans [19]. If countries are judged by the written words in their constitutions, Mexican constitution is the most progressive constitution in the world because some of rights written in the Mexican constitution are not even mentioned in the Canadian or American constitution. However, the Mexican formal constitution does not square with governmental operation and the state of human rights protection on the ground. While Mexico has been practicing democratic elections since the late twentieth century, the widespread political corruption, violence, and the influence of organized crime have been conducive to undermining the rule of the law [20]. Thus, despite significant strides in advancing democracy, the country has nonetheless been suffering from the appalling rule of the law deficits that deprive full citizen enjoyment of civil liberties.

In its 2023 report, Human Rights Watch characterized Mexico as "... one of the deadliest countries in the world for journalists and human rights defenders [21]. In its recent report on human rights in Mexico, Amnesty International shed light on the egregious inconsistency between the formal constitution and the dismal violation of human rights in Mexico.

... national legal safeguards are often not effectively enforced in many parts of Mexico, creating a wide gap between legal principles and the experience of those who come into contact with the public security and criminal justice system [21].

What can explain this sharp discrepancy between the Mexican formal constitution which includes a wide range of civil liberties, and the actual state of individual rights is that constitutionalism is not well established in Mexico. Despite being characterized by some writers as a constitutional democracy, authoritarianism as reflected in decision-making by elites and restricted political mobilization is cemented within the core of the Mexican political culture [23]. Furthermore, as Paola Rosa Rodriguez has pointed out, Mexican constitution contains two types of regulations, one protects

human rights and the other outrightly encroach on the individual rights of those suspected of participating in the organized crime activities [24].

The Islamic Republic of Iran is another country that displays the striking mismatch and discrepancy between the written words in the Constitution and the state of civil liberties in practice. Iran's constitution protects a wide range of civil liberties. In Chapter III: The Rights of the People, the Islamic Republic of Iran's constitution protects a wide range of civil liberties. Article 19 (equal rights for all regardless of their race, colour language, and ethnicity), Article 20 (equal protection of law and enjoyment of all human, political, economic, social, and cultural rights), Article 21 (rights of women), Article 23 (freedom of belief), Article 24 (freedom of expression and press), Article 25 (banning censorship) Article 26 (freedom of association) Article 27 (freedom of assembly), Article 38 (forbidding torture as a means to extract confession) [25].

However, human rights violations have become a striking characteristic of the Islamic regime in Iran. Religious, ethnic, gender, and institutional discrimination is rampant. In his last report to the UN Human Rights Council, Mr. Javid Rahman, the UN Special Rapporteur on the situation of human rights in Iran provided a chilling report on the outrageous human rights violation and the reign of terror under the ruling Islamic regime:

... the "scale and gravity" of violations committed by Iranian authorities pointed to "the possible commission of international crimes, notably the crimes against humanity of murder, imprisonment, enforced disappearances, torture, rape and sexual violence, and persecution" [26].

In their comprehensive legal analysis of the judicial system in the Islamic Republic of Iran which despite being declared as an independent institution but in reality, is controlled by the Supreme leader of the country, Ronda Cress, Catherine Kent and Mohammad Nayyeri concluded that:

Iran does not comply with certain long-established rule of law principles such as separation of powers, equal protection and due process of the law, right to a fair trial, right to an independent judiciary, as well as individual freedoms such as the rights to freedom of expression and association [27].

Like Mexico, Iran's constitution is another classic example of the vivid discrepancy between formal written constitution and effective governmental practices. The Islamic Regime's identity has come to revolve around an in-built pugnacity towards Western values particularly, liberal democratic principles and norms [28]. Since the commencement of its political life in 1979, the Islamic Republic of Iran has vehemently endeavoured to cultivate a political culture that is opposed and even hostile to liberal principles and values which is in turn geared to forestalling the advance of democracy. The consolidation of such an ingrained illiberal political culture has drained the ground for the development of constitutionalism which is an essential condition for governmental restraints and the protection of civil liberties.

5. Conclusion

Civil liberties are geared to enhancing both human development and socioeconomic growth. The appeal of protecting civil liberties is so strong that it has propelled both liberal and nonliberal democratic countries to entrench civil liberties in their respective constitutions. Constitutional recognition of civil liberties is the necessary prelude to rights protection, but it is not sufficient to safeguard the enjoyment of those entrenched rights by citizens. It is not the written words of the Constitution but rather the ingrained liberal values and principles in political culture that foster a given society's political commitment to upholding democracy.

As the conditions of civil liberties in Mexico and Iran demonstrate, civil liberties that are purportedly protected in their respective constitutions do not exist in practice. In Britain, in the absence of an entrenched Bill of Rights, there is a deep respect for civil liberties. In Canada, even though the entrenched Charter permits federal and provincial governments to curtail certain civil liberties, political authorities have generally eschewed from undue violation of civil liberties. It is thus clear that an entrenched Bill or Charter of Rights can never function as the main bulwark against state infringement of civil liberties. The most effective safeguards of civil liberties are the democratic character of political institutions, the independence of the judicial system, and a legal tradition of

veneration for individual rights and freedoms which are shaped by an ingrained and vibrant liberal political culture which in turn largely consolidates constitutionalism. If the liberal principle of political restraint is not internalized as a habit by public authorities and people, written words in the constitution cannot shield civil liberties from governmental intrusion. Deeply rooted liberal political culture promotes constitutionalism which is the most effective bulwark against state encroachment of civil liberties.

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