BOOK REVIEW


The meaning of civil liberties is contested and the boundaries of the subject are unclear. This explains why people tend now to adopt the slightly more straightforward term “human rights”. A text on civil liberties must therefore provide some definition, not simply of the way liberty is protected within the U.K.’s constitutional system, but what it means to talk of civil liberties. Is there, for example, a genuine U.K. civil liberties tradition? If so, what counts as a civil liberty? Who is included? Are socio-economic entitlements relevant? In this otherwise impressive and highly original book there is a surprising absence. The authors celebrate the diversity of approaches within the scholarly tradition and make important connections to activism, but provide little insight into their conventional approach to topic selection. A book which is overflowing with innovative ideas thus rests on strangely conservative preferences. Others have had a go at explaining the subject recently. In The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945, Keith Ewing and Conor Gearty attach civil liberties to the struggle for political freedom (Chapter 1). In Civil Liberties and Human Rights in England and Wales, David Feldman attempts a justification of his own expansive approach to the subject (Part 1). He ties civil liberties to the concepts of freedom and personal autonomy. The authors of the book under review are oddly silent on many of these matters, despite their refreshingly open approach to scholarship. Therefore, having stuck to civil liberties in their title, and defended the choice, this original contribution basically revolves around a critical approach to some standard civil and political rights. In other words, the civil liberties tradition, in this understanding, is severely constricted. This is fine if reasons are given. But generally the reader needs to know why the authors discount, for example, socio-economic entitlements. Should a book on civil liberties include detailed reference to the social and economic guarantees which make political freedom possible? How should the tradition address immigration and asylum? In other words,
what can be justifiably excluded from the civil liberties tradition? In every other respect, however, this is a first-rate, inclusive, and original work of scholarship.

If there is a core to the civil liberties tradition (the authors are very keen to locate their work in this tradition) it rests on liberal values as the basic starting point in the analysis of law and politics. These include “freedom to” as well as “freedom from”. The tradition stands against anti-liberalism, dictatorship, and authoritarian and discriminatory forms of government. Thus the tradition is connected to the struggle for political freedom. More recently, the tradition has moved into the private sphere to explore the horizontal application of legal norms. Freedom and personal autonomy have historically been central to this liberal tradition. It is a tradition forged from an awareness of the fragility of political democracy and the importance of political freedom. It may be loosely defined, as the authors note, but it is anchored in liberal politics.

The authors do advance a favoured approach to the subject. They opt for “nonfoundationalism”, which is Allan Hutchinson’s latest formulation (2000, pp. 52–55). The use of this terminology by Hutchinson causes confusion and promotes a caricatured version of the arguments of others. The word “game” may also cause offence among those involved in civil liberties work and/or those who suffer human rights abuse. While it is not meant in its frivolous sense, it is easy to see why it might be inappropriate. Whitty et al. would do well to avoid these sorts of distractions. There is a debate in philosophy on foundationalism which has no relation to Hutchinson’s arbitrary labels. As if to confirm this, the authors rapidly abandon “nonfoundationalism” and at the end of the book opt instead for “critical pragmatism” and “imagination” (pp. 428–434). What happened to “nonfoundationalism”? From my reading of the text, they appear to be advocating a version of pragmatism which Richard Rorty (another key liberal thinker), for example, would welcome. Are the authors anxious about some of the implications of “nonfoundationalism”? This is not a major problem. The difficulties raised disappear when the authors engage with the substantive issues. It is in these sections that they display their considerable knowledge of selected topics and understanding of critical debates in law and politics. They demonstrate a willingness to make use of critical theory to probe the limits of human rights. The result is a fresh perspective on the subject.

There is no shortage of commentary on the Human Rights Act 1998 at the moment. There has been an outpouring of legal writing on its nature and implications. As the title suggests, the book under review is not another commentary on the Act. It is much more ambitious than that. As noted, the authors locate the book within what they term the “UK civil