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Divided by a common language:

American and British perspectives on constitutional law

Sir Rabinder Singh¹

It is a great honour and pleasure to be asked to deliver this year's Sir David Williams lecture. The first time that I saw Sir David was on my first day of lectures as an 18 year old undergraduate, when he gave the first lecture I attended on constitutional law at the lecture theatre at Mill Lane. At that time, according to our timetable, he was known as Mr D. G. T. Williams. From that moment on his qualities became quickly apparent. He was not only a wise teacher but also a modest man. In my second year I had the privilege of being lectured by Sir David on administrative law. Towards the end of my undergraduate career here, I also had the benefit of advice from him as to the future. In particular he was one of those teachers who encouraged me to go to the USA. I followed in his footsteps in the sense that, like him, I was a Harkness Fellow and, like him, I studied at the University of California. I have therefore taken as my subject for this year's lecture what I think would have been one of Sir David's interests: that is a comparison between American and British perspectives on constitutional law. Inevitably these reflections will be selective, since the topic is so vast that it could easily take many years of study.

In this lecture I will focus on four topics. First, by way of introduction, I will outline some of the key differences between the constitutions of the US and the UK. Secondly, I will look at some history relating to the drafting of the US Constitution and the American Bill of

¹ I would like to thank Jeff Minear for help with research for this lecture. All errors are mine.

Rights. Thirdly, I will look, by way of example, at a particular right: the right to freedom of speech. Fourthly, I will consider the process for appointment of judges in the two countries.

Introduction

The United States and the United Kingdom clearly have many things in common. Both our countries are stable democracies and have been for a long time. The franchise was extended beyond a privileged elite at different times in their histories but both became full democracies, with universal suffrage, around the same time just under a hundred years ago. Both countries have a longstanding commitment to the rule of law. Both countries have a commitment to the protection of civil liberties. Accordingly, although the language used in the two countries may sometimes differ, we recognise that both are countries in which the people have the power to choose their own government at regular elections; the government is subject to the law; and individual liberty is protected by the law, if necessary by resort to the courts. Let me turn to some of the main differences between the two constitutions.

First, as is well known, the US has a written constitution, which is set out in a short document and which can be carried around by citizens, whereas the UK does not. In the recent case concerning the invocation of Article 50 of the Treaty on European Union (the Brexit case), Lord Neuberger put it this way:

“Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions. Reflecting its development and its contents, the UK constitution was described by the constitutional scholar, Professor A V Dicey, as ‘the most flexible polity in existence’ - Introduction to the Study of the Law of the Constitution (8th ed, 1915), p 87.”²

As that quotation makes clear, unlike the constitution of the US, our own constitution (i) is not codified in a single document; (ii) is to be found in the ordinary law of the land rather than a fundamental law; and (iii) is flexible because it can be changed in the same way that other laws can be, rather than requiring a special procedure for amendment.

² R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [2017] 2 WLR 583, para 40.

The second main difference is that the US is a republic whereas the UK is a monarchy. But it has been a constitutional monarchy for many centuries, since the Glorious Revolution of 1688. It became clear, after the Great Reform Act of 1832, limited though that measure was, that the monarch would no longer be able to insist on a government being formed which did not have the confidence of the House of Commons. In the century which followed, the UK became a representative democracy.

The third main difference between the constitutions of the two countries is that, although we both use the term “separation of powers”, and Montesquieu famously misunderstood the English constitution in this regard, the US draws a sharp distinction between the executive branch and the legislature. The President is elected separately from members of the two houses of Congress. In contrast, in the UK the Prime Minister is not directly elected but is usually the leader of the political party which can command a majority in the House of Commons. And all ministers are expected by convention to be a member of one or other of the Houses of Parliament, at least after their appointment if not before.

Although the legislative power of the United States is expressly vested by the Constitution in Congress, it is clear that the President enjoys some rule-making power in the form of Executive Orders. To be clear – this is not delegated legislation, although that concept exists in the US as it does in the UK. Executive Orders are not rules made under powers delegated by Congress but are inherent in the executive function, which is assigned by the Constitution to the President. The concept of Executive Orders has assumed particular prominence in recent weeks, as Donald Trump has issued a number of such orders on becoming President last month. It is only rarely that the US Supreme Court has held that an Executive Order was outside the President’s powers on the ground that it violated the doctrine of separation of powers and purported to enact what was in substance legislation, which is a matter exclusively for Congress. The most famous example of that was in 1952,

when the Court struck down President Truman's Executive Order which had seized the country's steel mills at a time of industrial dispute.³

In the UK there is very limited scope for the executive to make rules which are tantamount to legislation unless there has been delegated power to do so given by Parliament, although there are some areas of the Royal Prerogative where there remains a residual legislative power. In the Brexit case, Lord Neuberger said, at para 44:

“In the early 17th century Case of Proclamations (1610) 12 Co Rep 74, Sir Edward Coke CJ said that ‘the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm’. Although this statement may have been controversial at the time, it had become firmly established by the end of that century.”

I turn to the fourth main difference between the two countries. Although we rightly regard both countries as democracies, the UK still has one part of its legislature which is not elected: the House of Lords. In contrast the US Senate comprises two senators each, who are elected by the voters of each state, however large or small. However, it should be noted that this is a relatively recent development in American history. The original Constitution, in section 3, stipulated that the senators should be chosen by the legislature of each state. This was altered by the 17th Amendment, which was ratified in 1913, during a time known in American history as the Progressive era. Since then US senators have been directly elected by the people.

The fifth main difference lies in the concept of federalism, a fundamental feature of the US Constitution, which necessarily means that the powers of the national or “federal” government are limited. Recent developments in the UK have led to devolution to the constituent nations of the UK, in particular to Scotland; to a lesser extent to Wales; and in a different way to Northern Ireland (which had its own “Home Rule” from 1920 until direct rule was imposed in 1972). Devolution was, of course, a subject close to Sir David Williams’ heart. These developments, important though they are, have still not introduced a federal structure to the distribution of powers in the UK. First, England – the largest part of the

³ Youngstown Sheet & Tube Co. v Sawyer 343 US 579 (1952).

union – remains without its own Parliament, although recent changes have been introduced to the procedures of the House of Commons in relation to legislation that affects only England (“English Votes for English Laws” as it is sometimes called).⁴ Secondly, a fundamental feature of our constitution remains the supremacy of the Westminster Parliament. The US Congress has no such supremacy even in theory.

Some history

I will now turn to some history. Although the Revolutionary War, as it tends to be called in America, or the American War of Independence, as it tends to be called in this country, marked an obvious rupture in the constitutional arrangements for what had until then been English colonies in North America, it is important to note that, at the time, the founders of the American Republic believed that they were (in the words of Gordon Wood): “Englishmen with a strong sense that they were heirs of the English tradition of freedom.”⁵ There had been, and continued to be even after the war, considerable movement between America and Britain, both physical travel of people; and metaphorical travel in the sense of exchange of ideas. As Jonathan Clark puts it in his study of political discourse in the Anglo-American world between 1660 and 1832: “The Revolution of 1776 was slow to happen because Englishmen on both sides of the Atlantic were locked into the belief that they were already living in a libertarian polity.”⁶ Clark goes on to suggest that:

“From the middle of the eighteenth century in both England and America, it began to be re-emphasised that William I had corrupted the Saxon constitution by imposing the ‘Norman Yoke’; that its restoration had been alternatively the work of the barons who drafted Magna Carta; or of sixteenth century Protestant reformers; or of Civil War heroes; or of Glorious Revolution patricians; or, most radical of all, that it remained to be accomplished.”

Clark attributes this view in particular to a Welsh Dissenting minister who, as it happens, was also called David Williams, who lived from 1738 to 1816 and who was a “[f]riend of Benjamin Franklin, libertine and would-be liturgical reformer.”⁷

⁴ For a more detailed description of how the concept works see the Report of the House of Lords Select Committee on the Constitution, ‘English votes for English laws’, HL Paper 61 (2016).

⁵ Gordon S. Wood, *The Idea of America: Reflections on the Birth of the United States* (2011, Penguin), p.173.

⁶ J. C. D. Clark, *The Language of Liberty 1660-1832: Political Discourse and Social Dynamics in the Anglo-American World* (1994, CUP), p.7.

⁷ *Ibid.*, p.18.

Even the most obvious difference between the new republic and the “Mother country” from which it had just broken away, namely its written constitution, was not necessarily perceived at the time to represent such a great change from what had happened in the past. Many of the colonies had been established by Crown Charters. As Wood puts it:

“The whole of the colonial past was littered with such charters and other written documents of various sorts to which the colonial assemblies repeatedly appealed in their squabbles with Royal power.”⁸

This was regarded as a continuation of an earlier English tradition, of putting rights down in a written document: the best known of these of course was the Magna Carta. It is perhaps no surprise that Magna Carta is still revered today, arguably more in the United States than it is in this country.

Nonetheless, despite their common origins, there can be no doubt that the two countries quickly diverged in a radical way. Over the two centuries after the American colonies had become independent, the principal concern in Britain became how to make Parliament more democratic and therefore more representative of the people. Parliament was perceived as the guarantor of the liberties of the people and the principal threat to those liberties was perceived to come from the Crown. The fundamental doctrine of constitutional law in this country became the doctrine of Parliamentary Sovereignty, particularly as set out by Blackstone in the 18th century and Dicey in the 19th. In contrast, in the American colonies even before independence and more particularly, after 1787, in what became known as the United States, the idea took hold that there should be a higher form of law, set out in a written constitution, which would be the fundamental law of the land and to which even legislatures would be subject. In fact many Americans believed that they were drawing on an earlier tradition in England, illustrated by Dr Bonham’s case,⁹ in which Coke CJ

⁸ *Ibid.*, p.175.

⁹ (1610) 8 Co Rep 114.

suggested that even an Act of Parliament might be held to be void by the courts if it were “against common right and reason, or repugnant, or impossible to be performed.”¹⁰

As is well known, there was no express provision set out in the Constitution of 1787 itself to provide for the judicial review, let alone nullification or striking down, of Acts of Congress. The doctrine which Americans call “judicial review”, in other words the power of the courts to review the constitutionality of Acts of Congress, was only made explicit by a decision of the US Supreme Court: Marbury v Madison.¹¹ Although the doctrine of judicial review was never expressly set out in the Constitution of the United States, it has become an accepted and fundamental feature of that constitution. It has never been seriously attempted to repeal that doctrine, for example by constitutional amendment. For good or ill, therefore, the power of the courts, in particular that of the US Supreme Court, to strike down even Acts of the elected Congress for their inconsistency with the Constitution, has become embedded in American life and culture.

Of course we have no such concept in this country. We still have no fundamental law in the sense of the written constitution which Americans have. Even what are sometimes described as “constitutional statutes”, such as the European Communities Act 1972 and the Human Rights Act 1998, are still ordinary Acts of the Westminster Parliament. They were not enacted by any special procedure being required. In principle, they can be repealed by another ordinary Act of Parliament.

Nevertheless, so long as the European Communities Act remains in force, we have had something similar to the American doctrine of judicial review whenever an issue has arisen which fell within the scope of European Community (now European Union) law. To that extent it has been possible for, indeed the duty of, courts in this country to disapply even provisions in an Act of the Westminster Parliament if and to the extent that they are incompatible with a provision of European Union law which has direct effect. This of course is now subject to the decision of the people of this country to leave the European Union in

¹⁰ For the early history of the American tradition drawing on Dr Bonham’s case, in particular in the colonies before the Revolutionary war, see B. Schwarz, A History of the Supreme Court (1993, OUP), pp.3-11.

¹¹ 5 US (1 Cranch) 137 (1803).

the referendum on 23 June 2016. However, as I have said, unless and until the Westminster Parliament repeals the European Communities Act 1972, the duty of the courts of this country remains clear. Indeed, in the Miller case the Supreme Court has held that even the start of the process of leaving, by invoking Article 50, must be authorised by Act of Parliament rather than being a matter for the Royal Prerogative. A bill to obtain that authority for the government is currently before Parliament.

So far as the protection of human rights is concerned, as is well known, the structure which was adopted by the Human Rights Act is somewhat different. Parliament was careful not to give the courts the power to strike down Acts of Parliament on the ground that they are incompatible with human rights. However, Parliament did place what is in substance responsibility for judicial review of Acts of Parliament with the courts by enacting the Human Rights Act. In particular Parliament gave the higher courts (that is, in England and Wales, the High Court and above) the power to make a declaration of incompatibility in respect of primary legislation. This power has been exercised, although not on a large number of occasions, since 2000, when the Human Rights Act came into full force. About 20 declarations of incompatibility have been made. Conor Gearty has described this novel kind of court order in characteristically provocative terms: “They are grand announcements of judicial distaste but no more than that – shouts of antipathy dressed up as legal remedies but without the usual enforceability that we take for granted comes with victory in court.”¹²

Perhaps most importantly this power was exercised by the House of Lords in the Belmarsh case: A v Secretary of State for the Home Department (2004).¹³ In that case the House of Lords made a declaration that Part 4 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with fundamental rights as set out in Sch.1 to the Human Rights Act, in particular the right to personal liberty in Article 5 and the right to equality in the enjoyment of other Convention rights in Article 14. Although a controversial decision, it is notable that the response of both the Government of the day and Parliament was to accept

¹² C. A. Gearty, On Fantasy Island: Britain, Europe and Human Rights (2016, OUP), p.69.

¹³ [2005] 2 AC 68.

that declaration of incompatibility. The incompatible provisions of primary legislation were repealed by Parliament. This is despite the fact that a declaration of incompatibility is expressly not made binding.

The American Bill of Rights, which comprises the first 10 amendments to the US Constitution, has much in it that we would recognise, even if the language now seems a little archaic. Freedom of speech, freedom of religion, the right to a fair trial and the right to property are all there. This is hardly surprising, since the founders were drawing on what they perceived to be their heritage from the English common law. They were also in some instances drawing on the express language of the English Bill of Rights of 1689, for example the prohibition on “cruel and unusual punishments” in the Eighth Amendment. Although at one time, in the 1970s, it appeared that this might be interpreted in such a way as to prohibit the death penalty, that has not occurred. In contrast the UK has now accepted the abolition of the death penalty in all circumstances, including wartime, by ratifying the 13th Protocol to the European Convention on Human Rights. There are some rights in the American Bill of Rights that have no counterpart at all in our understanding of fundamental rights, in particular the right to bear arms in the Second Amendment.

The American Bill of Rights originally applied only to the federal government and not to the states. This should not come as any surprise. After all the original structure of the constitution of 1787 was one in which the several states, which had recently become independent from Great Britain, convened in order to create what they called “a more perfect union”, following the unsatisfactory experience of the Articles of Confederation of 1781. The founders of the American republic, who had met in Philadelphia in 1787, generally speaking regarded the Federal Government as at best a necessary evil. Some indeed feared that it might become as tyrannical as the British Government was perceived to have been in the years leading up to the War of Independence. Consideration was given to enacting a Bill of Rights at the Philadelphia convention. However, the delegates decided not to proceed in that way at that time.

One of the founders of the American republic, Alexander Hamilton, was opposed to the idea of a bill of rights. As Carol Berkin puts it in her recent history of the drafting process: “Hamilton insisted that [it] was redundant in a Lockean republic. Guarantees of rights, he declared, might be valuable as stipulations between kings and their subjects. But in a constitution ‘founded upon the power of the people, and executed by their immediate representatives and servants ... the people surrender nothing, and as they retain everything they have no need of particular reservations.’”¹⁴

Nevertheless it soon became apparent to the supporters of the new federal government that, in order to assist in the ratification process, it was going to be necessary to introduce amendments to the Constitution by enacting what became the Bill of Rights. This was what James Madison then achieved and the first 10 amendments were ratified by 1791.

Some had a concern that setting out certain rights expressly in a bill of rights might be taken to imply that they were the only rights which people have. That would have been contrary to the natural rights theory in which they believed as heirs to John Locke. It was for this reason that the final two amendments were included in the Bill of Rights. They are relatively unknown provisions and are rarely referred to in the jurisprudence of the Supreme Court. The Ninth Amendment states: “The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

The Right to Freedom of Speech

As a major example of the way in which American constitutional law protects fundamental rights, I now intend to consider the right to freedom of speech. This is one of the rights contained in the First Amendment. That amendment has attained an almost mythical status not only in American law but in American culture. Even the fact that it is numbered the First Amendment has had some significance attached to it. In fact, as it happens, in the original

¹⁴ C. Berkin, The Bill of Rights (2015, Simon & Schuster), p.26.

draft Bill of Rights, the rights which are now contained in the First Amendment were to have been in a clause numbered four. Madison's original proposal would have made textual amendments to the main body of the Constitution.¹⁵ It was only later that it was decided to set out the amendments separately, in effect as an addendum to the Constitution. Even in the version which was eventually passed by both Houses of Congress and sent to the states for ratification, freedom of speech was mentioned in the third proposed amendment. Since the first was never ratified and the second had to wait another 200 years before it was ratified in 1992, the famous clause concerning freedom of speech and religion became the First Amendment.¹⁶

The second point to make about the express language of the First Amendment is that, on its face, it applies only to the federal government and not to the states. In fact, if read literally, it applies only to one branch even of the federal government, namely Congress. So far as relevant it provides that Congress shall make no law abridging the freedom of speech. There was in Madison's original proposal an amendment, in the then clause 5, which would have included a prohibition on violation of "the freedom of the press" against the states but this was not enacted in the final version of the Bill of Rights.¹⁷

The jurisprudence of the US Supreme Court only established that the right to freedom of speech applied to the states indirectly in the early part of the 20th century. This was achieved through the "due process" clause of the Fourteenth Amendment, which prohibits the states from depriving any person of life, liberty or property without due process of law. The Fourteenth Amendment was one of the amendments passed after the American Civil War in the late 1860s. To a lawyer in this country it might seem surprising at first sight that a clause which appears to deal with "due process" has been interpreted by the US Supreme Court to include substantive guarantees as well. However, in American law it is now well established that this is the case. Americans refer to this doctrine as "substantive

¹⁵ The text of the original amendments proposed by Madison to Congress on 8 June 1789 is set out in Berkin, *op. cit.*, pp.149-152.

¹⁶ For more detail about the drafting and ratification process, see Richard Lubanski, James Madison and the Struggle for the Bill of Rights (2007, OUP), in particular Appendix V, which sets out the amendments as sent by Congress to the states on 25 September 1789.

¹⁷ *Ibid.*, p.151.

due process.” This is the vehicle by which the Bill of Rights has been held to bind the states as well as the federal government.¹⁸

Despite the rhetoric which surrounds the First Amendment, and indeed the Bill of Rights more generally, it took a long time for the Supreme Court to establish the modern principles on freedom of speech. As Eric Foner puts it:

“Today, the liberties enshrined in the Bill of Rights are central to Americans’ conception of freedom. This has not always been the case; indeed, at many moments in our history, from the suppression of abolitionist meetings in the 1830s to the Red Scare after World War I and the depredations of McCarthyism during the Cold War, individual rights have been seriously curtailed – often in the name of freedom. The growth of civil liberties in this country is not a story of linear progress or simply a series of Supreme Court decisions, but a highly uneven and bitterly contested part of the story of American freedom.”¹⁹

Samuel Walker, in his history of the American Civil Liberties Union, suggests that:

“There was no tradition of free speech before World War I, in either legal doctrine or public tolerance for unpopular views. The glittering phrases of the First Amendment were an empty promise to the labor movement, immigrants, unorthodox religious sects, and political radicals. Intolerance began with the first English settlers who attempted to suppress religious heresy. The Puritans may have come to the new world seeking religious freedom for themselves, but they had no intention of granting it to others in their own communities. Through the end of the nineteenth century, American society was a set of ‘island communities’, each a ‘closed enclave’, intolerant of the ideas or behavior it disliked.”

Indeed, Walker suggests that in the 19th century “the courts scarcely functioned in many frontier communities. The majority imposed swift and certain justice through vigilante action.”²⁰

There is a well-established distinction in American constitutional law between the restriction of the “content” of speech and the regulation of the time, place, and manner of the exercise of the right to freedom of speech. It is conventionally thought that regulation of time, place and manner is permissible as long as it is reasonable.

¹⁸ Cf the situation where some rights on their face bind only the states, e.g. the Fourteenth Amendment, which guarantees the equal protection of the laws. It was held in Bolling v Sharpe 347 US 497 (1954) that this indirectly binds the Federal government through the Due Process clause of the Fifth Amendment. By this means the US Supreme Court was able to hold that racial segregation in the schools of Washington DC was unconstitutional, even though the Equal Protection clause on its face only applies to the states.

¹⁹ E. Foner, The Story of American Freedom (1998, Picador), p.xvii.

²⁰ S. Walker, In Defense of American Liberties: A History of the ACLU (1990, OUP), pp.28-29.

When it comes to the content of speech, the generally received wisdom is that Americans will not tolerate any restriction of what they can say at all. However, this has never been the law. Historically the way in which the US Supreme Court addressed the problem was by recognising that there were certain categories of speech which were outside the protection of the First Amendment. Traditionally obscenity was such a category, although in practice today this will hardly apply in the case of adults. Child pornography is an entirely different matter. Another famous category of unprotected speech relates to what Americans call “fighting words.” Even defamation, although the doctrines have been different in our two countries, is not protected speech under the First Amendment. It has also long been recognised in American law that the state is entitled to criminalise incitement to commit criminal acts. However, as a result of what was originally called the “clear and present danger” test, it has been established that there has to be a close nexus between the words used and the likelihood of a criminal offence in fact occurring.²¹

The problems with which both our countries are grappling today are not new ones. A hundred years ago, shortly after the First World War and the Russian Revolution, America had to address the question of what, if any, restrictions could be placed on “extremist” speech. At that time the fear was of violent revolution along the lines of what had just happened in Russia.

One of the most famous such cases was Whitney v California (1927).²² Anita Whitney was a member of the Socialist Party who was arrested after giving a speech called “The Negro Question”, in which she protested about race riots and lynching. She was convicted under a California law which prohibited “criminal syndicalism.” She was convicted of assisting in organising an association to advocate terrorism. Although the US Supreme Court upheld that conviction, Justice Brandeis concurred rather than dissented. However, his concurring

²¹ Brandenburg v Ohio 395 US 444 (1969).

²² 274 US 357 (1927).

judgment is usually regarded as being tantamount to a dissenting one. It has also been described by his recent biographer, Jeffrey Rosen, as “a kind of constitutional poetry.”²³

In Whitney Brandeis said:

“Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”

As Rosen observes, Brandeis clearly had in mind the words of President Jefferson in his first inaugural address in 1801:

“That though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.”

Brandeis echoed those words when he said that:

“Recognising the occasional tyrannies of governing majorities, they [i.e. the Founders] amended the Constitution so that free speech and assembly should be guaranteed.”

In A v Secretary of State for the Home Department Lady Hale expressly quoted the same passage from Jefferson’s inaugural and said, at para. 237:

“Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities. ...”

In fact, as we have seen, Anita Whitney’s conviction was upheld by the Supreme Court and Brandeis’ opinion was a concurring one, even if it reads like a dissent. A month after the court’s decision, the Governor of California pardoned her, saying that freedom of speech is the “indispensable birthright of every free American.” She was soon to be back before the courts, for violating a state statute which made it a crime to display a red flag. In

²³ J. Rosen, Louis D. Brandeis: American Prophet (2016, Yale University Press), p.128.

1931 the US Supreme Court held that that law was “repugnant to the guaranty of liberty contained in the Fourteenth Amendment.”²⁴

In the last 25 years the US Supreme Court has come to recognise that there are no categories of speech which are in principle unprotected by the First Amendment. On the other hand, the Court has also come to recognise that it may be possible in principle for the state to regulate even the content of speech where a law is narrowly tailored to serve a compelling state interest. This is sometimes called “strict scrutiny.” In this way, although Americans would not necessarily use the same terminology as we use in Europe, there is in practice a doctrine similar to our own principle of proportionality.

Accordingly, I would suggest that, although at first sight the experiences of the US and the UK appear to be very different in the context of freedom of expression, in fact there are many similarities too. A major exception to this is in relation to the concept of “hate speech.” The US Supreme Court has taken a fundamentally different approach to “hate speech” from that taken in many other democratic societies, including the United Kingdom: see its decision in RAV v City of St Paul, Minnesota.²⁵ Whereas, like many countries, we have laws which prohibit (for example) incitement to racial hatred, such laws have not survived scrutiny in the US.

Although the law in the United Kingdom has not had, until relatively recently, a positive right to freedom of expression, the values underlying it were embedded in the culture of this country and in the common law for many centuries. In particular the market-place of ideas theory can be found in the writings of John Stuart Mill in the 19th century. They were clearly influential on the jurisprudence of the US Supreme Court in the early part of the 20th century, e.g. Abrams v United States (1919).²⁶

More recently, it is clear that the flow of ideas has also come in the other direction: American law has influenced our law, even before the Human Rights Act came into force.

²⁴ E. Foner, *op. cit.*, p.185. The case was known as Stromberg v California 283 US 359 (1931).

²⁵ 505 US 377 (1992).

²⁶ 250 US 616 (1919).

Most notable was the decision of the House of Lords in R v Secretary of State for the Home Department, ex parte Simms (1999).²⁷ Lord Steyn said:

“Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market’: Abrams v United States (1919) 250 US 616, 630 per Holmes J (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the government and administration of justice of the country...”²⁸

Another example of American “constitutional poetry” can be found in a freedom of religion case: West Virginia State Board of Education v Barnette.²⁹ At page 642 Jackson J said:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein.”

Note even the use of alliteration in that passage. That case concerned whether the state could compel school children to salute the American flag. Although that practice is often thought to be one of the most fundamental features of American culture, the US Supreme Court held that Jehovah’s witnesses could not be compelled to do so. It is also notable that the decision, which reversed the court’s own earlier decision of just three years before, was made at the height of the Second World War. It perhaps provided an indication of what Americans thought they were fighting for against the totalitarian regimes, in particular Nazi Germany.

As the Divisional Court (of which I was a member) said, after citing these authorities, in R (BBC) v Secretary of State for Justice: “History has taught us that, in fields as diverse as

²⁷ [2000] 2 AC 115.

²⁸ *Ibid.*, p.126.

²⁹ 319 US 264 (1943).

politics, religion, science and the law, what starts as a heresy may well end up as the orthodoxy.”³⁰

Furthermore, as the European Court of Human Rights has often said in its jurisprudence on Article 10, freedom of expression constitutes one of the essential foundations of a democratic society. Accordingly “it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population.”³¹ The jurisprudence of the European Court has frequently stressed that the hallmarks of a democratic society are not simply that the will of the majority must prevail. Rather a democratic society is characterised by pluralism, tolerance and broad-mindedness.³²

In this context I would recall again what was said by the Divisional Court in the BBC case, at paragraph 49: “these words, which appear in many of the articles of the Convention, are not superfluous. The framers of the Convention, arising as it did out of the ashes of European conflict in the 1930’s and 1940’s, recognised that not everything that the state asserts to be necessary will be acceptable in a democratic society.”

Judicial appointments and independence

As I said at the outset of this lecture, both the United States and the United Kingdom have mature legal systems, with a strong tradition of judicial independence and respect for the rule of law. In this context, judicial independence is a particular aspect of the separation of powers.

It is often thought that in the US judges are elected. In fact the picture is much more complicated. There is an important distinction between the federal judiciary and judges in each of the states. It is in the nature of American federalism that there will be different systems for the appointment of judges in each state.

³⁰ [2013] 1 WLR 964, para 41.

³¹ Sunday Times v United Kingdom (1979) 2 EHRR 245, para 65.

³² Handyside v United Kingdom (1976) 1 EHRR 737, para 49.

The federal judiciary are not elected at all. The Constitution created the Supreme Court, although its composition was not spelt out in the Constitution itself and has been affected by Congressional legislation since 1789. Over time the number of judges on the Supreme Court has been increased to its current number of nine, including the Chief Justice. The power to appoint judges to the Supreme Court is vested by the Constitution in the President, with the “advice and consent” of the Senate. A similar appointment process is used for the District Bench and the US Court of Appeals, which is divided into various circuits, covering the vast geographical area of the United States’ territory.

Presidential appointments, in particular to the Supreme Court, can be the subject of intense public debate. There are confirmation hearings before the US Senate. Some see this as an unfortunate introduction of partisanship into what should be an independent process; others regard it as an important, democratic check on what is otherwise the great power vested in the Supreme Court. Although judicial interpretations of the Constitution can be reversed by constitutional amendment, the system for amendment of the Constitution was deliberately made difficult by the Founders, and in practice, it is rare for a decision of the US Supreme Court to be overturned in this manner. That means that the prospect of having well-established judicial decisions of that court overturned can be the subject of intense political controversy: in particular the decision of the US Supreme Court in Roe v Wade (1973), which decided that the Constitution confers the right to choose to have an abortion.³³

Since February last year there has been a vacancy on the US Supreme Court, arising from the death of Justice Scalia. President Obama nominated Merrick Garland for the appointment but the Senate declined to consider the nomination before the outcome of the Presidential election was known in November. At the end of January this year the new President, Donald Trump, nominated another judge to fill the same vacancy: Neil Gorsuch. It will now be for the US Senate to decide whether to confirm that appointment.

³³ 410 US 113 (1973).

So far as state courts are concerned, the practice relating to judicial appointments varies enormously. Originally each of the 13 states after the War of Independence selected its judges through either executive or legislative appointment. There were at that time no elections for the state judiciary. However, in the first half of the 19th century there was a democratic movement associated with the presidency of Andrew Jackson, often referred to as “Jacksonian democracy.” As it has been put by Rachel Paine Caufield: “states began to move away from appointive selection methods in the mid-eighteen hundreds with the rise of Jacksonian democracy and its emphasis on democratic accountability, individual equality, and direct voter participation in governmental decision-making.”³⁴ By the time of the American Civil War the vast majority of states had changed their method of judicial selection to direct election by the voters.

However, a contrary trend began to emerge in the first half of the 20th century. This was initially associated with the Progressive era. A movement began for what Americans call a “merit system.” The first state to adopt the merit system was Missouri in 1940. Since then a large number of states have adopted such a system, in particular for the highest court in each state. In fact 24 of the states and the District of Columbia have adopted some form of merit system, “making it the most prevalent system of judicial selection in use in the United States today.”³⁵ As Brian Fitzpatrick explains, although there are differences among these various systems, they have two common features. First, with regard to initial selection, judges are not elected but are appointed by the Governor of the state, from a list of names submitted by a nominating commission. Secondly, at some point after appointment in most of the systems, state judges must come before the public in a referendum (albeit an uncontested one), through which voters can remove a judge from the bench.

Even in those states where there is no election for the initial appointment of a state judge, and for this purpose I will confine myself to the highest court in the state, the general practice tends to be that a judge must then face a “retention” election. I will describe the

³⁴ ‘However pickers pick: finding a set of best practices for judicial nominating commissions’, (2007) 34 Fordham Urb. L.J. 163, 167.

³⁵ Brian T. Fitzpatrick, ‘The politics of merit selection’, (2009) 74 Missouri Law Review 676, 678.

practice in the state with which I am most familiar, that is California. According to the constitution of the State of California, judges for the Supreme Court must be nominated by the Governor and confirmed by the Commission on Judicial Appointments, which consists of the Chief Justice, the Attorney General, and the Presiding Justice of the Court of Appeals. Since 1979 it has been required that the State Bar commission on judicial nominees' evaluation should conduct a thorough investigation of the background and qualifications of prospective nominees. However, the Governor is not bound by that commission's recommendations. Once appointed, judges must stand for retention at the time of the next gubernatorial election after their appointment. Appellate judges serve twelve year terms.

Although, in many states, judicial retention elections are low key affairs, in the state of California they have often been controversial. I remember that, while I was a student in California in 1986, there was a well organised campaign against some members of the state Supreme Court, including the Chief Justice, Rose Elizabeth Bird. The particular reason why they were unpopular with many electors was their perceived antipathy to use of the death penalty. A total of \$11.5 million was spent on campaigning both for and against the judges, setting what was at that time a record for spending in a judicial election. They were voted off the state Supreme Court.

In this country, of course, we have no election for judges, not even what the Americans call a "retention" election. There was a time, around the turn of the 19th and 20th centuries, when Lord Halsbury was Lord Chancellor in the Salisbury governments, when party affiliation does appear to have played a part in judicial appointments. However, that has long since passed. In any event, today we have the Judicial Appointments Commission (in England and Wales). That commission was created by Parliament in the Constitutional Reform Act 2005, with the express purpose of placing it at arm's length from the government of the day. There are similar appointment bodies in Scotland and Northern Ireland. When it comes to the Supreme Court of the UK, appointees are selected by a panel which includes representatives of the JAC and its counterparts in the other parts of the UK. The sole

criterion for judicial appointments is merit: that is now a statutory requirement in the 2005 Act.

In the past it was not uncommon for judges in this country to have had party political careers. Some of our best judges had such a background:³⁶ for example, Lord Reid, who served with great distinction on our highest court, the House of Lords, between 1949 and 1975, had been a Conservative MP. Another Law Lord, Lord Simon of Glaisdale, was appointed straight to become President of the old Probate, Admiralty and Divorce Division of the High Court in 1962. Before his appointment he was a Conservative MP and Solicitor General in Harold Macmillan's government.

There was until well into the 20th century a practice by which, if the post of Lord Chief Justice became vacant, the Attorney General of the day had the right of first refusal upon it. Sir Rufus Isaacs became Lord Reading CJ in that way, having been a Liberal MP and a member of the Asquith Government. Indeed our modern sensibilities about the separation of powers may be quite recent. While Lord Reading was a serving Chief Justice, he was also appointed to be this country's ambassador to the United States. The last such appointment was that of Lord Hewart CJ, who had been a Conservative MP and Attorney General in the National government of the 1930's.

In the United States, one former President became Chief Justice of the US Supreme Court (William Howard Taft). One of the most successful Chief Justices in American history, Earl Warren, had been a Republican Governor of California and only just lost out to Eisenhower for the Republican nomination for the presidency in 1952. It is often reported that, when President Eisenhower left the White House, he was asked whether he had made any mistakes during his presidency. He replied "only two: and they are both sitting on the Supreme Court." He was thinking of Chief Justice Warren and Justice Brennan.

³⁶ In the more distant past other examples include Coke CJ, Lord Camden and Lord Mansfield, all of whom had served as Attorneys General.

There can be no doubt that some great American judges have previously held high political office. For example Justice Robert Jackson had been Attorney General in the administration of President Franklin Roosevelt and served with great distinction both on the US Supreme Court and as the Chief Prosecutor at the Nueremberg War Crimes Tribunal after the Second World War. More recently, one of the current justices of the Supreme Court, Elena Kegan, was Solicitor General in President Obama’s administration, having previously been Dean of Harvard law school.

In this country also we have experience of such appointments, indeed quite recently. Lord Mackay of Clashfern was a highly regarded Lord Chancellor and Law Lord, having previously been Lord Advocate in Margaret Thatcher’s government. More recently still, Lord Rodger of Earlsferry was a highly regarded Law Lord and then Justice of the Supreme Court, having previously been Lord Advocate in the John Major administration.

Indeed some commentators would suggest that it can be desirable for the senior judiciary to include at least some judges who have previous experience of government and the legislature, in the light of the important constitutional questions which judges sometimes have to decide. This does not compromise the principle of independence, provided there is a separation of powers at the time when they are serving judges. Judges must relinquish any links they may have had with a political party on their appointment to the bench.

Concluding remarks

I would like to end with a few concluding remarks. Clearly the United States and the United Kingdom have a long and shared commitment to constitutionalism. However, the structural differences between the two constitutional systems mean that it is difficult to prune principles from one legal system and simply transplant them to the very different soil of the other. Sometimes we use the same phrases, such as “separation of powers” and “due process” but these can be false friends, as their meaning may be quite different in the two countries. Having said that, the two systems have clearly influenced each other too and continue to do so, as in the field of freedom of speech. Looking at the jurisprudence of the US can be helpful in providing useful insights into the way in which a problem is analysed,

even if the answer would not necessarily be the same. It can also, quite simply, be enjoyable for the “constitutional poetry” one can find there.

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