

## COMMON TRACK TWO

### LIVING DEMOCRATIC FREEDOM IN AN UNJUST WORLD

My argument here is that the subject of civil liberties (or to use human rights language, civil and political rights) has got to its honoured position in contemporary democracy by creative exploitation of the pressures that result from three paradoxes that lie at its heart. These relate to national security, to democracy and to political violence. As will be evident from what I have to say in later tracks, I believe that terrorism law now threatens to expose these paradoxes and in so doing to tear apart the structures that hold our subject together, leading – if we are not careful – to a reconstitution of civil liberties in an altogether more reactionary, more authoritarian form. The essay will propose ways in which progressive vigour can be restored to civil liberties so that its emancipatory and radical dimensions can be sustained even in the face of this antagonistic anti-terrorism narrative.

What follows is a reflection on how to keep our faith in rights and our energy for civil libertarian activism in a sometimes hostile albeit democratic political environment.

#### *National security*

The first paradox can be simply put: to be effective, civil liberties protection must provide a mechanism for its own failure. Or to say it another way, an absolutist civil liberties culture is not one in which civil liberties are unqualifiedly protected. The point here is not just the obvious one that every guarantee of the right to vote and to the freedoms of expression, assembly, association and so on, necessarily have to contain exceptions on account of the fact that these concepts are simply too wide to be of use without further modification. This is of course true: even the entitlement

to vote is predicated on a minimal level of mental capacity and, as the public law cliché puts it, no one has the right falsely to shout fire in a crowded cinema. But the point is deeper than this. Democratic freedom sometimes requires the truncation of these rights even in their political, civil libertarian manifestation.

It is not inherently contradictory for a democratic culture to prohibit certain kinds of political expression, whether in the form of speech, membership of an organisation or public protest. Most democratic states ban many substantive communications that could broadly be described as forms of political expression. How wide or narrow such censorious actions are depends on the history and politics of the state concerned and in particular on how fragile and/or vulnerable its institutions are to the sentiments being banned: the Germans are understandably more anxious about Nazis than are the Americans, the British keener to crack down on racially-motivated hate speech than other countries that do not share its colonial past and diverse population today.

The European Convention on Human Rights contains a number of clues as to what is going on with these apparent subversions of our subject. Many of the key civil liberties set out in that document are capable of being overridden where this is for certain legitimate goals and is prescribed by law, but crucially this can be done only when it is considered 'necessary in a democratic society'. Article 17 declares that 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.' If things get really rough, this paradigmatic political rights charter permits states to derogate from their obligations under it in 'time of war or other public emergency threatening the life of the nation' (albeit only 'to the extent strictly required by the exigencies of the situation').

Most democratic constitutions have clauses along similar lines. If they do not, the responsible authorities tend to imply them into the document (if they are

judges) or assert them (if they are elected leaders). The important civil libertarian point to make is that this should not surprise us or disturb us as a matter of principle. The test of a successful democratic culture is not its willingness to implode when faced with illiberal forces inclined to misconstrue the freedoms offered by such a society as invitations to destroy it. This is the case whether the threat comes from the Left, the Right or from some pre-modern brand of politicised religion. The willingness of representative democracy to equip itself to fight against forces that would destroy it must entail an openness to the curtailment of civil liberties where this is judged essential to survival. Those who reject this premise as an unwarranted invitation to authoritarianism are likely to be closet libertarians, verging on anarchists, rather than civil libertarians in the political sense in which I am using the term here.

If there can be no serious argument against the need for such a democratic over-ride button, however, there is great controversy over who should have the right to push it. The difficult question is not one of principle but of practice. This is where the pressure arises. The issues were simpler in the era before mass suffrage. Power was then in the hands of a sequence of elites whose invariable tendency was to confuse the threat they personally (or as a class) faced with a danger to the country as a whole. In such situations, the claims of national security were often a mere camouflage for the vested interests that lay behind them. In 1688, King James II no doubt thought he was putting England first even while Parliament put him to flight for, among other misdeeds, 'endeavour[ing] to subvert and extirpate ... the lawes and liberties of this kingdome'. Two generations later, the justly celebrated civil liberties case of *Entick v Carrington* (1765) established that the British executive branch's version of state necessity did not necessarily accord with that of the law of the land. The importance of this case lay in the way it established on behalf of the judges a claim to have a shared responsibility for the assessment of what kinds of abridgements of civil liberties were required in the name of national survival. Many of the advances in civil liberties in 18<sup>th</sup> century Britain were made in the courtroom, by brave juries, courageous counsel and unintimidated judges.

With the growth of the democratic movement at the end of that century and its revival after a period of repression inspired by anxiety about the possible contagiousness of the French revolution, advocates of civil liberties found themselves facing the hostility not only of a propertied class used to parliamentary power but also their allies on the bench, now increasingly unsettled by the prospect of sharing power with the merchants and other beneficiaries of the industrial revolution. During the first half of the 19<sup>th</sup> century, the national interest in Britain and in other countries as well was wheeled in to provide a rhetorical veneer for class partisanship, but once again it was unsuccessful.

Resistance to a widened franchise involved savage repression, military attacks on protestors and when the modest reform measure of 1832 came up for debate in Britain warnings of imminent national doom in both Houses of Parliament. The same cycle was then played out in the course of the late 19<sup>th</sup> and early 20<sup>th</sup> century as a truly democratic culture secured its niche in the industrialised West with the support of the socialist and trade union movements and via a strong commitment to a universal right to vote. Ireland's anti-imperialist struggles of the nineteenth and early twentieth century fit a similar pattern with the dispute in this case being about the composition of the national entity as well as supposed national survival.

So much for the past, when resistance to the democratic goals of civil libertarians turned the assertion of even the basic freedoms of expression, assembly and association into highly dangerous acts, potentially treasonable or seditious if the authorities chose to see things that way. With an elected parliament to which the executive is accountable and upon which it depends for support, the entitlement of those who decide what can be done in the name of national security has become less of a subject of controversy. The ministers asserting the need to constrain civil liberties for these reasons have been able to invoke their democratic mandate as a moral basis for their action.

In Britain, the United States and elsewhere, this has made the crackdowns on radical political speech during the Cold War both possible and broadly speaking tolerated by the general public. During the period 1945-89, there was a general acceptance that the challenge to the legitimacy of the state was real enough to warrant defensive action. The courts as well as the legislative and executive branches in most liberal democracies accepted this assumption, as did important regional tribunals like the European Court of Human Rights. Certainly this meant that there were allegations of partisanship in the protection of civil liberties with certain categories of persons being quite unable to actualise their rights while others (less subversive of authority) were free to protest as they wished. But allegations of double-standards were thought a price worth paying for the preservation of democratic structures. The same was broadly true of the terrorism laws prior to 11 September 2001: these were sharply focused and usually applied with the kind of restraint that could only flow from a culture whose commitment to freedom and democracy did not feel challenged by the sporadic acts of relatively weak – albeit it is true occasionally very violent – subversives.

The change since 11 September has been in the way in which terrorism laws have become generalised and in the flimsiness of the national security claims that have underpinned their expansion. We see this in the extraordinary attempt by President Bush of the United States to establish himself as commander-in-chief in an never-ending war on terror that placed him above his country's own constitution, able on his view to disregard legislative and legal constraints on his actions. It has been evident as well, though as yet to a much lesser degree, in the British reaction to 11 September; this initially involved detention without charge for suspected international terrorists and has now led to a scheme of 'anti-terrorism control orders', restrictions which can be imposed on suspects without proof of any criminal activity.

Large numbers of countries have followed in the repressive paths blazed by these supposedly model democracies. Even the United Nations, depressingly, has joined in the action with security council resolutions having led to a return to black-

lists of banned persons and groups, resolutions which when manifest in law have been held by many judges (including the important court of first instance of the European Court of Justice) to be beyond the reach of human rights inquiry. Much of this activity is predicated on a definition of terrorism so vague that it permits action against persons whose only offence is that of radical political activity. It is this potentially broad field of attack on civil liberties that anti-terrorism law has opened up which, allied to a ratcheting up of the anti-terrorist rhetoric, has rendered the changes of the recent past potentially so dangerous as compared with the anti-communism and anti-terrorism of the past.

The civil libertarian must answer these developments. The first point is to acknowledge that civil liberties are not absolute: to claim otherwise is to fly in the face of history. But having acknowledged this, the defender of civil liberties must insist that no elected leader can have a blank cheque to act as he or she wishes in the name of national security, that the fact of democratic legitimacy is not sufficient to warrant the seizure of such a power. Judgements as to what is required to ensure national survival must be shared, with the legislative but especially with the judicial branch.

Civil libertarians must swallow whatever suspicions they might have had of the judges ('right-wing'; 'reactionary'; 'illiberal' etc) and recognise that the authoritarian tendency has made such advances recently that the judges have found themselves in the front-line of the defence of freedom. This is an odd place to see them it is true but they must be cheered on nonetheless. This is the case when the British house of lords rules that detention of suspected international terrorists is a breach of human rights, when the US supreme court of largely Republican appointees decide that President Bush has gone too far even for them, and when the international court of justice bravely castigates the Israeli wall.

There are many other examples as well – the news on the judicial front is not at all as bad as is sometimes supposed by those of us who are dyed-in-the-wool critics of judicial conservatism. But the 'war on terror' has made liberals of us all.

When the executive and legislative branches have been won back to the civil libertarian side we can go back to arguments about how judges are holding up social progress, but now is not the time for such luxurious disputes.

### *Democracy*

If the first paradox of civil liberties is concerned with the subject's requirement to contain within itself the seeds of its own destruction, the second is likewise taken up with absorbing another contrary impulse within its deep structure. The historic purpose of civil liberties as the law and practice of political freedom has been to secure a representative system of government; in its classic form this is what all the protesting and speech-making and associating have been about.

The achievement of this form of rule does not, however, bring an end to our subject or even a restriction of it to the legislative arena; rather the reverse in fact – one of the tests of the success of a democratic culture is its willingness to accept political expression which is not focused on the duly elected representatives of the community but which lies well outside the parliamentary mainstream. This continued appreciation of the need for popular protest in a country with plenty of formal democratic channels open to it is another of our subject's historical legacies which fortunately we have been unable – so far at least – to shake off. During the ongoing democratic revolution of the 17<sup>th</sup> through until the mid-20<sup>th</sup> century, civil liberties had to exist separately from the legislature because (albeit to a lesser and lesser extent as time went on) that body was not representative in a truly democratic sense. But the suffragettes were the last civil libertarian movements in the West that was able to say with perfect clarity that the elected persons making decisions about their future were in no way their representatives, having achieved their positions on the basis of votes cast by one gender only.

If the democratic developments of the 20<sup>th</sup> century did not render the subject of civil liberties redundant, they did affect it in important ways. The universal franchise having been largely achieved by the late 1920s, civil libertarian energy found itself caught up in a new field of battle. The main arena of dispute has not

been about winning power to change the system but about exercising the rights to freedoms of expression, assembly and association in order to influence legislators in favour of particular points of view.

This is where the fact that we are now in much of the world, formally at any rate, citizens of states organised entirely on democratic principles becomes highly relevant. It means that government now has a new way of rebutting public protest, pointing not to the substantive error of the policy change that is sought but rather to the inadmissibility of the mode of bringing it to the legislators' attention. The country is a democratic one, the relevant decision-maker tells the crowd: go and write to you MP/TD/Senator, run for office or seek to inform opinion in more orthodox/less invasive ways. This democratically-rooted counter-attack on civil liberties was first in evidence during the Red Scare in the US in the 1920s and the General Strike in Britain in 1926. In both cases, government ministers justified their actions – draconian emergency regulation; strong police action; tough prosecution policies – with a new authority based on their democratic legitimacy and the existence of alternative mechanisms for calling executive decision-making to account.

More recent protests that have similarly been on the margins of political debate have been equally vulnerable to control on the basis that such forms of protest are unnecessary in today's free society: examples in Britain include CND activism in the early 1980s, 'stop-the-city' protests, eco-demonstrations, and other forms of 'direct action'.

Of course the political leadership did not in the 1920s and 1930s, and does not today, regard the fact of an operative democratic system of government as a sufficient basis for the removal altogether of political freedom: the paradox lies precisely in the need to continue to allow those civil liberties that previous civil libertarian gains appear to have rendered redundant. The men and women who run Britain (and Ireland) today recognise the need for civil liberties as a matter of principle, and concede the legitimacy of this or that particular public protest as a

social fact, but neither acceptance means that they welcome the practice of public protest with open arms.

These democratically elected officials cannot help but see themselves as the current winners in an impeccably fair electoral race and with a consequent monopoly of wisdom which public protestors are seeking by the short-cut of direct action to undermine. From time to time ministers are emboldened to take a tougher line with protest than might otherwise have been expected, with the negative energy evident on such occasions flowing out of an underlying sense of grievance about the need for public protest in general. The frustration of the Blair administration at the anti-war demonstration mounted over many years in Parliament Square by Brian Haw, leading to legislation specifically designed to remove him, is one example; the same prime minister's whipping up of national anger about a proposed Mayday protest in central London on 1 May 2001 was another. What we see in each case is a playing out of the tension between democracy and civil liberties that is in turn a direct result of this paradoxical necessity for continuing civil liberties protection in a country in which civil liberties appear to have achieved their goal.

The new climate of anti-terrorism places fresh pressure on this ambiguous approach to extra-parliamentary activity. The breadth of the definition of terrorism in most legal frameworks, already noted as usually going beyond acts of violence, makes it possible for the police and security services to be deployed not only against violent subversives but those involved in direct action and public protest as well. These expansive readings of the law are not resisted by a political leadership that in its heart of hearts is not clear why, in these truly democratic days, any public protest is really required. So when the police use their anti-terrorism stop and search powers to harass protesters on their way to a demonstration outside an arms fare, as happened a few years ago in the United Kingdom, the authorities feel no embarrassment about justifying the behaviour and continuing to authorise the laws which have permitted such abuses to occur. (They have since been brought to an end as a result of a ruling of the European Court of Human Rights.) Only when

publicity becomes really intense, as when the terrorism laws were invoked in 2005 to prevent a Labour member returning to his seat at Party conference having been ejected for heckling the foreign secretary, is there enough anger generated to secure an official apology.

The civil libertarian needs to meet this official antipathy to public protest by explaining afresh why the forms of democracy do not mean the end of civil liberties, why public protest is a vital part of good government and why the laws on terrorism should be restricted to the core of serious criminal acts to which they ought exclusively to refer: murder, manslaughter, causing explosions and the like – not general, destabilising behaviour as is often the case today. The civil libertarian needs to be unafraid to argue that instability, inconvenience, disconcerting direct action and the like are routes to a better democratic future, not evidence of terrorist subversion.

### *Political Violence*

The final paradox can be more briefly stated than our first two. It flows from both, and its central relevance to contemporary discussion of political freedom will be immediately grasped. The subject of civil liberties presents itself as necessarily involving a rejection of political violence as a matter of principle but in fact it has in the past depended on exactly this sort of violence, or the threat of it, for its success. This is not only a point about the way in which parliamentary government was established in England, Ireland and the United States by means of a successful usurpation of power, backed by the force of arms.

It is a reference as well to the political ferment which built up for mass suffrage across the industrialised world in the 19<sup>th</sup> century. It encompasses the politically-inspired subversion of the Chartists and the famous willingness of the suffragettes to engage in subversive violence to achieve their ends. Just as the English parliament of the 'glorious revolution' spoke of the need for rights to secure the nation from the disorder of a failed Royal despotism, so generations later the Universal Declaration of Human Rights in 1948 asserted in its preamble that it was

‘essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’

The civil libertarian needs to be unafraid of remarking that the achievement of political freedom has depended on violence in most countries, and that there are situations of imperial domination or domestic tyranny where even today this is the only progressive option. The language of terrorism needs to be tackled head-on so that it ceases to be the overarching prohibition on political violence, regardless of context, that it has recently become. Such tackling of fundamentals will make the position of the civil libertarian easier because less defensive. The legacy of the successful subversion upon which the subject is built produces an ambiguous relationship between it and political violence: generally condemning the latter but being quick to ensure that those accused of it receive a fair trial; deploring criminal acts but being ready to accept and defend conduct which is well into the zone of the lawless, complaining about the abuse of police discretion rather than the undeniably fact that a law has been broken; agreeing that inflicting injuries to persons is wrong but being a bit uncertain about property and being more than willing to describe as merely robust ‘direct action’ what others would call a criminal mob.

This edge to the subject is what keeps it honest, stops it becoming the handmaiden of power, servants rather than challengers of the established (democratic) order. But it does leave civil liberties vulnerable to being tarred with the wrongs of others.

The answer is a dual commitment to democracy and the criminal law, with the former being a *sine qua non* for the ruling out of subversive violence and the latter being the best way in which to protect the rights of the majority without destroying individuals and whole communities in the process. The civil libertarian should argue unashamedly for the replacement of the language of terrorism with the language of the criminal law, for a return to policing rather than military metaphors to describe this branch of serious crime. In order to ensure its continued survival,

civil liberties needs successfully to show that all the threats posed by terrorism can be catered to by the criminal process, invigorated by reform and by a stronger international cohesiveness if needs be, but criminal (rather than administrative or emergency-based) nevertheless.

### *Conclusion*

It is in the state's recent and growing preoccupation with terrorism that civil liberties as a subject has faced its greatest challenge in the democratic era, with the exposure of all the three paradoxes discussed above combining to impose immense pressure on our subject.

The alleged necessities of counter-terrorism have already engaged the right to life and the prohibition of torture and inhuman or degrading treatment or punishment. Its demands have also impacted severely on other basic freedoms, such as those of liberty, speech, assembly and association. It would be absurd to claim that civil liberties are dead or dying in the liberal democratic world. But they are certainly under severe attack from a variety of sources and chief amongst these is this idea that the West is engaged in some kind of global 'war on terror' or 'clash of civilisations' which threatens the integrity of the nation in such exceptional and unprecedented ways that exceptional and unprecedented actions are needed to defend it, that (to quote the British Prime Minister who has driven so much of the reorientation in this area, Tony Blair) 'the rules of the game are changing'.

The health of our subject depends on its being able to balance the tensions that flow from its paradoxical need to provide exceptions to itself, its continued insistence on the legitimacy of extra-parliamentary opposition, and its determination – rooted in its violent history – not to regard all disturbances of public order as inherently wrong. The danger of the counter-terrorism discourse is that it leads to a collapse of all these tensions in the direction of security and away from civil liberties. A tranquil state that is rooted in fear is not a free society.