

DEMOCRACY AND CIVIL LIBERTIES: A REAPPRAISAL

**Text of a talk given by Conor Gearty at the Centre for the Study of Human Rights, LSE,
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In this lecture I want to consider afresh the language of civil liberties, democracy and human rights, and think through how these terms have been affected by the new anti-terrorism war that was begun after September 11 by President Bush and Mr Blair, and which now seems to be stretching into the indefinite future. This is a war that is being partly, some might say ostensibly, fought in the name of democracy, freedom and human rights, so it is important to get the language right, especially for those who have been opposed to the very concept of an 'anti-terrorism war'. At the end of my talk, I will suggest ways in which a rival model of democracy and civil liberties is both historically well-founded and still possible, not having been (yet?) entirely obliterated by the potentially repressive atmosphere that has been (I would say opportunistically) ushered in after 11 September.

Let me start with the idea of 'civil liberties'. On the Left and among liberals generally, 'civil liberties' and the need for their 'protection' are almost taken for granted as 'a good thing', but the term is not at all unproblematic. In a recent valuable article on the relationship between liberty and security in the post 11 September age, the political philosopher Jeremy Waldron identifies four meanings to the term 'civil liberties'. They are as follows:

(a) In its straightforward meaning 'civil liberties' refers to certain freedoms understood as actions that individuals might wish to perform, which (it is thought) the state should not restrict. Free speech, religious freedom, freedom of travel fall into this category.

(b) We also use the phrase 'civil liberties' to refer to more diffuse concerns about government power, which are not necessarily driven by any sense of a privileged type of action which individuals should be left free to perform. For example the government's ability to listen in on telephone conversations is a civil liberties concern, even though the 'liberty' in question – sometimes referred to as 'privacy' – does not amount to very much more than the condition of not being subjected to this scrutiny.

(c) Sometimes 'civil liberties' refers to procedural rights and powers which we think individuals should have when the state detains them or brings charges against them or plans

to punish them. These are rights like the right not to be detained without trial, the right to a fair trial process, the right to counsel, etc.

In an almost throwaway line, justifiable in the context of the paper, Waldron then remarks that there is a fourth possible approach to civil liberties, 'the rights associated with democracy and civic participation.'

Let me look more closely at these four definitions. The third of them, the provision of procedural safeguards for suspected criminals, is an important but in my view a discrete topic, better regarded for present purposes as a different subject, a branch of criminal justice, on which views as to the balance between justice and the individual may legitimately vary but upon which the core health of our civil liberties does not generally depend: how we treat people under police questioning or when they are otherwise suspected of a crime is an important matter but one that is different from, for example, how we police political marches and demonstrations.

Turning now to the first two of Waldron's definitions, both of these are concerned with, in some manner or another, asserting individual freedom at the expense of state power. Each involves a strong presumption against executive action. Their model of the world is highly individualistic, and insofar as this is the kind of 'freedom' and 'liberty' that people have in mind when they talk of 'human rights', then this underlying individualism applies to that term as well.

There is a lot to be said for having a presumption in favour of liberty, and for requiring governmental action to be justified. I do not dispute this for one moment, especially in relation to Waldron's first category of privileged freedoms. But this perspective on civil liberties and human rights, emphasising individual freedom as a matter almost of ideological commitment, should not be carried too far, lest it end up seeming to come close to opposing the idea of governmental action *as such*. The second category of residual liberty is particularly vulnerable in this regard. Marx's criticism of the idea of human rights as reflecting a world of 'isolated monads' is in point here. These versions of civil liberties encapsulate what Judith Shklar has called a 'liberalism of fear'¹ and they seem also to reflect Isaiah Berlin's concept of negative liberty.² For the purposes of this talk I would like to sum up these

¹ 'The Liberalism of Fear' in N L Rosenblum (ed), *Liberalism and the Moral Life* (Cambridge, Mass: Harvard University Press, 1989).

² 'Two concepts of liberty' in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

first two of Waldron's definitions as reflecting to a greater or lesser extent the 'libertarian' tendency within civil liberties.

Now compare the fourth category, 'the rights associated with democracy and civic participation'. We can immediately see that this is very different. It believes in the power of the state and is committed to the democratic state. It favours community activism, talking to people, engaging in politics. People usually only do this if they believe there is something worth changing, so this version of civil liberties also generally involves (though it does not have to) a belief in the transformative power of the state to bring about a more equal society. If you wanted to be neutral you could call this the Republican tendency in civil liberties; those who believe in democracy as a means to a set of egalitarian ends might want to call it the socialist tendency.

Believers in this republican version of civil liberties emphasise not liberty and individual freedom so much (though they recognise these as important, to varying degrees) but the right to vote, the freedom of political expression and – an essential point this – the sovereign power of the legislature to act on behalf of the people. They are relaxed about, perhaps even enthusiastic for, a strong executive arm within the State, and where libertarians see the state invading liberty they see legitimate intrusion into privilege for the good of all. 'That it not liberty', they reply to liberals affronted by some government intrusion, 'that is merely the proper control of license'. So there is a commitment to liberty in these civil libertarians, but it is less fixed, more easily rebutted than in Waldron's first two categories: perhaps it could be said (though no doubt the founding father of all this John Locke would disagree) that there is more of the 'civil' and less of the 'liberties' than in the first two definitions, which are practically all 'liberties' with hardly any 'civil' qualification.

Historically people committed to this Republican perspective on civil liberties have mistrusted the judicial branch because they have suspected judges to be more committed to the libertarian tendency than they would like. They have also historically mistrusted the language of human rights for the same reason. (I should say in passing, though, that I think the UK Human Rights Act far more closely reflects Waldron's fourth definition, the Republican approach to civil liberties, than it does the first two.)

Exploring the tension between these two perspectives on civil liberties has become more important than ever in recent years. In particular there is a large problem, an Achilles Heel, in the Republican model to which I want to return at the end of this talk, in the context of discussing the impact of the events of 11 September 2001. But first I need to complete the

picture by briefly drawing attention to a third perspective on civil liberties which is an offshoot of each of Waldron's four categories but which nevertheless differs from them in a vital respect. This version believes in *all four* of Waldron's definitions – but only for certain people. It is an important tendency within civil liberties that has been more powerful in the past than it is today but which has never finally disappeared. Let us call it the exclusivist tendency: civil liberties are great, both as presumptions in favour of freedom and as the building blocks of politics – but they are not for everybody.

Of course this is how civil liberties first got off the ground in this country, and it was only through hard graft and political struggle that the idea gradually took hold that everybody was entitled to a degree of freedom and in particular (Waldron's fourth category) a share in a democratic – rather than oligarchic or aristocratic or propertied – polity. Unpropertied men and women secured the right to vote; working people secured the right to associate; protection for criminal suspects was extended to all; and so on. This drive towards equality has been one of the great achievements of the democratic era. But there has continued to be this rival voice in civil liberties, one that proclaims a commitment to civil liberties while denying their availability to all. This was evident, obviously, during the two world wars of the last century, when draconian controls on liberty and political action may be thought to have been justified as a temporary expedient. But it was also the case during the Red Scare and the Cold War, when communist speech was controlled by men and women who *at the same time* saw themselves as devotees of freedom. The then Home Secretary Sir William Joynton-Hicks put his finger on it in a parliamentary debate in 1925 when he described 'freedom of speech' as involving 'the right to a full propagation of your opinion, provided you do not try to damage the Constitution.' The radical opponents he was jailing for their views were engaged in 'the wrong kind of speech'. In the 1930s the political freedom of leaders of the national unemployed workers' movement was sharply curtailed, as was (eventually) the right to march and associate of Mosley's Blackshirts. Ministers demonstrated the same kind of commitment to an exclusivist approach to civil liberties when restricting the freedom of the Irish during the period of the Northern Ireland troubles, and when justifying the media ban on the expression of certain Irish republican views that was in place in place during the late 1980s and 1990s. So this is not exactly an eccentric or marginal theme in civil liberties discourse.

Let me turn now to 11 September. The power of that moment has been to permit, justify would be the word that some would use, the creation of a set of circumstances which have put enormous pressure on the Republican tendency in civil liberties, or the democratic side of the subject, as I would describe it. Let me make clear that I am now talking mainly about the

United Kingdom. We have in power a government which is broadly speaking committed to the Republican model of civil liberties, a point that is easier to see if we leave the issue of criminal justice to one side, as of course I am suggesting we should. It believes in a properly functioning democratic system and on the whole is prepared for the ups and downs of managing such a method of rule: today's education vote taking place as we speak is evidence of that. It is also committed to governmental regulation and is not afraid therefore of big government: like true democrats it is more inclined to see license that needs to be controlled where the more liberal-minded civil libertarians might detect the infringement of basic liberty.

September 11 and its aftermath have seen the Republican tendency in our approach to civil liberties challenged from radically different directions by both the libertarian and exclusivist perspectives on the subject. The libertarians have been quick to reject out of hand the exercise of anti-terrorism powers because as I have earlier suggested they tend by inclination to be opposed in principle to (or at least very suspicious of) the exercise of *all* governmental power. It is not a case of the kind of government we have that concerns them, it is the very fact of government that makes them uneasy. So there are all these automatic reactions to government initiatives as leading to 'Big Brother', a 'surveillance society', etc. as though (I exaggerate but not much) the fact of a proposed law was enough to require opposition to it, without any consideration of its underlying necessity. I should say again that I agree that we should be very careful about permitting government to make inroads into our liberty, but that is not the same as saying that they should never do so.

I believe that while much of the hostility to government in the post-September 11 era is justified, some of the more extreme responses draw their rhetorical power from a libertarian rejection of government as such which is a position that I would unhesitatingly reject, as would – I imagine – most people on reflection, even those whose rhetoric derives unthinkingly from it. More to tonight's point, libertarian extremism camouflaged as the protection of civil liberties does immense damage to the latter's republican/democratic cause.

The civil libertarian exclusivists are saying something different after 11 September, and it is more dangerous. Certainly it has been heard far more openly within government than I believe it ought to have been. 'We have been right all along', they say, 'our freedoms are only for us, not *the other*'. As we have seen the definition of 'the other' has changed through the ages. It has been the union agitator, the activist woman, the Communist and the Irish. Now it is the turn of the foreign terrorist suspect, or maybe even 'the follower of Islam'. He or

she has no place in our civil libertarian model, even if they live here. Our freedoms are only for us.

The power of this embrace by the exclusivists lies in how it exploits the weakness in the Republican approach to civil liberties. I mentioned earlier that such a weakness in this model of government existed, and I need now to tackle it head-on. As I have said, an essential feature of the Republican approach to our subject is to empower government to be strong, to regulate where it needs to regulate, to control what has to be controlled. This is fine when it comes to bus lanes, unhealthy meat and even healthier monopolies. But what happens when this power is turned on the freedom of the citizenry and on the political process itself, and the executive of the day – eliding the issue of its own survival with that of the nation – uses its power to attack both those it defines as ‘the other’ and also its political opponents, thereby contriving in the words of the American scholar John Ely, ‘to block off the channels of political change’?

Legislation passed since 11 September has certainly attacked the liberty of the newly defined other, the ‘terrorist suspect’, a far wider category of person than we might like to believe is the case. We have de facto internment and wide-ranging terrorism laws, and we recently had horrendous draft proposals for a new emergency bill, now thankfully substantially watered down. Anti-terrorism laws also have the potential to subvert the political process. The Terrorism Act 2000 extends to internal affairs as well as external threats. The movement of peoples that is generated by the unsettled and grotesquely unequal nature of our post Cold War world translates itself into the perception of an asylum crisis at home, where once again in our history we find it easy to deny basic political rights and freedoms to the wrong kind of foreigners.

The question I want to end with, then, is a fundamental one for the health of our democracy: how do we keep alive the Republican perspective on civil liberties and the libertarian presumption of freedom while at the same time recognising the need for strong state action against terrorist attack (rejecting the extreme libertarian position), but without falling into the exclusivist trap of drifting into an authoritarian state in which no truly radical challenges to the status quo are possible, and in which only a portion of the population enjoys a wide range of civil liberties?

I think we can do this, and more to the point we are doing it. The flames of political freedom and of legitimate libertarianism are still burning albeit sometimes flickering under the pressure of unwelcome air. I know it is unusual for a civil liberties commentator not to end on

a forecast of doom and gloom, so I should perhaps explain why I am saying this. First, let's get the courts out of the way. They have been their usual, useless selves, present company excepted – as always! The deployment of police powers under the terrorism law against ordinary political activity has been upheld. The de facto internment power has been upheld as *in compliance with human rights*. The Lords are going to review the law, but haven't got round to listing the case yet. The ersatz 'court' in charge of detention has even said it will look at evidence obtained by torture as long as it is reliable. So much for the theory, much canvassed in the run up to enactment of the Human Rights Act 1998 that we needed the bill in order to empower the courts to protect us in times of emergency.

No, it has been in our frequently maligned political culture that we find evidence of a civil society still alive to the values of freedom and political liberty. The campaigning organisation Liberty has been to the fore here, as have a handful of politically-aware lawyers and journalists. The Churches and the professions have been strong. The Select Committee on Home Affairs under Chris Mullin and the Joint Committee on Human Rights have done well. There have continued to be protests; the detainees have not been forgotten by the people of this country even though clearly that is the executive's wish. Parliament's dislike of the Anti-Terrorism, Crime and Security Bill led to the insertion of sunset clauses in that measure (I prefer to call them day-break clauses in this context), and led also to the setting up of a committee of privy counsellors. Now that body of, I think it would be fair to say, establishment figures has reported, deploring the internment power in emphatic terms and demanding that Parliament debate the matter afresh. On another front recently opened by the Government, important concessions to the civil contingencies bill have been obtained as a result of vigorous political action.

I conclude that it is possible to keep the civil liberties flag flying as long as we know exactly what we mean by civil liberties and why we regard the term as so important, and having thought things through in this way (making the concessions that may have to be made en route) we are not afraid then to mark our territory out in a rational way and to defend it, against all-comers and with all the allies that come to hand.