

## DEMOCRACY AND CIVIL LIBERTIES: A REAPPRAISAL

**Text of a talk given by Francesca Klug at the Centre for the Study of Human Rights, LSE,  
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Thank you Conor for a fascinating exploration of the meaning of civil liberties and its link to democracy.

I think you have taken us a long way forward from the sometimes banal characterisation of **abuse** of civil liberties and human rights to mean virtually *anything* which states do to *interfere* with individual choices or liberties

I particularly appreciate your coining of a new categorisation of the **'Republican Tendency' in Civil Liberties**. I admit when I first heard this I thought you might be referring to the Bush doctrine which he set out in October 2002 as:

" Any time we've got any kind of *inkling* that somebody is *thinking* about doing something to an American and something to our homeland, you've just got to know we're moving on it, to protect the United Nations constitution and at the same time we're protecting you..."<sup>1</sup>

I want to begin with the hugely significant question with which you ended which I would sum up in my own words as follows:

If states have a duty to uphold civil liberties and human rights what does this obligation consist of when it is third parties who threaten to abuse fundamental rights and freedoms – for example by seeking to kill as many civilians as possible – and how is the state to fulfil this obligation without drifting into authoritarianism itself and curtailing the fundamental rights and liberties of – at a minimum – those deemed by the state to be associated with the threatening group.

Let me say that I think this is absolutely the right question to ask. This is – if you like – the 'big question' of our generation of both human rights scholars and activists. If we are to defeat the Bush doctrine of pre-emptive force, we *must* be heard to acknowledge the legitimate concerns about safety and security that lie behind it.

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<sup>1</sup> Address, Aberdeen, South Dakota, 31 October 2002:

For while it is not difficult – from a human rights perspective – to criticise Guantanamo Bay or our own Anti-Terrorism legislation – **although it is hugely important we do so** – what is much harder is to be able to develop a human rights framework that not only addresses what governments *shouldn't* do but what they *should* do to protect our human rights from gross violations by others, (whether the 'others' be states, groups or individuals).

I would go even further and suggest that addressing this question is not only fundamental to keeping the flame of human rights alive in current circumstances, but to mapping out what is *distinct* about human rights discourse and its relationship to democracy.

The phrase human rights (as distinct from inalienable rights or civil liberties) was not widely used before WW2. It was a term that took off in the wake of the Universal Declaration which bears its name and it was this Declaration, of course, which set the framework for all subsequent international and regional human rights treaties.

Whilst many of the precise circumstances which led to the drafting of the Universal Declaration of Human Rights (or UDHR) were very different to those we face today, I would suggest there were certain profound features in common. And for this reason the drafters of the UDHR addressed a not dissimilar 'big question' to the one we are asking tonight.

It is important to appreciate, that the UN delegates who drafted the Declaration were not preoccupied with the same concerns as the revolutionaries or constitutionalists who shaped the earlier Enlightenment bills of rights from the 1689 British Bill of Rights through to the French Declaration and American Bill of Rights. These pioneers put the civil in the liberty by combining their quest for 'the rights of man' with their struggles for democracy.

Drawing on the popularised theories of John Locke, Tom Paine and others, these early civil libertarians established three related principles (which bears out Jeremy Waldron's categorisation).

- i) that Governments which abused individuals' so-called 'natural rights' to free thought and liberty should forfeit their legitimacy

- ii) that meaningful citizenship of the new democratic republics depended on rights to free speech and protest.
- iii) that concerns over due process and fair trial rights lay in the significant proportion of prosecutions by non-democratic governments for crimes against the state. In this context, the state was cast as the 'criminal' who violated the 'natural rights' to free speech or protest of the prosecuted who became the 'victim' in such trials.

But the backdrop to the drafting of the UDHR in 1947-8 was very different.

The world had just witnessed the *failure* of constitutional liberties in the heart of supposedly democratic Europe to provide *any* protection against genocidal murder and rampant abuse of the most basic rights and liberties.

It was not just a question of an all-powerful state terrorising its disenfranchised citizens – although there was plenty of that. Thousands of people had colluded with the Nazi government or occupying power all over Europe to deport or murder their fellow citizens. As with more recent massacres and attempted genocides in Bosnia, Rwanda and Kosovo, the 'classic model' of state tyranny was not sufficient to explain this.

Conscious of the inhumanity that individuals had shown to their fellow human beings, under orders or otherwise, the drafters of the UDHR were concerned to develop a set of ethical values which went beyond endorsing the principle of liberty and which addressed a more complex set of relationships than the individual to the state.

The question they faced was therefore not unlike the one we are asking tonight – how do you preserve and build on the civil liberties that an earlier generation had won by *reducing* the power of the state, whilst charging the *same* state with the responsibility of preventing individuals from destroying the rights of others.

It is by responding to this 'big question,' I would suggest, that human rights discourse starts to move towards the acceptance of what Conor identifies as 'the Republican tendency in civil

liberties ' in which, as he puts it, 'there is a belief in the transformative power of the state to bring about a more equal society.'

Time prevents us from discussing the process by which the drafters of the UDHR came upon their tentative resolutions to this 'big question,' but suffice to say, it lay in the introduction of three new values that were barely visible in earlier civil liberties discourse.

With significant input from the non-liberal and non-Western discourses of Islam, Confucianism and Socialism, these three distinct values were dignity, equality and community.

The whole of the Declaration – and consequently in my view modern human rights discourse – can be understood as the working through of the relationship of these 3 'new' human rights values with the traditional civil libertarian principles of liberty, democratic freedoms and justice.

As one of the prime authors of the Declaration, the French representative Rene Cassin was keen to emphasise, the UDHR was *not* “a mere offshoot of the eighteenth century tree of rights.”<sup>2</sup>

With **dignity** came the proposition that the state had to take positive measures to respect individuals' inherent worth rather than just refrain from abusing their liberties.

Article 22 – which introduces the economic, social and cultural rights section of the Declaration – describes these rights as “indispensable for [human] dignity.”

With **equality**, the drafters chose not *just* to stick with the Enlightenment formula of 'equality *before the law*' but to introduce the thoroughly modern formulation that everyone is entitled to the rights in the Declaration “without distinction of any kind,” such as race, colour, sex, religion, and so forth (Article 2). “Equal protection *of the law*” and “protection against any discrimination” – including “incitement to discrimination” – were emphasised (Article 7).

Once it was accepted that human rights values require states to proactively take measures to root out discrimination then the concept of liberty was bound to change.

It could no longer mean that everyone was free to choose who to rent their property to or who to employ, for example. If *everyone's* rights were to be secured there had to be limits to individual liberty.

But it was the introduction of the idea that 'everyone has duties to the community' in A29 of the UDHR which takes us closest to addressing Conor's 'big question' and which most distinguishes human rights discourse from civil liberties<sup>4</sup>.

After much debate, the delegates introduced the concept of 'community' with the explanation that it is only through the 'community' that "the full development" of an individual's personality" is possible.

The implications of this insight are profound. If human beings do not just need *freedom* to flourish but a thriving community on which they depend, then it is inevitable that you have to put *limits* on individual rights.

And these limits are not just to ensure freedom for *all* (which is what equality achieves, if you like) but for something like the 'common good.' That there must be limitations on individual rights "for the purpose of securing due recognition and respect for the rights and freedoms of others" is established in the same Article 29 which introduces the idea of 'duties to the community.'

This notion that society is more than just a collection of discreet individuals is a major and distinctive theme of post-war (or second wave) human rights thinking. It is the riposte to the Marxist critique that rights discourse should be written off as egoistic and individualistic.

But there is a resounding caveat to human rights limitations on individual rights and freedoms. A caveat which, finally, takes us to the link between civil liberties, human rights and democracy – that axis of virtue – that Conor so usefully discusses.

In all human rights treaties, from the UDHR onwards any limitations on fundamental rights must be lawful, proportionate and necessary to achieve a prescribed goal "in a democratic society."

Although never precisely defined, this phrase 'in a democratic society' is repeated over and over again in human rights treaties. Given that human rights are widely understood as providing a bulwark against majority rule, and are sometimes described as anti-democratic for that reason, where does this apparent circularity leave us?

It seems to me that at least leaves us with a *framework* with which to address our 'big question.'; one that civil liberties discourse on its own struggles to provide.

Why? Because although human rights, like civil liberties, can be understood in functional terms – as providing the openness, and engagement *necessary* for a democratic society – human rights goes much further in setting boundaries to the *outcomes* of a democracy, *not just* the *process*.

So in human rights terms legislatures should *not only* be *restrained* from passing laws which unnecessarily imperil liberty, democracy or justice, but they should be *required* to take measures which uphold the values of dignity, equality and community such as introducing social security or preventing discrimination or, for that matter, protecting victims of violent crime

In other words, in human rights discourse the state is no longer necessarily in the dock as the 'criminal violator' of individual freedoms, as it was in 18<sup>th</sup> century libertarian discourse, when it takes measures to deter violent crime and prosecute alleged criminals. In certain defined circumstances it is in fact *obliged* to "take preventative ...measures", in the stated view of the European Court of Human Rights "to protect an individual whose life is at risk from the criminal acts of another individual."<sup>2</sup>

**So in human rights terms, measures which fill gaps in child protection or the eradication of racial or domestic violence should not just be proofed for necessity and proportionality but should be demanded. By the same token, Civil Contingency measures may be something civil libertarians can live with provided they are proportionate, but – with the same proportionality safeguard – they are something human rights promoters should welcome (at least if they have not been updated in fifty years).**

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<sup>2</sup> *Osman v UK* [1990] EHRLR 228, para 115. See also *T v UK*; *V v UK* [1999] where the EctHR spoke of the state's "duty ...to take measures for the protection of the public from violent crime."

But lest this be confused with a watered down version of the Bush doctrine, it is important to keep emphasising that such limits on individual freedoms have *definable limits of their own*.

In human rights terms our protection cannot be at the expense of obliterating the most basic rights and freedoms of a minority, however tiny, who are given no effective opportunity to defend themselves from the allegations of their accusers. **For such people are also a part of the community to whom we all owe responsibilities; Mr Bush and Mr Blair included.**