

REFLECTIONS ON CIVIL LIBERTIES IN AN AGE OF COUNTER-TERRORISM

C A GEARTY*

The philosophical formulation of the question of rational law – the question of how an association of free and equal citizens can be constructed through the means of positive law – forms the emancipatory horizon of expectation within which the resistance to what appears as an unreasonable reality becomes visible. (Jurgen Habermass, *The Postnational Constellation*¹).

THE PROBLEM DEFINED

The critical perspective that we bring to the present state of the law, or to this or that proposal for change, is formed in large part by our understanding of what we as a political society are committed to, and of what we believe ourselves to be capable. This set of expectations is in turn made possible by the kind of institutional structure within which, as active citizens, we find ourselves. The better our framework, the more open it claims to be, the more justice it delivers, then the more critical we are of decisions which to our eyes involve departures from what we believe the system to be capable of achieving, and from what, furthermore, we think it ought to provide. Hence the great disappointments always suffered by egalitarian campaigners in democratic systems, not only under occasional reactionary administrations but under left wing and social democratic ones as well. Enough is never done, because enough can never be done (short of the achievement of an egalitarian revolution which the 20th century has taught us will produce at best only a brief mirage of progress, at worst unnecessary bloodshed and counter-reaction).

The fate of the socialist-minded activist in modern democratic politics is that of the perpetual bemoaner, lamenting the reactionary zeal of the Right or the betrayals of the governing Left, as the case may be. Even when progress is acknowledged to be evident, it is inevitably condemned by such critics as too little too late, or (even worse) as a token morsel thrown down to put them off the scent. The tone of politics on the Left in contemporary democracy is routinely one of doom and gloom, of betrayal and anger rather than of optimism and pragmatic policy ambition. Such language is at odds with the sunnier idealism with which

* Professor of Human Rights Law and Rausing Director of the Centre for the Study of Human Rights, LSE.

¹ (Cambridge, Polity Press, 2001), p 58.

socialist ideas started. Nor is particularly appealing at election time. The attraction of the 'third way' to very successful left-leaning politicians like Bill Clinton and Tony Blair has lain in the way it has allowed them to escape the negative rhetoric of their political heartlands without formally entering the enemy's right-wing territory. The goal of democratic success in the societies in which they have found themselves has necessitated for both men just such a switch, away from their respective political bases – the bastions of the left-wing political activists with their dreams of equality and their constant disappointments – and towards a middle ground populated by a quite different sort of person, one with much more run-of-the-mill ambitions for the state and for what it can and should do for those within its jurisdiction.

These people, and there are far more of them than there are political enthusiasts of any sort, have a different set of assumptions about the framework of government than those of the actively involved, and as a result their critical perspective on what can and cannot be achieved will often be very different from that of the engaged political player. And because many of these individuals vote, it is their version of achievability, of what is to be expected, of what emancipatory initiatives should be undertaken, that really counts. This is frustrating for the political activist who is involved in agitation and meetings and planning around the clock, such being their nature. It is also annoying for the thinker who has sat quietly in his or her office and worked out exactly why equality is a moral imperative. Why should the version of the possible to which the activist and the scholar has come be usurped by these once-very-four-years-citizens? It may be democracy and they are stuck with it, they know that. But they can't help accusing their own leadership of letting them down, of betrayal even, when (in the hope of re-election) that leadership continues in power to notice these whimsical occasional citizens, who may only vote every four years but who read the papers and form judgments every day. The disappointments of the Left flow from the minority status of its emancipatory horizon of expectation, which in turn results from its ambitious but again (other than at the level of woolly rhetoric) self-defeatingly sectional view both as to how effectively to construct an association of free and equal citizens, and as to which policies to promulgate within such a body.

An extreme example of this dissonance between persons who are politically engaged (usually on the Left) on the one hand and the general population on the other is to be found in the area of civil liberties. Few subjects excite the political activist, the liberal and the concerned lawyer more than the need to protect civil liberties. The term is frequently called into action as a shield against governmental proposals for change in a wide range of areas, such as in relation to the police, criminal justice, prisons, terrorism, public order, criminal procedure, data protection, surveillance, and identity cards. Indeed there are many others;

civil liberties has become a catch-all kind of phrase, denoting many kinds of conduct which may not self-evidently seem to engage the term but which have been dragged within its remit by government attack. Where privacy is concerned, often there is not even any individual behaviour as such involved but rather some part of a person (voice, genetic code, blood) that it is necessary to protect from the state. Organisations deeply rooted in civil society devote themselves to the protection of civil liberties, the subject being defined in this reactive way. Lawyers' associations are usually also committed in the same manner. There is rarely talk of 'the enhancement of civil liberties' with a consequent need for focus on and discrimination as to what the term entails. As a result of this reactive nature, the effort of identification and definition only rarely arises: a civil liberty becomes known by the fact of a government attack upon it.

It may be because of this openness of meaning, with its consequence that the language of civil liberties is so often deployed against so many proposals for action by the state, but the truth would seem to be that the wider community does not invariably show the same solicitude for civil liberties that is revealed so persistently and so frequently by the political activist, the liberal intellectual and the public lawyer. Seats in parliament do not usually depend on a representative's voting record on civil liberties. Nor do the opinion polls punish politicians for making proposals condemned as invasions of our civil liberties. Indeed the opposite may even be the case, with such criticisms having the entirely counter-productive effect of causing the electorate to believe that the government might indeed be onto something worthwhile, on drugs-control for example or serious crime or anti-social behaviour. Having been condemned consistently by civil liberties groups for his cavalier approach to freedom, the UK Home Secretary David Blunkett was nevertheless rated the third most popular member of the British cabinet in a poll taken shortly after the 2003 attack on Iraq.² His rating remained exactly as it had been a year before, notwithstanding the enactment in the interim of draconian anti-terrorism legislation which had excited the indignation of civil libertarian activists as few bills have in recent years.

There is something almost stylised about the way in which civil libertarian issues feed into the modern political discourse. A proposal is presented by a government minister, on crime, immigration, terrorism or some other contemporary issue. It is then attacked by the 'civil liberties lobby' as was to be expected, indeed (for reasons mentioned above) perhaps as was even thought politically desirable by the minister. This or that change may or may not then be made, dependant on the strength of the 'lobby' in the individual case. There is no

² *Guardian* 23 April 2003, p 1.

particular sense of the civil libertarian perspective being integral to the debate, other than to the extent that the minister satisfies him- or herself that the measures being proposed do not 'unacceptably erode' civil liberties. Such assertions are invariably made, with ministers rarely denying that civil liberties matter, instead claiming that civil liberties concerns have been 'fully taken into account' (or some such phrase). What are not fully or (sometimes) even partially regarded are the views of the primary defenders of civil liberties, the activist NGOs and lawyers dedicated to their protection from government abuse. These defenders of civil liberties have become something akin to the road-haulage association or the consumer groups, a hurdle that occasionally lies in the way of enactment of legislation, which may be hard or easy to get by depending on the particular issue, but which is no more than that.

In its modern form, the protection of civil liberties has become the work of a lobby, not the duty of the entire citizenry, and a lobby moreover whose claim to act on behalf of the whole of society is not shared by this wider audience; indeed the general public are far more likely to see the civil liberties crowd less as the defenders of their own freedom and more as the shop stewards of thieves, terrorists and 'fat cat' lawyers. This is an attitude which is frequently encouraged by government. Sometimes even deeper, politically motivated hatred is directed at civil libertarians. The attacks on the ACLU in the United States have sometimes reached a pitch of hostility reminiscent of the Cold War era, as when the presidential candidate Michael Dukakis was forced to defend his membership of the organisation in the 1980s. In the United Kingdom, recent Labour Home Secretaries have been able to use their authority in a movement traditionally committed to civil liberties as a platform for serious efforts to distinguish the protection of civil liberties (to which they as ministers say they are and remain committed) from the ostensible protectors of those same freedoms (who are described as self-serving or fanatical or as 'not living in the real world'³).

The world-changing events of 11 September 2001 have had their own large effect on the traditional discourse of civil liberties, piling further pressure on the term, connecting it once more with anti-patriotic elements and widening still further the division between the popular and the liberal/activist perceptions of what the protection of civil liberties entails. This disconnection was already evident by the time of the attacks on the twin Towers and the Pentagon; it was not generated by that event. What is new about the era that has been ushered in by 11 September, however, has been the willingness of elements within the leadership in certain democratic states to deepen still further their hostility to the language of civil liberties, to open up a new front in their assault on the liberal/activist understanding of

³ The phrase is that of the United Kingdom's Home Secretary David Blunkett, used in May 2003 in the course of a speech rebutting criticisms of certain legislative proposals from a retired senior judge.

the phrase, by asking publicly whether now is not the right the time to give up on civil liberties altogether, at least insofar as certain suspect groups and perhaps also other undesirables are concerned. The argument since 11 September has therefore moved from that we have just described; it is not so much any more entirely about who protects civil liberties better, the politician representing the community as a whole or the 'civil libertarian' intent on this one thing. Rather it is now increasingly about whether the civil liberties of certain groups can afford to be taken into account *at all*. This is a dramatic and pretty new twist, the first breach (in the democratic era outside of formal war at least) in a previously unqualified (at least rhetorically) commitment to the equal protection of the laws, and an indication perhaps of future assaults on the whole idea of civil liberties by a rival discourse rooted exclusively in concerns of national security and counter-terrorism.⁴

The danger inherent in these developments (both pre- and post 11 September) for the activist/civil libertarian position simply cannot be exaggerated: if current trends continue, such citizens will find that the rhetorical and indeed practically-expressed priorities which they believe have taken for granted for generations will be turned on their head: where there was freedom, there will now be security; where there was individual liberty there will henceforth be the interests of the state; where there was due process there will be almost casual executive discretion; and so on *ad nauseam*. The civil libertarian who persists in using the old language will cease to be at odds with the prevailing, more community-minded point of view, as is still the case at present, and will become merely eccentric, of historical interest perhaps, a curiosity certainly – and irrelevant. The old liberal's language kit will be full of tired metaphors redolent of a past era, while those who count – those who tell the police what to do and arrange the detention camps and the telephone intercepts, sanction the torture and so on – will have to hand the freshness of phraseology that flow from a rejuvenation of fear. The civil libertarian will become like the jaded priest clinging to homilies redolent of an era long past.

The major language shift described above is not yet complete. The idea of 'civil liberties' still carries some resonance not only with the liberal activists but also with the wider community and with some political leaders. Behind the times as always, certain judicial cultures are only now developing strong civil libertarian perspectives. (The American having been earlier in the civil libertarian game are closer to the exit than the rest.) There is still a sense of the idea of civil liberties being in conflict with more 'modern' needs such as for national (or homeland) security, rather than having been yet wholly vanquished by such needs. It is still possible that

⁴ A new perspective which has been able to build on the distinction between the resident/citizen and the non-resident/alien which has to some extent always been in the law.

a catastrophic overreach of state power (a failed invasion; a pre-emptive attack on north Korea that goes wrong; US economic collapse) or some monstrous overplaying of the anti-civil libertarian hand (mass detention; the careless use of torture) might reconfigure the political landscape so as to permit the re-emergence and reassertion of the old language. However the more likely eventuality at the time of writing is a continuation of the slow and inexorable decline in the traditional idea of what is entailed by civil liberties, the continuation of its marginalisation and its eventual replacement by the new security paradigm.

In order to fight back effectively, something that (we have to believe) is still possible even at this late stage, proponents of civil liberties must develop a much clearer intellectual strategy than has been evident in the past. This strategy should be rooted in a proper understanding of the historical origins of the term, and also express a clear view as to what the subject does (and more to the point does not) encompass. Slimmed down and historically aware, a new revitalised and confident language of civil liberties need not go down without a fight: we owe that at least to those generations of past activists without whose struggles we would have nothing now to defend.

THE ORIGINS OF CIVIL LIBERTIES

Our first task is to clarify the terms that we are using. Let us begin by asserting that the hey-day of *civil liberties*, the moment in time when this version of freedom imposed itself on the historical imagination, occurred in England in the 17th century. It was during the last decades of this period that the liberty and freedom (both in the broadest sense) of the property-owning were successfully asserted against the absolutist inclinations of the Stuart monarchy. After a few, quasi-democratic turnings that led nowhere, there eventually emerged the constitutional settlement of 1688, under which the property owners of the day secured the enjoyment of freedom and liberty in general, and the civil liberties that came with such freedom in particular: namely the right to vote for representatives in the sovereign parliament, and the ancillary rights of expression and assembly that went with, and made meaningful, that right to vote. The connection between civil liberties and freedom at the abstract level of political theory was very early made, and the link between civil liberties and parliamentary sovereignty was likewise present at the birth of civil liberties in their modern form. The power of the phrase lay in its ability both to reach up into the clouds of abstract philosophy, and at the same time down into the fields of pragmatic constitution-building (as we would call it today).

During the nineteenth century, which for present purposes we can call the 'Age of Democratisation' and lengthen from 1789 (French Revolution) to the general emergence of the universal franchise in (to use a term loosely) the West in the aftermath of the First World War, there is to be noted a marked expansion of the categories of holders of civil liberties in what today we would call the old democracies. During this period, the right to vote is extended beyond the property-owner to men generally and then to women as well. The ancillary freedoms of liberty, expression, association and assembly also came during this time to be enjoyed by a far wider set of persons than had previously been the case, with a climate of official tolerance gradually replacing the atmosphere of repression with which the period began. From being an essential tool in the elite's government of a place in its own interest, civil liberties gradually emerged as an entitlement available to be claimed by all, and to the protection of which it was thought governments and other components of civil society ought to be dedicated.

How did these changes come about? Each political environment has its own story to tell. As far as Britain is concerned, the advances of the 17th century were secured via what we would call today *civil disobedience* (the deliberate, principled breach of a law judged unjust), but they also required much more than this, embracing what we would now describe as *terrorism* (the indiscriminate killing of civilians and/or assaults on their property practised by subversive elements in order to communicate a message to government or to secure an advantage over the authorities) and (let us call it) *military-style insurgency* (attacks by organised subversive forces on the political and military authorities of the day). Because rival armies eventually took to the field, the conflict in 17th century England also embraced *civil war* with the intervening stage of *guerrilla warfare* perhaps not having been resorted to. After the radical changes of the 1690s, there were fairly robust coalitions of interests determined to obtain for themselves the civil liberties that that earlier generation of revolutionaries had secured for the propertied. Realising these ambitions required action on the streets and in the printing presses. There were lots of crowds shouting slogans and threatening revolution, assembling where they should not have done and generally (from the legal point of view) making criminal nuisances of themselves.

A brisk survey of the period will find plenty of examples of 'civil disobedience', 'direct action', even 'terrorism'. There was of course conventional parliamentary engagement as well, such as the reform legislation passed in Britain in 1832 and 1867. These various techniques of securing change were in their 19th century context about many things, of course, but from the perspective of this article it is worth noting that they were at least partly about achieving a situation of general respect for civil liberties: civil liberties were the *end*, not the *means* to the

end as the other forms of action (terrorism, civil disobedience, civil war etc) had been in the 17th century and were in the 19th. These other tools of political change were mechanisms for securing outcomes rather than – as was the case with civil liberties – efforts to achieve agreed democratic procedures for change. This important difference may explain why historically the Right has shared (in, it is true, a frustratingly ill-defined, inconsistent, almost whimsical, romantic kind of way) the Left's attachment to civil liberties. The origins of the subject are deeply conservative: it is about joining the status quo, not subverting it.

Thus it was during this age of democratisation that the articulation of what was meant by civil liberties emphasised not the creation or enhancement of these freedoms but rather that the need for them should be accorded 'respect' and 'protection'. The subject was not about fabricating something wholly new; rather it was about sharing out among the many something that was already available to the few. What then was that 'something'? Clearly the right to vote was the first essential requirement. As for the 'ancillary' freedoms of liberty, expression, association and assembly, those seeking (among a mixture of other goals) *respect* for their civil liberties during this period were not demanding that they be given these rights in the way they were demanding the right to vote. Rather they were insisting that they be allowed exercise these 'rights' without state interference. They wanted to protest without being shot and to publish political pamphlets without being jailed. It is true that certain laws, against combinations for example, or sedition, might well have been regarded by 19th century radicals as irredeemably bad. But we can guess that the democratic agitators and union activists of the time would not have been conscious of calling for the *abolition* of all the laws that were deployed against them: those of trespass, breach of the peace, unlawful assembly, binding over etc. It is more likely that to the extent that they thought about it at all, they believed in the main in having some public order law on the books. It was more a case of seeking to ensure that these laws were no longer exercised in a way that effectively destroyed *their* civil liberties.

This is a key point of principle. Under the traditional English/British system, in theory everybody had these ancillary civil liberties except insofar as they were removed by the operation of law. In practice, however, because the law extended so widely, a group's or an individual's civil liberties could be effectively extinguished by the hostile exercise of official discretion, if the authorities chose to act antagonistically. When we understand this point we can see why the subject of civil liberties so often resolves itself into a study of official discretion: look at the British and Irish cases of *Beatty v Gillbanks*;⁵ *O'Kelly v Harvey*⁶ and

⁵ (1882) LR 9 QBD 308.

Duncan v Jones.⁷ All three of these decisions involved not just the police/magistrates deciding to break up a hostile gathering: there was an element of pre-planning on both sides (especially *Duncan v Jones*). The law on the protection of civil liberties involves analysis of the hostile exercise of official discretion 'on the spot' as it were, but it also involves study of the hostile exercise of such discretion, provoked by the peaceful action of persons intent on asserting their civil liberties: Mrs Jones outside the training centre, Mr O'Kelly at his meeting, Captain Beatty and his team of Salvationists. Here the subject of civil liberties comes very close to that of civil disobedience. The latter is about the principled defiance of a law judged unjust; these cases are about the principled defiance of an unjust exercise of a discretion under a law that might in itself not be regarded as unjust.

We should now briefly summarise what we have been saying so far. First, civil liberties are those freedoms which are necessary to the proper functioning of a decision-making assembly designed on the representative principle (the right to vote, the freedoms of speech, assembly, association etc). Second, though pre-democratic in their origin, the concept of civil liberties was ideally suited to the democratic era – the wider the range of persons entitled to representation, the more the civil liberties of the propertied few became the 'rights' of the many. Third, civil liberties are about facilitating an effective system of representative government; they are not about achieving any particular political outcome – they differ therefore from forms of political agitation (civil disobedience, terrorism, military insurgency) which are extra-parliamentary in nature and which are invariably driven by a commitment to policy outcomes rather than procedural integrity. Fourth, while the subject of civil liberties does involve the imposition of certain positive obligations on the state (mainly related to the right to vote and the prevention of disruption of the civil liberties of others by private parties), it is primarily concerned with ensuring that there is no inappropriate interference by the state with those civil liberties (expression, assembly etc) which are essential both to the proper exercise of that right to vote and to the political activity that occurs all the time in a democracy, whether or not a vote is in the offing. Fifth, the subject is as a result of all that we have said more narrowly defined than is commonly assumed; criminal justice for example should be regarded as outside the remit of civil liberties proper, as should prison law and police powers generally, though it is recognised that all these subjects can impact on civil liberties to the extent that official discretion exercisable under these laws impacts on the right to vote or the ancillary rights of expression, assembly etc. For sixthly and finally the special case of the right to vote apart, the subject is primarily about the exercise of official discretion under the law, rather than about the laws themselves. It follows that what especially interests

⁶ (1883) 15 Cox CC 435.

⁷ [1936] 1 KB 218.

the civil libertarian scholar is the practice of civil liberties, what the subject looks like on the streets rather than on the statute book.

THE TAMING OF DEMOCRACY

With this ground cleared, we can see that the triumph of democratic forms represents also a victory for the idea of civil liberties. The two are inextricably interconnected. Democracy is about ensuring that the representatives of any given community get to decide what is in the best interests of that community, with each elector having an equal say in the outcome of the elections that determine who is to sit in the representative assembly. Civil liberties are about guaranteeing that equal say. It might have been thought that the achievement of democracy would have secured the future of civil liberties for all time, making the current attacks on them literally impossible to imagine. But that is to underestimate the fragility of the hold that representative democracy has on our political imagination. The drift away from a commitment to civil liberties described in the first part of this paper has not come from nowhere. It is a subset of a wider and more fundamental corrosion in allegiance to the idea of representative democracy itself. This weakening of confidence in democracy has made easier the assaults on civil liberties that have (as we have seen) nearly completely wrested from it its traditional, democracy-reinforcing meaning. For while the reach of the language of western-style democracy reaches further and further across the globe, so what is entailed by 'democracy' shifts before our eyes, becoming in the traditional democracies more and more about presidential-style, media-friendly business-oriented leaders, and in the new 'democracies' being less and less about process (the right to vote, expression etc) and more about outcomes (the 'right' kind of market-sensitive policies; the most agreeable (to foreign eyes) leadership; foreign/US control of vital national assets; etc).⁸

It is not entirely accurate to talk of the 'corrosion' of the democratic ideal, as though there was once a golden age of untrammelled commitment to the representative paradigm. The victory of the democratic principle was fragile even at the moment of its achievement and its hold on the 20th century imagination was always precarious. The hatred for democracy shown by 19th century defenders of the capitalist status quo was rooted in the assumption that victory for the representative principle was bound to usher in a transformation of society

⁸ The most explicit exponents of this new brand of democracy are to be found in the Project for the New American Century, which is housed in the American Enterprise Institute, an organisation with very close contact with the present US administration: for a summary of their views see 'Where Next?' *New Internationalist*, May 2003, p 4.

that was guaranteed to lead to the extinction of their way of life. This is also what democratic socialists tended to believe,⁹ and what the propagandists of democracy maintained. The people were bound to vote for equality if given equality of voting power. The problem with this approach from the socialist perspective lay in its commitment to process rather than outcomes. We have already noted this key procedural character to civil liberties, and how it differentiates the subject from more outcome-based techniques of securing political change, such as terrorism, civil disobedience and so on. What mattered was that the people should have the power to decide; less important was what in fact they chose to mandate their representatives to do.

Through this chink in the 19th century coalition between the twin forces of socialism and democracy, reactionary elements were able to mount a brilliant rearguard action, accepting representative democracy in principle but at the same time throwing up various smokescreens and performing innumerable tricks so as to confuse or dazzle the newly liberated masses onto their side. Some of these manoeuvres were relatively benign, even beneficial, such as the expansion of welfare provision that is to be found being enacted in many western states at around this time. Less attractive was a new emphasis on imperialism, which in Britain for example created a basis in nationalism for the support that came to be shown by a substantial number of working class people for the Conservative Party: Benjamin Disraeli is still revered by Tory ideologists precisely because he was the first to see that electoral reform did not necessarily entail the obliteration of the ruling class.

In the twentieth century, the mechanism for controlling the optimistic, egalitarian impulses of the democratic ideal has been constituted out of ingredients that we can describe, using a familiar contemporary metaphor, as both 'tough and tender'. As far as the latter is concerned, the concessions initiated by or wrought out of the rich and propertied classes have continued, accelerated after the Russian revolution of 1917 and the establishment of what for many years looked to be a real alternative to capitalist democracy. Substantial gains have been made, and continue to be made, for the majority of the people which would not have been available in the absence of the democratic assertion of the indelibility of the linkage between political power and the wishes of all those affected by the exercise of that power. The tough side of the new democratic age has in contrast been evident in an emphasis on national security and the need to be ever vigilant to protect the democratic system from threats to its existence (both external and internal). The tension between these two models of politics, one taking democracy and equality as its starting point, the other focusing

⁹ See E Bernstein, *The Preconditions of Socialism* (H Tudor (ed and trans)) (Cambridge, Cambridge University Press, 1993).

emphatically on national survival, has been a constant of the democratic era. The first is hopeful, oriented towards freedom and civil liberties, optimistic and confident, inclined towards equality and social justice. The second is gloomier, more anxious, fearful of the future and pessimistic about progress, with no time for ambitious programmes or radical reform.

It has been through the language of war that the national security model has found its clearest expression. In the western democracies, the two world wars of (from their perspective) 1914-18 and 1939-45 provided many well-known opportunities for the evasion of democratic duties, from the postponement of elections through to the large-scale suspension of civil liberties. More interesting from the perspective of this article have been the 'cold' wars that have been pursued ('waged' is perhaps not quite the right word) in peacetime. There was the 'red scare' of the 1920s and of course the well-known activities of the McCarthyites and (to use perhaps an apt term) their fellow-travellers in the US and abroad during the 1950s.¹⁰ The actions taken against left of centre and socialist groups under the aegis of these various 'cold' wars, in the US and Britain but also across the democratic world, served to rein in the potentially wilder and more excessive enthusiasms of democracy, but without disturbing the democratic ideal to which all were able to feel they remained committed: the persecution of left-wing activists simply belonged to a different discourse and therefore did not engage with the democratic self-image of these states, much less cause embarrassment to their democracy-loving citizens. The fence that surrounded the democratic playing field, reducing its space for action, was invisible to most of those who played the game. Believing themselves to be wholly sovereign, they did not notice that truly radical ideas never occurred to them; the few who wandered out of the designated playing area were quickly arrested and expelled from normal politics.

The idea of terrorism has been around for a long time and has served for decades as an adjunct to the national security paradigm described above. The British government was able to persuade elected representatives in parliament to enact harsh anti-civil libertarian measures on the basis of the threat of Irish-based terrorism in 1939, 1974, 1976 and 1984. The last of these measures, passed when the Cold War had entered what we can now see as its final phase, extended these powers to encompass 'international terrorists', a prescient indicator of how things were to develop. For with the end of the collapse of Soviet power and the consequent conclusion of the Cold War, the 'terrorist threat' has come into its own as the primary basis for stifling the natural energy of the democratic ideal. It is not just about the

¹⁰ See S Walker, *In Defence of American Liberties. A History of the ACLU* (New York, Oxford University Press, 1990).

laws, though these were beginning to come thick and fast well before 11 September 2001, legislation in 1996, 1998 and 2000 in Britain and in 1996 in the USA, for example.¹¹ It is also – and primarily perhaps – about the atmosphere that is engendered in democratic states by the endless talk of terrorism and the ‘threat’ it poses to our whole way of life. How can a community concentrate on bettering its lot when it is constantly worried about its future? Fear is a great dissipator of political energy that might if left alone be effectively spent elsewhere, on tackling inequality for example, or on addressing world poverty. At very least, the attacks of 11 September have served to make this point even more obvious, transforming the idea of counter-terrorism from a residual weapon in a bigger war into a full-scale, self-standing and permanent ‘war on terrorism’, capable of being waged against visible and invisible enemies, in different ways as policy demands, and without the need for very much action on the enemy side.¹² For those always searching (consciously or unconsciously, institutionally or individually) for ways to hinder democratic growth, this new war could not have been more perfectly designed.¹³

Thus we conclude this part of these reflections by noting that the battle over the language of civil liberties that we identified in our introductory section is part of a larger conflict over what the idea of (representative) democracy entails. The public discourse in all democracies has invariably involved a tension between, on the one hand, the egalitarian/activist/liberal model of what democracy can achieve for its citizenry, and, on the other, the national security, ‘we-are-all-doomed’ paradigm, with its emphasis on survival at all costs. The events of 11 September 2001, preceded as they were by an extraordinary judge-made election in the world’s most powerful democracy, have given a firm upper hand to those whose inclination is to emphasise the need for national security and whose view of democracy is driven more by the desire that it deliver certain outcomes than that its procedure be clear and fair. As noted above, post 11 September, the language of democracy itself is at risk of being turned into an adjunct to US foreign policy, emphasising American-style liberty and freedom rather than the need for elections and civil liberties.¹⁴ A gloomy scenario indeed, from the perspective of the civil libertarian wedded to what the phrase used to mean. With the protection traditionally

¹¹ See generally on the British side C Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (Oxford, Oxford University Press, 2002).

¹² See on the legislative and political reaction in the US N Chang, *Silencing Political Dissent. How Post-September 11 anti-terrorism measures threaten our civil liberties* (New York, Seven Stories Press, 2002); and two excellent reports by the Lawyers Committee for Human Rights: *A Year of Loss: Re-examining civil liberties since 11 September* (New York, 2002); *Imbalance of Power. How changes to US law and policy since 9/11 erode human rights and civil liberties* (New York, 2003).

¹³ Particularly worrying is the development of a US military command for the United States: for the details see R Dreyfuss, ‘Bringing the War Home’ *The Nation*, 26 May 2003, p 18.

¹⁴ See P Berman, *Terror and Liberalism* (New York, W W Norton and Co, 2003) arguing for a ‘new radicalism’ and a ‘liberal American interventionism’ to promote ‘democratic values throughout the world’ (quotes from flyleaf).

afforded the phrase by society's commitment to democracy being washed away before their eyes, what hope do civil libertarians have of avoiding being drowned in the subsequent authoritarian deluge?

One big 20th century idea has been missing so far from our analysis. It certainly looms large and loud in our contemporary discourses, achieving more notice than civil liberties protection has ever managed. Where does human rights fit in the dismal catalogue of democratic decline which has just been mapped out in general terms? Was this not supposed to be the big idea of the post Cold War age? Where is the language of 'human rights' when it is most needed?

THE DOUBLE-EDGED PROMISE OF HUMAN RIGHTS

In its modern form, the idea of human rights first took root in the immediate aftermath of the Second World War. Promoted by Franklin Roosevelt during the war and given force by the Universal Declaration on Human Rights, this new language seemed to express well the desire of humanity to make a fresh start after the horrors of the years just past. As set out in the Universal Declaration, the range of human rights inherent in us all is vast, covering basic aspects of our individual dignity, many civil and political rights and also a range of social and economic entitlements. This UN document was of course intentionally unenforceable, self-consciously a mission statement for humanity rather than an immediately realisable set of goals for the people who read it. In their stronger, judicially-enforceable form, human rights of the immediate post-war period were narrower in focus, largely restricted to civil and political rights, or what we have called here civil liberties. The new constitutional arrangements for the defeated Fascist powers contained rights guarantees of this sort, and a novel regional co-operative arrangement in Europe (the Council of Europe) produced a judicially enforceable Convention primarily concerned with civil and political rights, the European Convention on Human Rights and Fundamental Freedom.

The drafters of these documents, essentially the victors in the Second World War, were dedicated supporters of democracy but they were equally vehement opponents of communism, and indeed of any kind of radical form of socialism. The link between market freedom and democracy was in their minds an indelible one. They were therefore faced with the challenge that the democratic socialists of the 19th century had failed, and with which (for example) the current US regime in Iraq is wrestling: how do you design a democratic system that always produces the answer you want? The civil libertarian/human rights charters of the

post-war period provided part of an answer to this when they embraced the right to property within their remit and (usually) made it impossible for any legislature, however democratically constituted, to tamper with that right (other than was permitted by the qualifications on the guarantee that were invariably set out in the framework document itself). More pertinently for the purposes of this article, these 'basic human rights' documents also generally permitted exceptions to be made to civil liberties where these were judged required to protect the democratic character of the state. The rights to freedom of expression, assembly and association and so on can in most human rights charters that matter (ie those that can bite on conduct at the political level) be set aside where the executive judges such action to be 'necessary in a democratic society' or some-such phrase. Further exceptions can frequently be made for public emergencies and the like: a whole scholarship around 'derogations' from basic human rights has grown up reflecting this fact.

These characteristics of this immediate post-war 'wave'¹⁵ of human rights development, designed to copper-fasten democracy from both right- and (more to the point) left-wing attack, have been followed up in most of the domestic bills of rights that have been incorporated into the national arrangements of old and newly emerging (ie post colonial) states from the 1950s onwards. Civil and political rights – civil liberties – are given positive protection, but not as absolute entitlements: their protection must yield both in individual cases from time to time (where the deployer of such freedom must be controlled in the interests of democracy) and also more generally in periods of acute political tension (a situation of public emergency). The explosion of rights-talk that has followed the end of the Cold War reflects the beacon-quality of this language as a repository of many of our better feelings about our fellow humans in an increasingly competitive world.¹⁶ Its force has threatened to swamp more traditional discourses within it, such as that which has been under scrutiny in this essay. Does the language of civil liberties gain from having been so enmeshed in this new human rights metaphor?

At one level, the constitutionalisation of civil liberties protection in human rights charters and/or in domestic bills of rights has clearly provided added protection for civil liberties. The old problem of a properly elected legislature choosing to attack civil liberties (a case of the democratic child biting the hand that feeds it its legitimacy) has always been a real one. It is a variant of the means/end dilemma that is inherent in every democrat's determination to see

¹⁵ F Klug, *Values for a Godless Age* (London, Penguin Books, 2000).

¹⁶ But for a critical appraisal of the trend see K Sellars, *The Rise and Rise of Human Rights* (Stroud, Sutton Publishing, 2002); S Holmes and C R Sunstein, *The Cost of Rights* (New York, W W Norton, 1999).

a fully sovereign legislature in place – a definition of success is that there is no ready means of controlling what the elected assembly chooses to do. Locating civil liberties in a constitutional code that oversees such legislatures may diminish the sovereign purity of the latter but it does at least give civil liberties a fighting chance of surviving, even in the teeth of some whipped-up (or genuine) popular anger. There is plenty of evidence of the existence of such charters/codes/bills of rights having had a disciplining effect on the way in which legislatures have approached the limiting of civil liberties within the jurisdictions for which they are responsible.¹⁷ The more courts charged with the enforcement of such documents come to regard civil liberties as important, the more the fighting chance of their survival increases. And as suggested above, the old paradigm of a class-based judicial branch wholly immune to the necessity of protecting political activists outside the ruling elite no longer holds good, at least not to the same extent as in the past.¹⁸

On the other hand, the constitutionalisation of civil liberties has proved less secure than might have been imagined. First, there are certain disadvantages in being caught up in a fungible kind of way in the every-growing and ever-more-unwieldy basket of human rights. While it is perfectly true that the initial focus in the early international and domestic documents on human rights was on civil and political rights, the subject has greatly expanded since then, and the insights in the Universal Declaration about what it means to be human have been translated into further documents (at both the international and domestic levels) which deal with a far wider range of subjects than civil liberties.¹⁹ Indeed the extent of international human rights is now such that it presents a full and, to the social democrat, very pleasing account of how life should be, but it cannot remotely be described as political uncontroversial, even in democratic systems of government of the best sort and particularly where the openness of the electoral system has permitted the rise of authoritarian proponents of liberal capitalism. It has surely been quite proper to develop international law as a cutting edge in the changing of attitudes to equality, discrimination, poverty and the abuses of minority groups across the world, but this forging ahead has left civil liberties looking like just a few freedoms among the many, with no especial or different call on our attention.

¹⁷ For a European and UK perspective on this issue see my 'Civil Liberties and Human Rights' in P Leyland and N Bamforth (eds), *The Contemporary Constitution* (Oxford, Hart Publishing, forthcoming 2003).

¹⁸ A trend assisted in some jurisdictions by reforms to the process of judicial appointment; for an update on the fast-moving UK position see K Malleon, 'Another Nail in the Coffin' (2002) 152 *NLJ* 1573.

¹⁹ See generally I Brownlie and G S Goodwin-Gill, *Basic Documents on Human Rights* (4th edn, Oxford, Oxford University Press, 2002).

Secondly, and following from this first point, in its (to this author at least) laudable drive to improve the lot of humanity, international human rights law has left the idea of democracy in its slip stream.²⁰ To the activist human rights lawyer, the nation state often seems to stand in the way of progress, to act as a barrier between the progressive ideas of human rights and the people these ideas are meant to serve. This is the case whether or not the representatives of such places are democratically elected. Of course the more democratic a state the more likely the government is to engage properly and fairly with the proponents of international human rights, but despite this the relationship remains an adversarial one, at least to some extent. Meanwhile international law has provided no alternative democratic framework to facilitate the development of human rights standards, to rein in the international human rights activists where necessary, and to ensure the effective enforcement of the codes of rights that are agreed, properly connecting them (if needs be) to democratic judgments about resources. The lack of this international democratic culture, allied to the habit of seeing national governments as standing in the way of change, has caused the international human rights lawyer to be less inclined to see civil and political rights as as important as they were once believed to be: they are about consolidating democracy, but what good has democracy been in delivering the outcomes in which the proponents of international human rights profoundly believe? This division between human rights and civil and political rights has been to the marked disadvantage of the latter.

Thirdly there is the problem of the capacity for override available in most human rights charters which incorporate civil liberties within their remit. We have mentioned the exceptions and derogations that can be made. Their focus will usually be on civil and political rights rather than on other social and economic entitlements since it is to the limitation of the former that a state, even a democratic state, will usually look when trying (or asserting that it is trying) to defend itself. It is true that the relevant international and domestic documents usually provide an appropriately restrictive framework for the operation of exceptions to and derogations from fundamental human rights: there is much talk in the documents and the case law of necessity, proportionately, 'pressing social need' and the like. All this is excellent in that it disciplines the state authorities minded to depart from civil liberties to think before doing so. However certain disadvantages inevitably flow from the existence of such suspensory opportunities in human rights charters.

²⁰ 'Democracy used to be a word that international legal commentators preferred to avoid': S Marks, 'The End of History? Reflections on some international legal theses' (1997) 8 *EJIL* 449. The 'used to' here attests to some progress in the area, evidenced by the material covered in Marks's piece. See generally the work of Thomas Franck, especially his 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46.

First, the very availability to the state of a course of conduct which can ignore (or greatly reduce) respect for civil liberties puts before the executive authorities an option for action which would previously have been unthinkable, there having been no words previously available to describe it: a wholesale departure from civil liberties without recourse to primary, democratically-rooted legislation to mandate such action. The override clauses contained in typical human rights charter can in most states be actualised without proper democratic accountability. Having been offered a button marked 'self-destruct', it would be surprising if governments – even non-malicious ones – did not occasionally succumb to the temptation to press it. This is especially so in the new atmosphere after 11 September, and has already produced a derogation in the United Kingdom. Where legislation restrictive of civil liberties is promoted, often in tandem with the declaration of such states of emergency, this constitutional language of crisis and national security provides a ready short-hand for draconian action: witness the range of repressive initiatives taken in the aftermath of 11 September in countries with theoretically impeccable bills of rights: we can only guess at what might have happened in the US if the drafters of that country's bill of rights had thought to put in it an emergency override clause.²¹

Second, there is the problem of the fragility of the linguistic safeguards built into the exception and derogation clauses in the typical human rights document. As noted above, the controlling words may read impressively, but the reality is that the judicial arm given the responsibility of overseeing their application, whether international or national, will invariably – and perhaps even (in democratic terms) rightly – accord the executive a high degree of latitude in its judgment as to what is required to protect the state. The point is attested to in case law from across the world.²² Even the absolutist guarantees of the US bill of rights have been shown not to be what they seem when interpreted by the judges in light of war or war-like domestic circumstances.²³ Save in wholly exceptional circumstances, judicial challenges to derogations from and exceptions to civil and political rights made in the name of national security usually end in failure.²⁴ This is the case even in those jurisdictions where the contemporary judicial fashion is for careful protection of civil liberties. 'Human rights' may be a trump in the pack of political cards, but the 'interests of national security' is the trump of trumps, carrying all before it.

²¹ For a taste of the implications for civil rights and due process of the changes in legislation and in the political climate generally in the US, see the reports of the Lawyers' Committee for Human Rights, n 12 above, and *Odah v United States* 321 F 3d 1134 (2003).

²² See in the UK, *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502; [2003] 1 All ER 816.

²³ A well-known example is *Dennis v United States* 341 US 494 (1951).

²⁴ An important European Court of Human Rights example is *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539.

Thirdly, and following from our second point, there is the problem of legitimisation. An attack on civil liberties that takes place baldly, either extra-legally or via legislation designed for just this purpose, has at least the virtue of being out in the open, and therefore being clear for all to see.²⁵ Of course there is still debate about the nature of the attack, how serious it is and whether it is justifiable, but the discussion is at least framed in the appropriate way. But a restriction of civil liberties which takes place within the framework of a human rights document (either a 'necessary' exception to free speech for example, or an action to counter a 'public emergency') can be presented as not an attack at all, but rather as an action *mandated* by the state's *commitment* to human rights. Far from infringing human rights, the repression is (fully) compatible with them. This legitimisation of what might have been considered by the naïve to be an attack on civil liberties then draws added strength from the (almost inevitable) judicial decision upholding the emergency action as valid, ie in accord with human rights standards. So internment, censorship, proscription and the like are *consistent with* rather than *departures from* human rights standards. The repressive state can deepen its reactionary engagement with domestic political dissent while all the time asserting confidently and (in legal terms) correctly that it is *respecting* human rights standards. The ordinary bulk of the population do not notice the shrinking of the political market-place of ideas, or if they do, they can be assured that the protestors they see being dragged away from the shopping mall²⁶ or the internees whom they read about being locked up without charge for years on end²⁷ or the organisations they find it is no longer lawful to join²⁸ are actually all being dealt with in a way that is in perfect harmony with 'the very best human rights standards,' a fact attested to by all the 'human rights experts'. And it is not impossible to imagine that torture, called by another name of course and surrounded by judicial safeguards (at least initially), could fit itself fitting neatly into this new human rights paradigm.

THE PROBLEM ADDRESSED

The last section has ended on a bleak, Orwellian note. Just as in 1984 the ministries of peace and love meant war and internal security, so today we have departments of defence engaging in hostile action abroad, and a set of 'guaranteed human rights' to underpin internal

²⁵ Where the action is truly heinous, there may be difficulties of detection of course, but 'out in the open' means here self-evidently a departure from civil liberties standards.

²⁶ *Appleby v United Kingdom*, European Court of Human Rights, 6 May 2003.

²⁷ *A v Secretary of State for the Home Department*, n 22 above.

²⁸ *R (O'Driscoll) v Secretary of State for the Home Department* [2002] EWHC 2477 (Admin).

repression at home. Of course the point is exaggerated, but with our language on the move at such speed and with so vast a power as the US seemingly engaged in reshaping our understanding of what democracy means (both internally and externally), who can be so sure that the next longish resting place for the language that governs our social organisation might not be along these lines? The battle-ground over which our next bit of this part of human history is being fought is the field demarcated 'democracy' and it is to the patch in that area marked 'civil liberties' that we need now to return. As we have already discussed, proponents of the current drift away from traditional assumptions about what democracy and civil liberties mean are vocally scathing of the sectionalism, the lack of realism, and the self-interestedness of the 'civil liberties lobby'. Defenders of political freedom counter with assertions about the importance of democracy and the need to respect our traditional liberties. Who is likely to emerge victoriously from this conflict?

At the moment it is no contest. Governments holds all the cards, including a full set of both suits of trumps. Behind them largely unaccountable and sometimes entirely secret 'security organisations' feed their democratic leaders with chilling stories of imminent terrorism and easily usable weapons of mass destruction, which horrifying narratives are then passed on to the wider electorate shrouded in mystery and (more to the point) always (the issues being so sensitive) scantily dressed so far as any detail is concerned. The media in open, democratic cultures play their part in maintaining this atmosphere of fear, often whipping it up voluntarily, sometimes fabricating dramatic versions of the truth out of 'information' supplied by the security state.²⁹ The intellectual community is developing some momentum behind a radical critique of the whole idea of democracy, with authors beginning to stress – to the widespread praise of distinguished colleagues - the inconvenience and disadvantage of traditional ideas of representativeness and accountability.³⁰ At very least, as we have observed at least twice above, the content of what is meant by democracy is under scrutiny, with the substantive end (freedom, US-style) gradually supplanting the traditional, process-based commitment to free elections and the sovereignty of the people that used to be what the idea of representative democracy entailed.

Against these forces are ranged a puny alliance of intellectuals, liberals, lawyers and dissidents, who are not even clear about what they mean by civil liberties and whose very marginality is in today's anti-foundationalist culture itself evidence of failure: if they were right,

²⁹ On the media, see A Roy, 'The Ordinary Person's Guide to Empire' *In These Times* 26 May 2003, p 17.

³⁰ See F Zakaria, *The Future of Freedom* (W W Norton and Co, New York, 2003) reviewed by N Ferguson under the title 'Overdoing democracy' in *The New York Times Book Review*, 13 April 2003, p 9.

surely they would be stronger than they are? This last insight is an implication in the work not of Conservative social Darwinians but of the post-modern Left, supposedly on the civil libertarian side! As the influential philosopher Richard Rorty has remarked, it is 'central to the idea of a liberal society that, in respect to words as opposed to deeds, persuasion as opposed to force, anything goes.'³¹ This is because in no society, including a liberal society, can there ever be absolute right answers out in the non-verbal ether, waiting to be found and adopted by this or that party; it follows that a 'liberal society is one which is content to call "true" whatever the upshot of such encounters [as between openminded forces] turns out to be.'³² According to Rorty, the high priest of this brand of word-thought, what 'liberal culture needs' is merely 'an improved self-description rather than a set of foundations'.³³ The various governments in power in the liberal democracies of the world have set about such a redescription with gusto since 11 September 2001, though whether any true-blooded liberal or even Rorty's liberal ironist, would regard it as an improvement is not so much an open as a rhetorical question, destined to elicit an automatic, negative.

The winners in this unequal battle of the labels should not be called right merely because they have won, or are winning. Such passivity ill-suits the civil libertarian left, which forged its identity in action, often against seemingly hopeless odds. It is not inevitable that Rorty is right and there is nothing worth fighting for out there, beyond words: modified forms of foundationalism which demand that there is still space for democracy, civil liberties and human rights remain available for use by those temperamentally so inclined, and these perspectives fit such activists better than the jaded 'know-all/know nothing' superiority of the post-modern scholar.³⁴ But even if Rorty and his 'school' are right, then we nevertheless owe it to past generations of fighters and activists who struggled for democracy and civil liberties, often dying for these causes, or being imprisoned, or treated harshly for it, not to forsake their world-view without so much as a murmur of dissent. Even the flightiest of language tricksters appreciates the power of the idea of solidarity, and if all we had left was a sense of solidarity with the brave democratic souls of the past who have made us what we are, then that should be enough to energise a fight back.

What then is to be done? First, there is some intellectual pruning that is urgently needed. As we indicated earlier, the branches on the tree of (civil) liberty marked 'criminal justice',

³¹ *Contingency, Irony, and Solidarity* (Cambridge, Cambridge University Press, 1989), pp 51-2.

³² *ibid* p 52.

³³ *ibid*.

³⁴ Particularly good are Habermas, n 1 above, ch 5; and S Lukes, 'Five Fables about Human Rights' in S Shute and S Hurley (eds), *The Oxford Amnesty Lectures, 1993* (Basic Books, New York, 1993) p 19.

'prisoners' rights', 'civil actions against the police' and so on need to be lopped off and sent across to other discourses. Civil liberties is not about the length of a criminal sentence, the state of a country's jails or whether a victim should be compensated for alleged police brutality. These are important issues to be sure, but they belong elsewhere, and the controversy that surrounds them has confused the subject of civil liberties and debilitated its capacity to communicate its message.³⁵ As will be obvious from all that we have said here, the core of the subject lies in the protection of political freedom. Civil liberties is concerned with making representative democracy work. Its perspective on the world idealises the arrangement of our public space in a way desired by the people within that space, with each being accorded equality of respect so far as their choice is concerned. Thus civil liberties is about securing free and fair elections and about ensuring that wealth does not dominate such elections. It is also about ensuring that the political atmosphere around such elections and in society generally is free and open, with all views being able to be heard, even if not believed. Though once invariably wedded to a particular outcome (socialism), today's civil libertarians are committed to the process rather than to what it is likely to deliver; they may have private opinions on the latter but these do not make them more or less civil libertarian in their perspective.

Secondly, having sharpened the remit of the subject, adherents to it should go on the attack. They should challenge current assumptions about the national security state, hold conferences in which they propose change – on campaign funding, on media ownership, on political speech – rather than merely react defensively to the latest piece of aggressive speculation by the post-democratic liberal extremists. A broad front should be possible, from the unions concerned about freedom of association on the Left to nostalgic civil libertarians on the Right. The need to redress the international law presumption away from democracy should preoccupy the modern civil libertarian whose energies should be as sharply focused on the global as on the local.³⁶ Politics is certain to present flashpoints around which mass campaigns can be built, the purpose of which should be to re-inculcate into the wider public some grasp of the importance of freedom and civil liberties. The consciousness-raising that occurred before and during the Anglo-American attack on Iraq in the Spring of 2003 might with care be extrapolated into a broader political agenda. The requirement for an explicit renewal of anti-terrorism laws in the UK provides an opportunity for critical engagement with

³⁵ For an original and penetrating analysis of the field of criminal justice see A Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell, London, 2002).

³⁶ See H Shutt, *A New Democracy. Alternatives to a Bankrupt World Order* (London, Zed Books, 2001); A Brysk, *Globalisation and Human Rights* (Berkeley, UCLA Press, 2002); T Dunne and N J Wheeler, *Human Rights in Global Politics* (Cambridge, Cambridge University Press, 1999).

the national security state,³⁷ and we should note that the United States Senate has already had to back down from making permanent ‘the sweeping antiterrorism powers’ in the 2001 Act though this is seen by informed observers as a retreat which ‘clears [the] way for [a] new bill’.³⁸ Nevertheless the fight is still out there to be had: the atmosphere in the US may be bleak but it is not so awful that a debate cannot even be had (yet).

Finally, the advocates of civil liberties need to grit their teeth and borrow some of the techniques of political campaigning that they have forgotten and that their opponents have mastered in recent years. Civil libertarian campaigners need to relearn the virtues of patience and focus, and to remind themselves of the importance such traditional socialist values as fraternity and solidarity. They need to reach out to the wider community, and use techniques of communication that connect with this audience and which are not to be sniffed at merely because they were not used in generations gone by. Advertising and branding need not be the exclusive weapons of the anti-civil libertarians; nor should money be on one side only. The aim should be for a scholarly reassertion of what civil liberties mean and why democracy matters, which can then be focused on particular political campaigns. These movements would then be able to draw support from a global coalition of civil libertarian minded citizens fully aware of the intellectual underpinning of what they were arguing for. A link between the scholar, the liberal lawyer and the trade unions seems vital here. If properly funded, such a campaign would be able to enjoy the benefits of modern techniques of communication and of marketing. This does not require a single movement, but it does suggest more co-ordination than is at present to be found: anarchy remains as attractive as it has always been, and just as futile. If the democratic and civil libertarian agenda is in place and working, the outcomes – fairness, justice and equality of opportunity for all – will come over time.

³⁷ The committee of privy counsellors charged with reviewing the 2001 Act is expected to report by the end of the year.

³⁸ *New York Times*, 9 May 2003, p 1.