

'Can we preserve liberty in an 'Age of Terrorism'?

J Ford, 2003¹

Extremism in defence of liberty is no vice...[m]oderation in the pursuit of justice is no virtue!

Barry Goldwater, Republican presidential nominee, 1964²

We must never, in the fight against terrorism, lower our standards to theirs...to compromise on the protection of human rights would [be to] hand terrorists a victory they cannot achieve on their own.

UN Secretary-General Kofi Annan, September 2003³

We will teach [terrorists] a lesson far beyond what the threat of force could convey. We will get them on our turf: on the law.

Noel Koch, CIA Counterterrorist Unit, 1998

Introduction

Because by definition they target aspects of normal civilian life and hold that at ransom to threats, terrorist acts are a threat to free society in a direct sense. But the threat to liberty at issue here is not that of terrorism itself, but the dangers that might lie in the methods that we adopt in order to *respond* to those engaged in terrorism.

The risk, of course, is that in acting to protect the systems that secure our democratic and civil freedoms, we might eat away at what we are supposedly fighting for.

My argument is that the threat posed by terrorism is not so severe as to make Goldwater's statement presently defensible as one of general approach. Instead, extreme measures would erode the values protected disproportionately to the threat posed. The long-term, pervasive, open-ended nature of any struggle with terrorism carries with it a risk that our society might, without a careful, deliberate degree of governmental self-restraint, harden in imperceptible but significant ways. Much of value, things that cannot be measured, might be lost. The power of the executive might creep imperceptibly wider in response to an amorphous threat. As Kofi Annan warns us, there are also sound reasons to resist

¹ Submission for the Ross Parish Essay Competition, Sydney, 2003.

² Pre-nomination Speech, San Francisco, 16 July 1964, advocating increased opposition to communism.

³ 'Fighting Terrorism for Humanity', New York, 22 September 2003.

the temptation to achieve interim victories by resorting too readily to methods that are indistinguishable from those of the terrorist. And it is necessary to consider the balance between liberty and order in conditions less stable than those prevailing in our country.

The outlook of this essay is one of realism and optimism. Liberties will be affected by security measures. Provided we are conscious of the risks to freedom when we formulate those measures, there is no reason why liberty cannot be preserved. Indeed it can blossom. A lesson of the Cold War might be that complex, deep democracies are designed to withstand the internal challenge (our own system's response) to this external (anti-system) threat. Rather than mumble about a conspiracy of government power, citizens in the established liberal democracies should act as the guardians of their own liberties. The task is more difficult in less stable environments. There, perhaps the example set by stable democracies in nourishing the Rule of Law is the most effective strategy to prevent terrorism leading to a curtailment of freedoms.

Since there is not simply a willingness but a necessity to overcome terrorism, it follows that a way to do so exists. Likewise, the question is not whether we *can* preserve liberty in the process of dealing with terrorism; we *must* do so, for otherwise (as Kofi Annan reminds us), the struggle is already somehow lost.

The answer to *how* we do what we clearly must do, is difficult and elusive, but revolves around measures founded upon respect for the Rule of Law. If this is our guide, terror must play on 'our turf', and so not only can it never win, but we can never lose our own values in the process.

Democratic Freedoms and Emergencies

Barry Goldwater was aware, in making his statement, of the danger of over-acting in defense of liberty. He called for order to be balanced with freedom 'so that order lacking liberty will not become the slavery of the prison cell'.

This balance is critical to a free society. Civil liberties are not granted but adhere in citizens unless justifiably limited. The default position should always be the one

calculated to maximize freedom of citizens: built into it is an acknowledgment that the normal situation is one where, base security aside, people are generally left in peace by their own government.

Of course, in an era of heightened terrorist threat, it is argued that the situation is not normal and liberties might need to be curtailed for security reasons. Most liberal democracies are, to a point, self-limiting in the means by which their executive can act even where that action is designed to ensure the peace and security of citizens. What is important, however, is that liberties currently enjoyed are not seen as luxuries that melt away with the first sign that more robust action is needed to preserve the overall scheme. A sophisticated liberal society can accommodate emergency measures. Only the very short-sighted would argue that civil liberties are an unnecessary encumbrance on the capacity to act decisively. The law is not so blunt an instrument that systems cannot be devised to both protect liberties and protect citizens from terror. I develop this below.

In 2001 and since, democracy itself was said to be under assault from organized terror. Zelman Freeman is no doubt correct in saying (if he means it as a general statement of principle) that during security crises, the whole community accepts that it must give up some individual rights and liberties, but that a robust political democracy ensures that these rights are restored when the crisis has passed.⁴

This is indeed so, but the problem is that the ‘War on Terror’, and all the changes it rings, is not likely to be a short term phenomenon. All leaders call it a complex problem with no end in sight. It is not a passing crisis. We must therefore look out for creeping limitations on real participation in public and private life that have no real or justifiable security benefits.

The Cold War lesson also suggests that democracy needs more than certain necessities, it involves the reconciliation of many inputs, the open interplay of rival ideas, ‘some

⁴ Zelman Freeman, *Quadrant* May 2002 (Letters to Editor) responding to Ronald Conway (*Quadrant* March 2002)

tolerance of differing truths'.⁵ In the speech already quoted from, Barry Goldwater spoke too of the need to cherish the values of 'balance, diversity, creative difference', in adopting any strong measures against an opposing ideology.

In order to preserve liberty, we need to reinvigorate the civil environment in which those liberties are enjoyed. Responding to terrorism by a deliberate flourishing of what we stand for, while holding to the Rule of Law, will mean that terror can never indirectly lead to the erosion of our values. Shaken by terrorist attacks, we should challenge ourselves in bettering our own democratic experience, and avoid settling for a comfortable, complacent, apathetic, and non-participatory national life, within a simplistic, undemanding conception of democracy.

While security will be a paramount concern of citizens, part of the robustness that enables democracies to survive security crises, comes from resisting the temptation to centralise, formalise, and control. That is, if democracy itself is really under attack, its best defence is the example it shows the world of an equivalent form of 'grace under fire'.

We have useful precedent to guide us in preserving liberties in a time of long-term ideological struggle. The Cold War was fought against a backdrop that set the 'order vs. freedom' dilemma in stark terms.⁶ Arguably, civil liberties emerged (at least in certain liberal democracies) relatively intact despite the pressure on governments to exert more and more supervision and control over subversion.

It is not self-evident that the response adopted by most liberal democracies so far has unjustifiably undermined freedoms. The structure of laws erected to deal with the threat of terrorism is something over which, ultimately (or in theory?), the citizens have control. If liberty is not preserved in the fight against terror, it might be the citizens who were not alert enough to prevent it.

⁵ Freeman, *ibid*, quoting Bernard Frick.

⁶ The Cold War was a situation of relative balance of power. To the extent that terrorists are an extreme fringe, an overly-forceful legislative response tends only to legitimate their voice, to set them up in opposition, thus giving them and their message more credibility than it might otherwise deserve.

It is also arguable that, in Australia, the raft of anti-terrorism laws introduced in June 2002 (which received bi-partisan support) and since, have struck an adequate balance between providing a mechanism to deal with terrorism, and preserving civil liberties. Freedom need not be undermined in dealing with terror. Lawyers, like other professionals in their respective fields, are able to build elaborate, flexible and adaptable frameworks – here to preserve civil rights in a way compatible with community expectations about security. But even if the laws appear too wide, and if we have a strong, rigid legal framework, there are other balances and checks in the system, conventions of restraint in the exercise of public power, a tradition of responsible government, and protections where the measures are not proportional to the constitutional power given to the legislature and executive: so ‘national security’ regulations that would have unreasonably restrained political activity were ruled invalid by the High Court of Australia in the *Communist Party Case*.

But it is not chauvinistic to say that in countries that do not enjoy the level or richness of societal freedom that Australians enjoy, and where such a tradition of government restraint is weaker, striking the liberty / order balance becomes rather more difficult.

Liberty in Less Stable Situations

The focus of this question, again, is not what we need to do about terrorists and terrorism directly but what we need to refrain from doing to ourselves and our extant freedoms.

But there are two ways, briefly, in which it is relevant to comment on the strategy chosen in any ‘war’ on terror. First, we do damage to the things we value if we descend to a level of evil in fighting evil. Secondly, there much that can be done about conditions in which terrorist messages, both rational and irrational, tend to find fertile grounds and followers.⁷

⁷ There is some danger in too readily or simplistically making the link between desperation (poverty, exclusion) etc, and terrorism. In the address already referred to, Kofi Annan recognizes this point.

That is to say, in answering whether we can preserve liberty in an age of terrorism, any answer ‘yes!’ must surely add ‘but part of doing so means taking a good look at the underlying factors that allow extremism to have any foothold at all’.

From the perspective of those in the stable democracies, this is because we cannot be said to have preserved our liberty if conditions exist around us that would allow terror, inimical to the enjoyment of liberties, to breed. From the perspective of those not in the stable democracies, liberty is unlikely to be secured, and then preserved, if the material conditions of life make extreme measures (governmental and terrorist) more likely.

It is interesting to reflect again here on the Cold War experience, this time of those living in the various ‘pawn’ states: to avoid terrorists (then, ‘communists’) seizing the State, it may again be felt necessary that regimes be supported which cannot be said to preserve their citizens’ freedoms. Where the stakes are higher, and the danger of loss of control to terrorist-inspired forces is great, the answer to the balance to be struck might be different.

The possibility of preserving liberties might also be different in those countries struggling to forge democracy where there is a legacy of autocratic or military rule. There the temptation to severely curtail freedoms in the name of the war on terror, might become irresistible. For example, Christopher Kremmer has written that the price of fighting terrorism has been ‘a sanctioned return to repression in Asia’ so that the quality of democracy there is being tested.⁸ While this may be overstated, and due deference to other nations aside, in cooperating with certain countries on terrorism, we cannot be said to have really ‘preserved liberties’ in the long term if we have overlooked those of the citizens of allies who helped us to secure our own pleasant situation.

It is thus part of my argument that preserving liberty in an age of terrorism requires assisting such countries with the sort of capacity building that will enable them to resist this temptation to over-exert authority. In this way, positive measures to increase equity and participation in the world economy do help to ensure the ground threshold conditions for democracy, and the strength in civil society to keep checks on executive power.

⁸ ‘Freedom on the line’, *Sydney Morning Herald* (Weekend), 13 – 14 September 2003.

Conclusion

Kofi Annan was surely right when he said that while one cannot compromise with terrorists, “we must use our heads, not our hearts, in deciding our response”. In doing so he was conscious of a blunt response leading to an erosion of the values that have led us to oppose what terrorism ‘stands for’.

Measures are needed to ensure we are ready to beat terror. But we must guard against ourselves. We must assist countries where the balance between order and freedom is harder to make. We must use our collective ‘heads’.

I have argued that we can also use our ‘hearts’. We can and must defeat terrorism, can and must ensure liberty flourishes. We must not cower in our freedoms but maximize them, and develop those of others. Without arrogance, we must perhaps even show off, that open democratic societies founded on respect for the Rule of Law can preserve liberty in an age of terrorism. In this way, less stable societies to whom we preach and model democracy and the Rule of Law, are also given hope.

To use a cricketing analogy, sometimes the best form of defence is to play one’s natural game. To flourish, to do more than simply abide in safety. And then liberty will not only endure, it will prevail⁹.

⁹ William Faulkner, Acceptance Speech, Nobel Prize for Literature, Stockholm 10 December 1950.