FREEDOM IN BLAIR'S BRITAIN

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> *"…the choice for mankind lay between freedom and happiness, and…for the great bulk of mankind, happiness was better…the party was the eternal guardian of the weak, a dedicated sect doing evil that good might come, sacrificing its own happiness to that of others."*

So wrote Mr Blair – not I hasten to add, our Prime Minister, but another famous Blair – Eric Arthur Blair a.k.a George Orwell in Chapter 3 of his most chilling and famous work "1984". Last summer, nearly twenty years beyond the projected doomsday of Orwell's totalitarian fantasy, Prime Minister Blair addressed the United States Congress in rather more inspirational tones:

> *"The spread of freedom is the best security for the free. It is our last line of defence and our first line of attack. And just as the terrorist seeks to divide humanity in hate, so we have to unify it around an idea. And that idea is liberty…the liberty we seek is not for some but for all, for that is the only true path to victory in this struggle."*

A few days later, I received the greatest and most daunting honour of being appointed as the thirteenth person to run Liberty or the National Council for Civil Liberties and to take this country's leading domestic civil liberties and human rights pressure group into its seventieth year.

This evening almost exactly marks Liberty's seventieth birthday and I face another daunting honour, that of returning to my old school and to a place of learning, thought and dissent inextricably intertwined with Liberty's own history. The briefest glance at the stories of each institution reveals many names in common: Harold Laski, Bertrand Russell, George Bernard Shaw to name but a few. I am glad to say that this close connection continues to this day. I often think of and turn to Conor and Francesca (Klug) as the intellectual wing of Liberty. Rabinder Singh (now of the law faculty) is one of Liberty's most impressive advocates.

But enough mitigation as to any discernible stage fright this evening. Why should Liberty's work be so hard when our Prime Minister travels the globe to pronounce his passion for freedom? In short, because freedom means such different things to different people and because since the War against Terror and in truth, at least ten years before, there has been in our country a decline in many of the liberal values which should unite those who love the rule of law, alongside the more progressive or radical disciples of civil liberties and indeed fundamental human rights.

Notwithstanding the Human Rights Act and other positive developments in specific areas of home and social policy (e.g. in the areas of race and gay discrimination), there has been an underlying authoritarian political and cultural trend which cannot in my view ever be addressed by law, lawyers or legislation alone.

The tragic events of September 11, 2001 did not begin but helped to accelerate this trend. What is it like to be Director of Liberty at the height (though who can measure the height of what could be an unending) War against Terror? Imagine your wildest dream interlaced with a developing nightmare. Perhaps you are a musician manqué? Imagine the opportunity to make music professionally but at a time when music is considered, frivolous, unnecessary, and possibly even dangerous. Do you play on regardless? The same tunes and arrangements but to ever dwindling applause and occasional abuse? When they shut down the concert halls do you take your music to the street? Do you try to understand the ears of those who find your art naive, atonal or old fashioned? Can you popularise your music whilst preserving its beauty and enduring value?

All are important questions but to return to this evening's theme – what do we mean by freedom?

Minds far greater than mine have responded to this question for hundreds of years around the world. Indeed just a few weeks ago, this very Human Rights Centre discussed fairly focussed definitions of civil liberties in the context of post 9.11 democracy.
I don't propose this evening to respond to Conor and Francesca's suggested definitions but instead to discuss freedom according to the definitions seemingly set by the Prime Minister and to some extent the present Home Secretary – Mr Blunkett. What is their view of freedom? Are they delivering against their own objectives, and if so, at what cost?

The Philosophy

Even the most cursory examination of relevant speeches and writing by the Prime Minister and the Home Secretary reveals an impatience with traditional civil libertarians, lawyers and judges (when doing traditional judging that is, rather than adjudicating over political scandal). Traditional ideas of liberty and indeed legal process are variously described as anachronistic, elitist and based upon the most obvious (essentially financial) vested interest.
Crucially, traditional values (whether of liberal left or legal establishment) fail to address the concerns of ordinary and disadvantaged people on council estates who would like a little less due process and a little more "justice". The Prime Minister's speech at last autumn's Labour Party Conference was a good case in point.

He acknowledged that a legitimate fear in a 19th century criminal justice system would be that too many innocents be convicted. In a 21st century system however, the greater fear is of too many of the guilty going free.

And heralding the present Asylum (Treatment of Claimants etc.) Bill:

> *"Changing the law on asylum is the only fair way of helping the genuinely persecuted – and its best defence against racism gaining ground. We have cut asylum applications by a half. But we must go further. We should cut back the ludicrously complicated appeal process, de-rail the gravy train of legal aid, fast-track those from democratic countries, and remove those who fail in their claims without further judicial interference."*

The Home Secretary spoke in similar vein:

> *".. in the post cold war era the challenges are very different to the past, but no less worrying. I know and you know that we cannot win the support for the drive for equality and fairness if people cannot hear our message because what is happening in their own lives is so frightening, is so uncertain that they turn away from the more progressive messages."*

Above all it seems, the Blairite notion of freedom is one of freedom from fear.
Fear of weapons of mass destruction.
Fear of terrorism.

Fear of crime.
Fear of nuisance, anti-social or loutish behaviour.
Fear of economic migrants or "bogus" asylum seekers and the racism which *they* engender amongst the host population.

This freedom from fear stands in stark contrast with outmoded ideas of freedom from state tyranny. On the Blair-Blunkett council estate, fear is of too few rather than too many, of over-timid rather than over-zealous policemen. The enemy is not an essentially benign state (that houses you, educates your children and looks after your elderly relatives). The enemies are your next-door neighbours from hell. On one side perhaps, drug addicts predictably engaging in chaotic and petty criminal lifestyles. Their children truant or have perhaps been excluded from school. In any event they hang around a lot playing loud music, or drinking, or worse. This causes you anxiety, not least for your own children who are basically "good kids". On the other side, perhaps a family of asylum seekers. You see them as a drain on over-stretched local services and aren't some asylum seekers really terrorists? You've never thought of yourself as racist but you're worried that you and your family are consistently losing out.

You want to feel safe. You want a great big CCTV camera and a child curfew order and your neighbours evicted or convicted or deported before something bad happens. You don't mind that you too will live under the gaze of the camera or that your children will be subject to the curfew or that if you are too noisy one summer evening, the first knock on the door may be from a police officer rather than a conventional complaining neighbour.

It is a bleak picture indeed. How does a human rights framework sit within it? Well firstly, we are consistently told, it is time to start concentrating more on the rights of decent law-abiding citizens, of victims rather than perpetrators or suspected perpetrators of crime. The most important rights on the Blair-Blunkett council estate belong to the non-drug addict, non-asylum seeker family.

Secondly, rights (and certainly in as far as they extend to our less popular neighbours) come with equal and corresponding responsibilities from which they are indivisible. This is not to be confused with a more conventional post-war analysis of limited, qualified or even "context-sensitive" rights. "Responsibility" is more than a word for describing the inevitable relationships with our fellow human beings understood and protected within the rights framework. Further it is quite different from a convenient way of summing up the legitimate societal objectives for which some rights may proportionately be limited. Put crudely, you

abrogate your responsibility – you lose your right. The chaotic petty criminal family with its nuisance children has long since lost its rights to a home, private or family life. It may also have lost any right to be presumed innocent as to any further allegations of misconduct. Furthermore, in this essentially utilitarian philosophy, it is possible for those who abrogate their responsibilities or indeed who "abuse" their rights to lose them – not only for themselves, but for all those in a similar class. So whole job lots of asylum seekers are administratively detained, or forced into destitution, or denied access to the highest courts in protection of their human rights, because some are not genuine, or would pursue unmeritorious appeals.

Thirdly, it is only the rights of the besieged family – the deserving disadvantaged, that engage any serious obligations on the part of the state. The primary state obligation is to protect the deserving family from its neighbours. However, it is also accepted that the family is entitled to its human dignity and consequent rights in the context of other service provision. The council house in which the family lives should meet some minimum standards. The elderly relative living away in a residential care setting should be treated with appropriate decency. However, the philosophy is slightly less forgiving in the event that such standards ever require legal enforcement and that drain on the otherwise benign welfare state – legal aid.

How then, is this view of freedom and society manifest in policy?

The Policy

Firstly, a very great deal of legislation is required, much of it in some way resorting to criminal or other punitive sanction as a means of seeking to change the behaviour of the few and alleviate the fears of the many. Much of this legislation lies predictably in the criminal justice and immigration and asylum spheres (at least one bill a year in the case of criminal law and about one every other year in the case of asylum). Further, one can discern increasing resort to for example criminal sanction or quasi-criminal sanction (a tool virtually invented by New Labour) in areas traditionally considered ripe for social rather than law and order policy. One of the best examples of this phenomenon lies in Mr Blunkett's first Department of State – the original flagship of the New Labour Government – Education.

In 1999, the then Education Secretary was particularly concerned about levels of truancy in Britain's schools. It may be extremely difficult to legislate for interested pupils, engaged

parents and inspirational teachers, but criminal offences (especially those likely to remain a dead letter) are easy and relatively cheap.

Section 444 of the Education Act 1996 already provided a criminal offence committed by parents who failed to secure the regular school attendance of their children. The offence was one of strict liability – no guilty intention or even knowledge was required on the part of the parent perpetrators. The offence might be committed by a busy working parent who packed a child's lunch each day and waved him off to school in the positive belief that school was the certain destination. It might even therefore, be committed by the deserving disadvantaged parent. However, the tradition was that offences of strict liability – though necessary and justified in many regulatory contexts – should not attract imprisonment. So the original section 444 attracted a fine only.

Mr Blunkett boarded the Criminal Justice and Court Services Bill of the then Home Secretary, Jack Straw. He boarded it with a clause amending the original section 444 penalty, to one allowing for up to 3 months imprisonment. Imagine the scenario – a single parent struggles to make ends meet and care for the child or children. A child persistently truants. The school and education authority contact the parent who fails to solve the problem. The state intervenes to protect the truanting child by prosecuting and imprisoning the parent with the likely consequence that the child is taken into care.

It was little surprise when this one clause in a Bill of 82 clauses and 8 schedules caused such consternation in both Houses of Parliament. Indeed the whole Bill might have been lost in the Lords had the clause not been amended to attach imprisonment only to a new discrete aggravated offence involving knowledge of the truancy and a lack of reasonable justification. Still however, one wonders how many children's educations were really saved or enriched as a result.

Secondly, one can observe the "modernisation" of traditional due process or principles of legal procedural fairness and a consequent blurring of outmoded distinctions between criminal, civil and administrative legal systems. There are umpteen examples of this phenomenon in Blair's Britain.

The so-called "re-balancing of the criminal justice system" calls into question traditional notions about how to tip the scales, about the need to protect the accused and the presumption of his innocence within an adversarial courtroom setting. Less advance

disclosure to the accused and more to the prosecution. Wider admissibility of an accused's previous convictions and so on.

A now well-worn formulation of civil order (aimed at the anti-social, football hooligans, past sex offenders etc.) allows criminal sanction upon breach – a sort of bespoke criminal offence designed by a magistrate to deal with the particular risk and conduct presented by an individual. Philosophically, one might argue that these are little different from traditional injunctions. However, state actors rather than irritated neighbours apply for these orders. Increasingly, they are accompanied by policies of "naming and shaming" (including on occasion – in the case of minors) by the police.

Predictably however, it is in the area of anti-terror law that the greatest blurring of traditional legal boundaries has taken place. For much of its seventy-year history, Liberty/NCCL has argued against a special regime of terror as opposed to ordinary criminal law. Why, we argued, should a crime motivated by politics be treated differently from one motivated by greed or simple hate? A crime is a crime is a crime and the most serious criminal accusation should attract the greatest and not the least by way of procedural protection.

Liberty's senior citizen status has allowed it to observe the exceptional anti-terror laws pre and post Second World War and on into and beyond the Cold War. It has watched the special measures applied to Northern Ireland and the rest of the United Kingdom. It has watched temporary measures become permanent and what Helena Kennedy calls the contagion of compromises to fair trial rights infect the wider legal system.

Up until 2001 however (and one includes in this analysis the extremely sweeping Terrorism Act 2000 which permanently replaced the old Prevention of Terrorism Act), anti-terror law in this country, did at least bear some semblance of criminal law. It might be categorised as a mutated form of that law – extended periods of pre-charge detention, broadly cast offences with reverse burdens of proof, proscription of organisations by the Home Secretary, incitement to terrorism abroad and so on. However ultimately, it was all vaguely recognisable to the criminal lawyer who would ultimately defend those falling foul of the legislation in some semblance of a criminal trial with all the hallmarks of the same – charges, criminal burden and standard of proof, cross-examination of accusers etc.

However, to some extent, this all changed with the advent of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 – the emergency legislation that followed the horrific events of September 11th, 2001.

When something truly terrible happens and in particular when innocents are killed and people feel afraid, an understandable cry goes out to the Government of the day to act. More often than not this means the Home Secretary. It must indeed have been a terrible emotional and practical burden to be the incumbent of that great office of State in the autumn of 2001. The obvious temptation, almost the modern tradition would have been to legislate. Yet how to act, to legislate when the just the previous year, your own government passed the toughest and most comprehensive anti-terror law of modern times (in the Terrorism Act 2000)? To complete the dilemma, how do you act when your government's own Human Rights Act has been in force for just under a year? The answer for David Blunkett was to derogate from human rights or as Conor has put it so colourfully, to dream the impossible dream and find the self-destruct button conveniently located in any Home Secretary's human rights starter pack. In so doing, the Home Secretary and his advisers also dealt with a human rights inconvenience of at least five years standing – namely the obligation not to deport, even suspected terrorists, to face torture in their country of nationality.

This was the ruling of the European Court of Human Rights in the case of *Chahal v UK* in 1996. Mr Chahal had lived in the UK for many years but remained an Indian national subject to immigration control. He was suspected of involvement with terrorism in the Punjab and faced deportation by the then Conservative Home Secretary on national security grounds. By 1996, in our pre-Human Rights Act framework of administrative law, immigrants facing deportation (particularly to potential ill-treatment) enjoyed a right to some semblance of fairness and to a statutory appeal process. This was not case however, in national security cases. Further, under our traditional administrative law, the executive had only to wave the flag of national security when faced with a judicial review to effectively oust any real scrutiny of its decision-making. So Mr Chahal's domestic law challenges were doomed to failure and the Court of Human Rights found that he had been denied an effective remedy for the vindication of his Convention rights under Article 13. It also found that his extensive detention (for a total of six years) pending deportation without recourse to an appropriate court breached his rights against arbitrary detention under Article 5. Crucially, as I have said, it found that to deport a person to a jurisdiction where they could face torture would constitute a breach on the United Kingdom's own part of the sacred Article 3 of the Convention – the absolute prohibition of inhuman and degrading treatment and torture.

This was a very important decision for those who believe in the sanctity of human life and human rights everywhere. It would require very serious thought and implementation by a Government of either persuasion. As it happened, the task fell to the New Labour

Government in 1997. The first plank of implementation required no legislation (and certainly none beyond the imminent Human Rights Act). From henceforward, people should not be deported from the UK to face torture elsewhere. Common sense dictates that this must have been of perennial embarrassment to the UK in its dealings with friendly but non-Human Rights-friendly governments around the world who crushed dissent (and indeed fostered terrorism) in their own jurisdictions and were incredulous at both the common law and international human rights protections granted to these “asylum seekers” to the UK.

Other aspects of judgment did require legislation. The Special Immigration Appeals Commission Act 1997 (which I worked on as a junior Home Office lawyer) was an attempt to compromise the competing demands of national security and natural justice in an administrative deportation setting.

The process involves closed and open parts to cater for much of the relevant material being of a secret intelligence nature. The subject and his lawyers (with their professional duties to him) are excluded from the secret parts and secret intelligence. At such times, the intelligence may be probed and tested by a vetted “special advocate” who had no relationship with the subject and may of course not divulge the nature of the secrets to him. It was always going to be an imperfect process but immigration appeals had never attracted the Rolls-Royce due process rights reserved for the criminal justice system. It was designed to give a deportation appeal to people who previously had nothing. It was not originally intended, nor was it ever capable of being a substitute for a criminal trial in the context of serious terror charges and a possible lifetime of detention.

In the wake of September 11, the so-called “ *Chahal* problem” was returned to by Whitehall. However, the problem remained that Article 3 – the prohibition on torture is an absolute and non-derogable right, even in times of perceived or actual national emergency. Further, in contrast with the rights-responsibilities approach discussed earlier, a fundamental human rights framework accords this protection of basic human dignity even to the most wretched in our world, including terrorist suspects.

However, with the creative genius reserved for those looking for legal loopholes, the following thought was born. It may not be possible to derogate from the prohibition against torture but the right against arbitrary detention under Article 5 may be derogated from under Article 15 of the Convention:

"in time of war or other public emergency threatening the life of the nation" and if the measures consequently adopted derogate only *"to the extent strictly required by the exigencies of the situation"*

So in respect of foreign nationals suspected of "links" (loosely defined) with terrorism or terrorist groups, and who may not be deported (because of the prohibition on torture), the government (in a chilling moral mirror of the law-free zone that is Guantanamo Bay), would employ indefinite detention without trial instead. It would do so by amending immigration rather than criminal justice or even conventional anti-terror legislation. A thin veneer of procedural fairness would be provided by access to the secret Special Immigration Appeals Commission ("SIAC"), whose jurisdiction would be limited to assessing the reasonableness of the Home Secretary's suspicion. A suspicion which at its lowest might amount to no more than a suspicion of links to other suspicious people.

Meanwhile, British Nationals (for the time being at least) retained our right to a conventional criminal trial in the event that we were accused of links to terrorism.

In discussing this crucial derogation from fundamental rights with the Parliamentary Labour Party in the autumn of 2001, the Home Secretary specifically remarked that he was not responding to intelligence of a specific threat but declaring *"a technical state of emergency"* for the purposes of derogating from the ECHR.

However, importantly, the Government chose not to derogate from Article 14 of the Convention which prohibits discrimination in the context of other Convention rights. How could the principle of equal treatment be squared with the policy? In finding the derogation unlawful, SIAC itself found discrimination as between British nationals and this class of foreigners. Both classes are capable of being terrorist suspects, in relation to both – there may be insufficient or insufficient admissible evidence to mount a criminal prosecution. Neither category may be deported. Members of the former group continue to live their lives at liberty, the latter potentially face a lifetime's incarceration with no knowledge of the charge against them.

The Court of Appeal disagreed with SIAC. This is not discrimination at all we were told. Like has not been compared with like. Crucially the detainees (unlike British terror suspects) have no right to remain in the United Kingdom. But surely this is no more than a description of the badge of discrimination – in this case nationality. Is it not unlike refuting an allegation of sex discrimination with the claim that "she is after all just a woman"? It would seem that in a

Britain where asylum seekers are viewed as almost sub-human and in a climate of fear of terrorism, even the courts may be slow to their defence.

In a further twist in this tale of terror law, last autumn, SIAC upheld reasonable suspicion and detention in the first ten appeals. However chillingly, the moral connection with Guantanamo Bay was made even more real.

In the course of argument, it had emerged that some of the secret intelligence relied upon by the Government may have been obtained by oppression or torture at Camp X-ray and around the world. Rather than deploring such a possibility, SIAC ruled in favour of the Government on the following points:

The Home Secretary is not bound to close his mind to material which may have been obtained by torture.
SIAC is similarly able to look at this material in vindicating suspicion. *"It is all a matter of weight and degree"*.
Finally, where any issue as to possible torture arises, the burden of proof is on the detainee (who lacks sight of the secret material against him).

The legality of the entire policy awaits consideration by the House of Lords Judicial Committee and it is said that this may not be possible before October of this year – when 14 detainees (all asylum seekers, some torture victims) will have been detained without trial for nearly 3 years. Gareth Peirce who represents most of the detainees speaks poignantly of the effect of such unending injustice upon the human psyche. She knows of the nightmares built on searching for answers and of the debilitating descent into mental illness.

Meanwhile, the Privy Council Committee set up under the 2001 Act to review its operation has reported that internment and the consequent derogation should end and both Houses of Parliament will debate the matter on the 25th of this month.

Liberty has spoken often of this policy over the last 2 years. It has spoken of the ease with which vulnerable minorities may be the first target of exceptional powers which over time, gain currency and acceptability until those in power become rather more ambitious.

However even I, did not expect such prophecy to be made good so soon. A few weeks ago, whilst on a foreign visit, Mr Blunkett took his thinking about the inadequacies of traditional fair

trials to the next level. Secret evidence, closed hearings, vetted judges and a reduced standard of proof are all now mooted for conventional criminal terror trials.

Finally, a more general statutory largesse towards the executive and law enforcement agencies is apparent. Once more this is best easily (but by no means exclusively) demonstrated by anti-terror laws benign in intention but capable of wide abuse (as has been the case throughout Liberty's 70 year history). Section 44 of the Terrorism Act 2000 allows a Chief Constable to designate an area for stop and search (without suspicion of criminality as under the ordinary law). This may be done if *"expedient to preventing terrorism"* and the designation may last for up to 28 days.

In difficult times, the rationale for such a power may be all too clear. On receipt of clear intelligence that a terrorist incident may be planned in a particular area at a particular time, a rational senior police officer does not wish to wait for reasonable suspicion of particular person. He understandably wants to cordon off the area in question and subject every person wishing to enter to an outer-body and bag search. The level of the threat justifies the use of police resource and those searched feel little injustice. There may be no reasonable suspicion of any individual but at least every person is treated alike.

However, in its largesse towards the police and the executive, parliament did not provide for judicial warrant before such a designation – such a departure from normal police powers as prescribed by the Police and Criminal Evidence Act. Nor did it provide for any parliamentary approval or even public notification. The only check on the senior police officer is the Home Secretary, to whom a designation must be sent and who must confirm or cancel it within 48 hours. In September of last year, section 44 of the 2000 Act was used to single out peace protesters and prevent them from approaching an arms fair in the Docklands. In the course of the ensuing litigation (which continues), Liberty learned that the Metropolitan Police Commissioner and indeed the Home Office have been making and confirming designations covering the entire Metropolitan Police area on a rolling basis since February 2001 (six months before September 11). To the best of my knowledge (though there is no way of knowing for sure at any time), the whole of London remains an area where there may be stop and search without suspicion, with all the potential for abuse.

The Critique

So what is so wrong with the Blair-Blunkett vision of how to deliver freedom from fear?

Firstly, it is both over-selective and simplistic in its view of those worthy of its generosity. In reality, perpetrators of crime may also be victims. Everybody's children are "basically good kids" and the persecuted person to whom aid should be sent and in whose name wars may be fought, is no less worthy of compassion and dignity when he arrives on our doorstep.

Secondly, it is ineffective in meeting its own objectives. The aspiration most proclaimed in relation to the bleak council estate is that it should be transformed from a grouping of unhappy individuals and families into a safe community. Yet crime is not solved nor community built on such crude and authoritarian a foundation as criminal legislation. You do not reduce crime by categorising yet more human misery as criminal behaviour.

Thirdly, it may be positively counter-productive. To continually compromise notions of fair treatment is not merely to offend lawyers' delicate sensibilities. Fairness runs deeper into our basic humanity than that. So persistently to denigrate fair process is to create apparent and actual injustice. There is nothing like a sense of injustice to turn people away from a stake in a community and indeed democracy itself. This was the lesson of internment in Northern Ireland. This must not become the tragic lesson of the criminalised children on the Blair-Blunkett council estate or of the various injustices done under the War against Terror.

Fourthly, just as the thinking learns insufficiently from the lessons of history, it fails to approach the future with sufficient caution. It stands in grave danger of leaving in its wake, a constitutional poverty, a trust in the executive – a raft of sweeping legislation to be used or abused by accident or design, by future governments of differing motives and persuasions. It fails to remember that democracy is more than mere majority rule – that the rule of law and respect for inalienable human rights distinguish democracy from the rule of the mob. This was recognised by a previous generation that knew much of the horrors and terrors of war. It should not be forgotten now.

The thinking lacks regard for the need to protect vulnerable minorities (including asylum seekers who cannot rightly be blamed for their vulnerability to the mob). It is quite right of course, that human rights belong to all of us – including the victim of crime and the elderly relative in the care home. However, the ultimate litmus of both democracy and human rights lies in the treatment of the most unpopular members of society. This is a standard from which those who believe in freedom must not flinch.

What then is Liberty's role in the future development and settlement of these questions? Too much resting on its history. Too much enjoyment of its birthday. These are not options.

The voice of Liberty must be both old and wise and young and dynamic. It must burst with compassion and reason. It must find its way to the heart of the Blair-Blunkett estate and make relevant a notion of human rights of which no human being may be stripped. This was ever the dream. This remains the possibility.

ENDS