

THE BLAIR REPORT

CONOR GEARTY

A CLOSE LOOK AT NEW LABOUR'S DECADE REVEALS

A JANUS-HEADED APPROACH TO FREE SPEECH

If it is to be fair, an appraisal of the state of freedom of expression in Britain during the prime ministership of Tony Blair must avoid three traps into which civil libertarian zealots in general – and free speech enthusiasts in particular – often fall. Seductive though they might appear to the already passionate, these wrong turnings risk plunging civil libertarians into a dark hole so far removed from the lived experiences of the general public that their perspective on freedom loses all persuasive power as a result.

The first of these is the temptation to deny history. This particular lament takes a number of forms: the current prime minister and/or home secretary are the worst in living memory; the 'erosion' or even 'destruction' of our civil liberties is gathering pace at an 'unprecedented' rate; governmental animosity towards Britain's traditional freedoms 'has never been stronger'. But these are the kinds of things that have been said about every government, at least since the early 1970s. In truth there has never been a 'golden age' of freedom from which to mark the start of our current 'decline'. Even the civil libertarian Roy Jenkins did not escape from it, when he introduced the first prevention of terrorism legislation (with its bans on politico-military associations) in 1974. Merlyn Rees was a particular hate-figure to activists when he was home secretary in the 1970s, as was Roy Mason in the Northern Ireland Office. During this period, official secrets prosecutions, expulsions of journalists and abuse of police powers were commonly front-page news. Then came the Thatcher years, when discussion about the decline of freedom became to all intents and purposes received wisdom: the media ban, the *Spycatcher* injunctions and the Official Secrets Act 1989 were just some of the anti-free speech highlights of the 1980s. Even John Major's administration produced similar stories in the 1990s, with anxieties about executive hostility towards the judiciary then being at their height: Kenneth Baker, David Waddington and Michael Howard were at least as controversial in their day as John Reid, Charles Clarke and David Blunkett have been in theirs.

If the first thing we need to do is recover our memories, the second is to re-establish a sense of proportion. Civil libertarians have long been inclined towards intemperate language. In the 1980s, activists set up organisations with names like Charter 88 and Samizdat, specifically linking the situation in Britain with that of central Europe under communist rule. There was much talk then – as



Catching the bus home after prayers, east London
Credit: Julian Lass



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there is now – of Britain being ‘a police state’, or nowadays ‘a police state for Muslims’. But if Britain is a police state (for whoever) how do we describe a place like Zimbabwe or China? What about the Muslims in Saudi Arabia, Syria or Egypt? Just as Belmarsh prison (where detainees were held under terrorism legislation) was never a ‘mini-Guantanamo’, so Guantanamo was never (as some alleged) like Stalin’s gulags. Nor, *contra* the Archbishop of York, is modern-day Britain remotely like living in Uganda under the tyranny of Idi Amin. These analogies simply cause the general public to tune out: they make the headlines, certainly, but at a high cost in public respect.

The third trap is to be grudging about acknowledging civil libertarian advances. Sometimes the civil libertarian is so inured to gloom that he or she loses the capacity to recognise good news when it comes along. The point has a particular salience so far as Tony Blair is concerned. At the legislative level he can point to many free speech successes. Pre-eminent among these is of course the Human Rights Act, with its guarantee of free speech (in Article 10 of the European Convention on Human Rights) but also with its further protection of the media laid out in the body of the Act itself. There is also the Freedom of Information Act 2000 to take into account. That this measure is ‘defective’ from an open government point of view is entirely to be expected: progressive change like this comes in statutory dribs and drabs, not all at once. Through party funding laws and the exercise of anti-monopoly powers, Labour has also from time to time tried to tackle the power of money as an informal control on political speech. It has obeyed the courts when it has had to (unlike Kenneth Baker who disregarded a court order when he was home secretary) and even when it has not been so obliged, replacing detention without trial of foreign suspected terrorists with a regime of anti-terrorism control orders after the intervention of the law lords. Its legislation on religious hate crimes contains many protections for free speech. We may feel that these changes do not go far enough, that we would have done more, and so on, but we can hardly simply ignore them because they do not fit our pre-determined picture of permanent decline.

So avoiding these traps, how has the Blair government acquitted itself? Its most damaging contribution came before it entered office, when it detached itself from civil libertarian causes in the mid-1990s. This was when the Labour opposition infuriated its followers and intrigued the authoritarian right with a series of concessions to reaction in the field of civil liberties. The legislative assault on youth culture and direct action that became the Criminal Justice and Public Order Act 1994 did not attract the hostility of the then opposition as it would have done just a few years before. The terrorism laws ceased to be iniquitous and became something on which Labour was initially largely neutral and then essentially supportive. The Tory-led emphasis on ‘law and order’ of the period found a

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'Things can only get better': Tony Blair, the new prime minister, London 1997

Credit: Peter Marlow/Magnum

willing chorus in Labour's shadow populism. When the party finally achieved office in 1997, the damage had already been done: deprived of its ethical watchdog on the shop-floor of British politics, public sensitivity to civil liberties protection had begun to show a marked decline, with fewer people caring about human rights and political freedom than at the start of that decade and more and more of them willing now to forgo these for some putative advantage in the war on crime. The evidence is that this fall in public support has not been reversed in the decade in which Labour has held power.

Rather than redress the imbalance of hostility towards civil liberties that it had helped to contrive, the successive administrations of Tony Blair have deepened it, continuing to outbid the Tory party in the fields of law and order and civil liberties as though it were a truly credible opposition and not the defunct force that it quickly became under the leaderships of William Hague, Iain Duncan Smith and Michael Howard. The Blair years have been marked by a tension between a legislative agenda that has been progressive and democratising in some respects – the sort of legislation mentioned above – and a 'criminal justice' perspective that has been nasty, consciously anti-intellectual and driven by a

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succession of moral panics. The latest and largest of these has been the ‘war on terror’, with important legislation having been enacted in 2000, 2001, 2005 and 2006, and with (it would seem) much more yet to come.

The principle of freedom of expression has spent the Blair years dodging cross-fire from these unilateral battles that Labour has been fighting in its self-declared wars on crime, terrorism and uncontrolled youth. Where free speech has been able to locate itself on the democratic/constitutional end of the spectrum, its concerns have tended to be taken seriously, for this has been to appeal to the human rights angel on the party’s left shoulder. The injunctions against the press have been fewer and less successful than in the hey day of Mrs Thatcher. As a martyr to free speech, David Shayler has hardly been in the same league as Clive Ponting. The debate about the incitement to religious hatred law may have resulted in bad legislation from the point of view of devotees of free speech, but the discussion at least accorded their subject the respect they believe is its due.

Such niceties do not exist when freedom of expression finds itself re-categorised as a threat to law and order. This is when the police – their forces mustered by an enthusiastically authoritarian prime minister – can find nothing wrong in holding hundreds of May Day protestors against their will in central London for hours on end, as happened in 2001. It is what allows private corporate interests to deploy protection against harassment legislation to suffocate public protest, in the fields of animal experimentation and environmental protest but also much else besides. The new world of public order policing and anti-social behaviour orders that has been pioneered by Labour all too frequently sees robust political expression on the streets as on a par with hooliganism. So Brian Haw’s protest in Parliament Square is scaled back by Parliament, and other such protests permanently prevented, while almost in the same breath legislators are approving their commitment to free speech in the context of this or that abstract constitutional measure.

Labour’s discourse on terrorism is the high-point of this Janus-headed approach to free speech. On the one hand it is because we are a free society that we need to defend ourselves against those that would destroy us. On the other hand, precisely to save ourselves it would seem we have to ban political associations suspected of terrorism on an unprecedented scale (over 40 proscribed organisations with more to come); empower the police with ‘exceptional’ stop and search powers that are then deployed to control political speech (even stopping on one famous occasion a Labour party activist from returning to his seat at conference after being ejected for heckling the foreign secretary); develop Orwellian anti-terrorism control orders to harass persons against whom no criminal charges are brought; and make deals with abusive foreign regimes to send their suspected terrorists (dissidents?) back to them on the basis of

unenforceable guarantees of good behaviour. Passed as a response to the July 2005 bombings in London, the 2006 Terrorism Act's initial intention to criminalise the 'celebration' of terrorism (afterwards watered down to 'encouragement') neatly captured how far the prime minister had moved from the anti-establishment, civil libertarian roots of the movement that had propelled him to power.

If the Blair years have been disappointing to civil libertarians, have the judges performed in a way that has deserved their approbation? The record here is mixed. There have been important legitimisations of policing and governmental excesses, it is true, but there have also been far more assertions of civil libertarian principle than the historian of judicial attitudes to freedom has had any right to expect. This has even extended to the anti-terrorism sphere, with the law lords' declaration of human rights incompatibility in relation to the detention powers in the Anti-terrorism, Crime and Security Act 2001 being perhaps the judicial highlight of the period. From a free speech perspective, only uncompromising devotees would criticise the wide-ranging injunctions imposed on the media to protect the killers of James Bulger from having their new identities exposed on their release from prison. The most important ruling on public protest was the remarkable decision at the end of 2006 in *R (Laporte) v Gloucestershire Chief Constable*. A police over-reaction to the possibility of trouble during an anti-war protest became the platform upon which the law lords unravelled, possibly for ever, the tangle of vague breach of the peace powers, under which the authorities have worked with such freedom for so long and through which so much political protest has been informally controlled in this country.

The Laporte case is a reminder of how much legislation now pertains in the field of public protest, with their lordships insisting that it is through such parliamentary (rather than common law) routes that protest needs now to be regulated. This democratisation of the control of public protest is to be welcomed. For all the flaws in the legislative process, it is an infinitely better means of achieving the right balance between speech and order than the military and policing approaches of the past. With the Conservative party having (temporarily?) called a halt to its verbal assaults on civil liberties, the first Labour administration of the post-Blair era has an opportunity to re-embrace this language without self-evident political risk. It remains to be seen whether, after ten years in office, the opportunity can be recognised and then, perhaps, seized. □

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