

GEARTY ON CIVIL LIBERTIES

The argument for compulsory DNA testing of the entire population (and all visitors to the UK as well), so eloquently put by Lord Justice Stephen Sedley, has provoked another bout of anxious navel-gazing by civil libertarians. Sedley is no reactionary but rather one of Britain's most progressive judges, a man with an impeccable record of legal activism. If even this kind of person is joining the Reids, Howards and the rest on the authoritarian side, does this now mean that Britain's much-battered freedom has at last lurched into terminal decline? Is the 'police state' that so many have warned about for so long finally on its way? Are we witnessing yet another example of what the promoters of a recent movie confidently described as the 'destruction of all our Basic Liberties'?

Fortunately the position is rather more complicated than this. Just as the Right is given to 'moral panics' (Teddy-boys; hippies; hoodies) so the Left regularly succumbs to 'freedom frenzies'. Earlier this summer, it was concern about police use of CCTV material. Before that it was Dr John Reid's proposals for new anti-terrorism stop powers. In days gone by, it was taking swabs from suspects and extending police powers of search. Long before

that it was the policing of industrial disputes and the prosecution of journalists and civil servants under the Official Secrets Act. Each generation of committed civil libertarians has been convinced that it is sure to be the last. Every Home Secretary is always the worst ever - until the next one comes along. No wonder the community as a whole treats civil libertarians much as the villagers did the boy assigned to look after sheep in Aesop's fable. But what words do we have left if the wolf does finally and truly arrive? A fresh, more cautious approach is called for.

We can start by being more careful about language. The term 'civil liberties' is confusing in that it includes both a commitment to the liberty of the individual and to political freedom, but these are not the same. The first is a liberal idea, rooted in that old

English notion of the individual being beyond and above the State and with a natural right not to be interfered with by it. These are the people who break CCTV cameras, are affronted by being asked to stop smoking in public places and who in earlier times refused to wear seat-belts in cars and crash helmets on motor-bikes. This kind of libertarianism is often quite reactionary and in its absolute form it is always being overridden - and rightly overridden - by government in the name of the public good. This perspective is better viewed as a presumption in favour of freedom, a reminder to us all that we need to be clear that there is (to use the language of human rights) a 'pressing social need' for our interventions and that the exact extent of the damage we do to personal freedom has to be warranted by the goal we are seeking to achieve. Advances in technology are always throwing up fresh opportunities for public good via new invasions of this kind of liberty. Stephen Sedley's proposals fit within this tradition: they deserve to be debated and not dismissed out-of-hand as heretical. The same is true of the pre-charge detention proposals that have been made by the government. No one now says there should be no detention after arrest at all; the dispute is rather (and rightly) over the length of such custody and the safeguards against abuse that should be built into it. (I believe for example that the case for any detention at all after a short period prior to charge has simply not been made.)

Political freedom is different and should be much less easily susceptible to democratic override. The deployment of terrorism and public order law to control, sometimes to curb completely, political speech and public demonstrations is a serious matter. It is clear that from this civil libertarian perspective there are aspects of the Blair/Brown legislative record on these matters that give rise to legitimate concern. But critics need also to acknowledge the broader context. We are getting a lot of controlling legislation it is true but this does not mean that past generations were much freer than we are now: in much earlier days the local militia just shot you or (a bit later) the police merely attacked you with all the force they could muster. Whatever might

be said about this or that individual clause, much of today's legislation, (some of it mandated by human rights law ironically) represents civil libertarian progress, a move out of rather than into a police state. Past generations of civil libertarians had battles on their hands which were far worse than those we confront today: the 1930s and the 1980s were particularly severe, with police powers being deployed in a draconian fashion against hunger marchers in the first decade and the striking miners in the second as a coherent part of what unreconstructed Marxists would call a straightforward class war. The old Labour Party was very much alive to the impact of such police aggression on civil liberties: the coalition between the worker and the intellectual was a source of great civil libertarian solidarity in days gone by, but this is much less the case today - Labour has lost the cohesiveness on issues of freedom and liberty that used to be such a feature of the Party.

It may be because of this that even taking into account the long view it is clear that the state of freedom in Britain today does give cause for concern. A recent authoritative survey of British attitudes, conducted for the Economic and Social Research Council by National Centre for Social Research and the LSE Centre for the Study of Human Rights,[*] found two disturbing trends in public opinion. First there has been a marked decline in support for civil liberties since the mid 1990s - the exact moment when the then opposition Labour Party decided to drop its long standing commitment to their protection. Second, even the support that remains drops still further when the public are invited to take into account the need to act to prevent terrorist attacks. The reduction of the civil libertarian minded, intellectual wing of the Labour Party to an eccentric rump to be mocked rather than admired is one of the most damaging pieces of work that the successive administrations of Tony Blair have done in this area. That effort at marginalisation would not have been as successful it was had there not been a broader uncertainty on the Left about how to react to religious extremism and political violence in the aftermath of the 11 September attacks. It is as though the Party lost its civil libertarian nerve sometime during the early and middle Blair years and has since found

it very hard to recover its sense of principle.

Though it is early days, the atmosphere under the new regime is already markedly different - and it has come through some severe tests (the Glasgow and Heathrow attacks) without having jettisoned its principles. In Britain government leaders have a special responsibility to set the right tone. There is a reasonable chance that the liberal intelligentsia can regain their place in the foreground of British politics. If civil libertarians do not chose to see this, and go on treating every government (or judicial) proposal as though it were an already enacted law and evidence of a police state, then the risk is that the new team will give up trying to engage in a serious discussion and revert to the bad habits of the past.

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[*] Mark Johnson and Conor Gearty, 'Civil Liberties and the Challenge of Terrorism' in A k, J Curtice, K Thomson, M Phillips, M Johnson (eds), *British Social Attitudes. Perspectives on a Changing Society* Sage Publications London 2007