

THE RULE OF LAW IN BRITAIN:

SOME EDITORIAL THOUGHTS ON WHY IT IS THREATENED AND HOW TO RESCUE IT

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A few years back I wrote a diatribe in favour of footnotes and of the idea that when footnotes were required, for Libertarian Alliance pamphlets or for anything else, those who failed to supply them should be consigned to the flames of hell. I'm afraid this little pamphlet has no footnotes either, because a central part of my argument is that although my subject is colloquially important, neither I nor most other people really know about it any more. I refer to that vague yet crucial concept, the rule of law.

SUB-MARXISM VERSUS THE MICKLETHWAIT FAMILY

In the early seventies I was a sociology student, and I recall well the general political and intellectual atmosphere of those times, which has been well described as "sub-Marxist". The actual reading of Marx, right through, or of anything else right through, was going out of style. The era was dominated not so much by

Marx himself as by slogans or rubrics or lines of sub-intellectual chat derived at third hand from Marx, suitably revised by persons like Herbert Marcuse to account for the mysterious failure of the working class to trade in its Vauxhall Vivas for a revolution.

One of the lines of chat concerned the "rule of law", always placed between derisive inverted commas. The rule of law, went the sub-Marxist, New Left patter, was a bourgeois sham, a fraud, a mask behind which the ruling class proceeds with its class warfare.

I had a interesting slant on this rule of law stuff because my late father was a quite grand lawyer, a QC (for the benefit of non-Brits, this stands for Queen's Council and means a superior sort of trial lawyer) and he then became something called (this may impress other British lawyers) the Commissioner for National Insurance and Industrial Injuries, a job on a par with being a judge, and which got him a knighthood. My father's father was also a QC and a Sir, as was my

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FOR LIFE, LIBERTY AND PROPERTY

mother's father. So I think you can see that the law and what happens in law courts is a big deal in my family, and even if neither I nor my three siblings have gone on to study law in detail by becoming lawyers or law academics, we still greatly respect the idea of and the fact of law and have an ingrained understanding of it.

Taunting my father with the sub-Marxist sociology student line on law and lawyers, I was faced with the extremely firm assertion that on the contrary, the rule of law is most definitely *not* a sham. It matters very much what the law says and what lawyers do in their courts, and it is absolutely *not* the case that the law is merely a disguised way for the ruling class to bash the workers, for the nobs to take it out on the yobs. Class warfare, like any other kind of warfare, takes little account of individuals or of individual blame, but law courts are *all about* individuals and individual blame. Exactly which individual did exactly what, and what ought individually to be done to that individual? This is the agenda of law courts. A nob, if found guilty, gets punished. A yob, if not found guilty, is set free. Nobs, in general, versus yobs, in general, it *absolutely is not*.

Was my father, a nob if ever there was one, right? After much thought I decided that he *was* right. In this matter at least I am his true son. But I was enough of a sociology student not to bother with the details of the law, and so it has remained. I have inherited an intuitive grasp of how the law works and why it matters, and have studied something of how it developed historically, but ploughing through things like the latest Criminal Justice Act is not my idea of fun at all.

THE CHATTERERS WHO DIDN'T CHATTER

But at least I am in favour of law, and have a rough grasp of how important it is. Contrast this with the prevailing attitude of my politically active contemporaries, who have all my idleness on legal matters, without the corrective of my family background.

It's very odd, if you think about it. We have had a generation of "radicals" so completely denied the educational benefits of police brutality and government nastiness that they have spent the last two decades saying that the rule of law *doesn't matter*. A century earlier, the intellectual and — no doubt in lots of cases literal — ancestors of these same nineteen sixties and seventies "radicals" were *obsessed* with law, and with the correctness or incorrectness of this or that government decision, this or that legal procedure. Lots of them *were* lawyers. They made parliamentary speeches, and wrote books, pamphlets and national constitutions saturated with such notions, and they watched the actual political bosses of their time for infractions against these beloved principles of legality like hawks. In the nineteen sixties and seventies, their descendants drivelled on about the repressive atmosphere created by "late" capitalism and its overproduc-

tion of washing machines, and ignored the mere law completely, except insofar as it pertained to marijuana or demonstrating.

I include myself in this general criticism. For me, one of the pleasures of libertarianism has been that one need not worry about what the nationalised industry of state law consists of. Come the libertarian nirvana, there would be a free market in law and all will be well, and the details didn't matter. Meanwhile, that pessimistic and legally educated limited statist, Sean Gabb, who edits the Libertarian Alliance's journal *Free Life*, has been grubbing about in law libraries for the last decade, sounding the alarm about the ever sorer state of the rule of law in Britain. But only very recently have I started to pay serious attention to such warnings. I too have stuck with such things as marijuana.

Not having paid attention carefully to this debate (that's my whole point here!) I don't *know* what's been going on in the academic field of legal philosophy, but I *suspect* it of having been a horror story, a genteel British version of the *fuhrerprinzip*, explicated by such respected luminaries as Ronald Dworkin and H. L. A. Hart. I sense that a generation of "radical" lawyers is now coming on stream, with considerably less understanding even than I of what "law" really means, and is now busily wrecking the same legal system that it ought to be defending vigorously. These ignoramuses and monsters are now, I fear, starting to become judges and to do real harm. After all, if our existing legal system is but a mask for class warfare, destroying it can't make things any worse, can it?

"WHY DIDN'T YOU STOP ME?"

So, you ask, what? So, number one, it is not surprising that a torrent of laws are now being passed, many of which the chattering classes sense to be deeply scary, but which they are in no way intellectually prepared to contest, yard by yard, this bit but not that bit, and *that bit especially*. Joe Public, egged on by the tabloid press, wants the teenage underclass either to bloody well start behaving or else be chased, caught, convicted, locked up with the key thrown away, and if the legal barriers erected in the course of the last seven centuries are kicked over in the chase, tough. The chattering classes look on, mute, unable even to chatter about the harm that is being done. They simply haven't done any serious thinking on this topic, and all the thinking they have done is rotten to the core.

Joe Public is also passionately in favour of being more tightly regulated, i.e. everyone else being more tightly regulated. A minivan crashes on a motorway, killing half a dozen kids, and Joe Public — through his faithful tribune the tabloid press — demands yet more laws against whatever it is, demanding, I don't know, compulsory seatbelts in the back seats of minivans. The real moral of a tragedy like this is that Joe Public, the driver of the minivan, is an irresponsible idiot for fall-

ing asleep at the wheel. But Joe Public prefers to blame his government for his sins instead of himself, in the manner of a child yelling at its parents: “Why didn’t you stop me?”

Well, why *didn’t* the government stop the tragedy? And if it didn’t, is not that same government the murderer of six defenceless children? And should it not rectify this state of affairs *at once* by passing a comprehensive law against this particular irresponsibility and two dozen other related irresponsibilities besides, while we’re about it?

The situation is not made any easier for anyone opposing such new laws if, as they always try to do, the television or newspaper people manage to find some of the bereaved and get them to ask such questions.

The chattering classes are, as I say, struck dumb. Or worse, they too may want some more hastily penned laws. The arguments against legislation mania, one of the more important of them being that having more than a certain large number of laws is the exact functional equivalent of having no laws at all, just haven’t been examined in the chatter of the chattering classes for the last few years. So, compulsory seat belts in the backs of minivans it is, and ... oh, what the hell ... let the relevant junior cabinet minister, that nice Mr What’s-his-name, who always dresses so smartly and has such an agreeable television manner, decide the details of the law and have them printed out as and when he feels inclined, along with all the other laws being decided by his ministerial friends and rivals or their civil servants on that particular day.

WE ARE ALL GUILTY NOW

The end result of this pandemic of lawmaking and regulating is going to be the exact disaster that the sub-Marxists had said was already the case, a legal system which is nothing but an instrument of class warfare. The dominant class will be whichever class has captured the government, and the victims of the process will be whatever minorities that this governing class happens to have taken a dislike to. We will finally have a legal system that sends people to prison for, in the words of an old TV sketch, Looking At Me In A Funny Way.

How come? Am I saying that innocent people will be stitched up and clapped in jail? Not a bit of it. Only the guilty will be convicted. Only the guilty will have their lives ruined. But pile up enough laws about pornography, health and hygiene, maximum working hours, back seat seatbelts, pet supervision, decibel levels at parties, doing your VAT in time, growing oranges without a license, *etcetera etcetera et bloody cetera*. Stir in a few innocent looking generalisations like: the government can decide at will to stop prosecuting you if it decides it likes you again. And the government is then unstoppable. If you then Look At Them In A Funny Way, they can imprison you for ever

for possessing one dog-eared copy of the *Karma Sutra* or for feeding your children more than the maximum daily permitted dose of chocolate biscuits, or for whatever other infraction of the law they chance upon you having infringed. On the other hand, if, once all this has been explained to you, you change your attitude and decide to become one of their stoolies —or whatever it is they want — then all charges can be magically dropped.

To quote another piece of sub-Marxist claptrap of an earlier time which is also now coming true: We Are All Guilty. Once again, if you say that everyone already is guilty, the way those damned sixties “radicals” did say, then how can it make things any worse if you decide that actually everyone really is guilty? Where’s the big change?

I recall reading in (I think) the American libertarian magazine *Reason*, that in one of the states of the United States they have two laws, one saying that a certain sort of night garment is compulsory for some damn reason or another, and a different law in another part of the legal forest entirely which says that this same sort of night garment is illegal, for reasons of fire hazard. Perfect. A policeman can arrest absolutely anyone, confident that one or other of these laws at least is being broken, even if nothing else is. Tyrannical state officials don’t have to go out of their way to create such paired laws as these, guaranteed to entrap anyone they want to entrap, given the present state of public opinion or the present habits of our lawmakers. They can just let the laws pile up and then match them together, the way you sort your socks out after a trip to the laundrette.

Et voilà: there you have it. *The Full Coercive Apparatus Of A Police State* (see Sean Gabb, Libertarian Alliance Legal Notes Number 6, 1989, titled thus, and subtitled *Thoughts On The Dark Side Of The Thatcher Decade*), followed by class warfare, democratised or not, to see which class controls this omnipotent machine for destroying anyone that any well placed individual or group of individuals aims it at.

THERE IS STILL TIME AND WE MUST USE IT

Micklethwait’s law of nationalised industries states that nationalised industries don’t go to hell immediately. They do little harm to begin with, and may even do some immediate good. In this case, smashing away the rights of the accused and regulating against this and that may indeed start by reducing the number of old-fashioned type crimes and the number of children slaughtered on the motorways or harmed by excessive chocolate biscuit consumption. But *then*, slowly but surely, and with increasingly destructive consequences, nationalised industries *do* go to hell. It will be several decades before the writing of something like this pamphlet, for example, could be so dangerous as to amount to an exercise in self-destruction, but that is the way things are now heading.

Accordingly, we chatterers have time, but must use it. We must denounce this explosion of regulation and ministerial discretion and arbitrary power, in writing and in detail.

The libertarians amongst us must cease being concerned only about stamping on the grave of Karl Marx and worrying only about the mere *level* of taxation (as if the *scale* of the government's activities is the only thing that matters, and as if the *nature* of those activities is of no importance).

And all you ex-sub-Marxists still have time to correct the intellectual omissions and errors of your wasted and hideously prolonged adolescences. You can still redeem your now ebbing lives by ceasing to moan about Thatcherism as if absolutely all of it was bad, by instead describing those bits of it that really are bad, in the Sean Gabb manner. Freedom good; tyranny bad. You agree with that, don't you? Well it's about time you did. If you are prepared to sully yourselves by submitting to the Libertarian Alliance good pieces of writing that defend legality and virtue and decency and the right to smoke dope and wave banners, but without any simultaneous demands that stockbrokers be forbidden to broke stocks or car salesmen to sell cars, then the Libertarian Alliance is willing to sully itself by publishing such stuff. Your writings will then be mailed out to the universe, alongside other writings about the wonders of unrestrained capitalism and the glories of the Global Information Superhighway.

WRITE IT DOWN

I am the Libertarian Alliance's Editorial Director. I do the Libertarian Alliance's desktop publishing. I am starting to do A3 colour posters, featuring quotes from earlier Libertarian Alliance publications together with eye-catching graphics, for undergraduates — and humans — to put on their walls. I don't just have the right to indulge in generalised ranting; it is my duty. The real writers, the ones who write down exactly which issue of *Reason* it was in which they saw that bit about the nightdress laws and exactly what the law said, and who do their footnotes properly, need to know what sort of longer-winded publications the Libertarian Alliance wishes them to produce and can be relied upon to publish and make much of.

A politics student called Malcolm Hutto gave a most interesting and depressing talk about the growth of British discretionary state power and consequent decline in the lawfulness of the British legal system, at my last-Friday-of-the-month libertarian gathering a few weeks back as I write this, on September 30th 1994. I urged him then to write down as best he could, even without proper footnotes if that was the price to be paid, approximately what he said that night. I urged him again to write it down when subsequently thanking him for his talk, and I now urge him yet again. Write it down, Malcolm. (It was this talk which first alerted me to the full significance of the fact that the

government can now *stop* a prosecution, even a prosecution originated by a private citizen, whenever it feels like it.)

Those of us who favour that free market in law that I mentioned at the beginning of this piece should oblige with a bit of detail. I should do this. I should say what else is meant by the rule of law besides having about the right number of laws. I hope to be producing something like this Real Soon Now, as they say in the computer software business.

CONSERVATIVES HAVE THEIR USES

There is at least one noble exception that ought to be made concerning the dereliction of duty perpetrated by Britain's chatterers on the subject of law. I refer to the conservative chatterer Christopher Booker, who now writes about the menace of rampant regulation for the *Sunday Telegraph*, and who recently also contributed an article on this topic to the recent issue of *Economic Affairs*, the journal of the Institute of Economic Affairs that was entirely devoted to this crucial topic (Volume 14, No. 4, June 1994).

As a libertarian I have no automatic love for conservatives, for real conservatives that is, who love the past and fear for the future. (I don't mean "conservatives" who are in the mere Conservative Party because they like capitalism or attending coffee mornings or something.) But those conservatives — Sean Gabb is another, of course — who have been concerned about conserving the effectiveness and honesty of the British legal system deserve our respect.

Conservatives are no use at telling us what positively to believe in. They are no good at mapping and creating the future, and communicating enthusiasm and optimism about it. All you get from them about the future is clouds of vacuous abstractions, and a general atmosphere to the effect that the battle is already lost anyway, what's the use, everyone under thirty is incurably barbaric, the future will be hell and to hell with it. But when an actual specific institution or network of institutions is being destroyed but while the memory of it still lingers, conservatives can be useful people. They can describe the lost Eden in reverent detail, and the nature of the snake or snakes in the Garden, better than your average optimistic radical — such as I — ever can. Conservatives are always looking for the evidence that things are getting worse and worse, and where things really are getting worse and worse, they are temperamentally inclined to do the exact job that needs doing. I can't believe that Booker is the only conservative who has been talking sense about the ghastly realities of British lawmaking and regulation mongering in recent years; far more likely is that he is simply the only one I happen to have heard of. I hope that this piece of writing will cause me to learn of other such conservatives, including many who have yet to be published and who would relish the thought of penning future issues of Legal Notes.