

THE FULL COERCIVE APPARATUS OF A POLICE STATE:

THOUGHTS ON THE DARK SIDE OF THE THATCHER DECADE

SEAN GABB

The logo for the Libertarian Alliance, featuring a stylized 'A' symbol followed by the words 'Libertarian Alliance' in a bold, sans-serif font.

Ten years ago, I gave way to one of my rare bursts of enthusiasm. I was at the time, I'll grant, still a schoolboy; and these things are always more permissible in them than in others. But, even for a schoolboy, it was a very great burst of enthusiasm. I seriously thought that, along with Mrs Thatcher, the second dawn of classical liberalism had arrived. This was it, I thought. No more socialism. No more national decline. No more Road to Serfdom. Oh, even as lads of my age went, I was naive.

To give praise where due, there *has* been a loosening of market forces. Wage and price controls are gone. Exchange and credit controls are gone. There are no controls on foreign investment either way. We have a tax system designed more for collecting revenue than confiscating wealth. Most of the nationalised industries have been sold off, or made to operate on something like sound business principles. Since 1981, we've been unusually prosperous. We even had five years of lowish retail price inflation. The Government's economic record hasn't been one tenth as wonderful as I expected, or as I hear it proclaimed. It's been quite good even so. It might easily have been worse.

But the economic record isn't the only test of a government. There are all those rights that don't bring a financial return: how they are respected. And, while the Tories have supervised the building of an impressive number of Japanese car factories here, they haven't rolled back the frontiers of the State. What they have done is bring about an unprecedented concentration of power at the centre. Every one of those bodies, public or private, which used to stand between the state and its citizens has been pushed aside: local government, the press and other media, the unions, the universities -

each has been humbled. And the Bar may soon be about to follow. But all this is common knowledge. Enough already has been said about it. What I wish to do in this article is describe the new and unusual ways in which this concentrated power is being used. I shall discuss to what extent we've ceased being a nation under the rule of law.

Now, this is a grand phrase, and Tory politicians love rolling it out on grand occasions. Nine times out of ten for them, it's just a euphemism for making people do as they're told. Rather, it's the most completely effective check on State power ever yet discovered. Put as fully and exactly as I can, it requires this: that no person be arrested, or imprisoned, or fined, or by any other means harmed, except in accordance with unambiguous laws of general scope, that have been laid down in advance, that are equally binding on all, and that are enforceable only by independent courts in which the prosecution is at a procedural disadvantage. Whoever has not been, or is not in process of being, adjudged in breach of any such law is to be as free of interference by the State as a foreigner living outside its jurisdiction.

The usual objection to this is that it lets crime go unpunished. Everyone knows of some evidently guilty person who's gone scot free thanks to a clever lawyer. But, in judging any set of legal rules, what must be looked at isn't the effect of a single instance, but of the whole scheme through time. Where the rule of law is concerned, it is invariably true that the greater security of life and property, and the readier public acceptance of those uses of power which are made, are well worth the occasional specific inconvenience.

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FOR LIFE, LIBERTY AND PROPERTY



I'd be as bad as the people in donkey jackets hawking *Socialist Worker* if I blamed every violation of the rule of law on Margaret Thatcher. Faith in it was already crumbling before her father was a little boy. Nor, in every case, has she been the greatest violator. In respect of the first of these listed below, she's been so far a distinct improvement on Harold Wilson and James Callaghan: she hasn't tried fixing wages and prices by decree. But, taken as a whole, what she and her colleagues have been about these past ten years can have only one meaning. They've been hard at work, freeing the State from all constitutional restraints. Consider:

IN ACCORDANCE WITH LAW

In the July of 1988, the Prime Minister was asked in Parliament what she thought of gazumping. In the late 1970s, when making libertarian noises was more to her taste than now, she might have answered that breaches of faith are always regrettable, but what else can one expect when the Government's monetary policy is making house prices rocket? Instead, she called on estate agents to adopt a voluntary code of conduct. If they refused, "the Government might have no alternative but to introduce statutory rules".

I know that estate agents are deeply unpopular. Having been one myself, I know that they're often deservedly so. But this apparently offhand remark is a perfect instance of what Enoch Powell calls "the rule of the Threat of Law". "Do as I tell you" a minister says. "Or I shall make a law compelling you to do it - and then you'll be sorry." Usually, the person threatened does obey. Perhaps he thinks saying "No" isn't worth the effort. Perhaps he'd rather deal with a single minister than many lawyers. Perhaps he thinks the Government has a right to push him around. For whatever reason, he usually obeys.

The estate agents haven't obeyed yet. But the press has long been kow-towing to a D-Notice Committee, the orders of which have as much legal force as one of my New Year resolutions. The tobacco companies almost fall over themselves obeying the Secretary of State for Health. Early in 1987, they agreed to cut their advertising budget at sports events sponsored by them from thirty per cent to twenty per cent of the total of any one event. At the same time, they increased the size of the Government Health Warning by fifty per cent.

Calling these agreements voluntary is a sinister misuse of language. Bad in themselves, they form ready precedents for a much larger use of arbitrary power. Compared with what it was, Parliament is a joke. But, it isn't yet entirely a rubber stamp. The Commons do occasionally put the Government front bench in a sweat. The Lords can be very stubborn, even if only for a year at a time. Though we have nothing like the American Supreme Court, the Judges do see off whole Acts of Parliament when the mood takes them. Even formulae like "the decision of the Minister shall not be called into question in any court of law" have been effectively voided. But when the Government can rule simply by stating its wishes and having them complied with, there's an end to all but the most extraordinary scrutiny in Parliament, and of all scrutiny whatever by the Courts. Ministers are freed from worrying whether they're acting *ultra vires*, or in bad faith, or for an improper purpose, or in breach of the rules of natural justice. They can be as selectively indulgent or severe as the whim takes them. With a bit of arm-twisting, with a few nods and winks, safeguards that have taken eight hundred years to evolve can be pushed aside as easily as I delete a paragraph on my wordprocessor.

LAWS OF GENERAL SCOPE

The rule of law isn't synonymous with freedom. As a doctrine, it governs the making and enforcement of laws, not their content. An Act imposing the death penalty on every person reaching the age of sixty-five would be perfectly compatible with the rule of law. For obvious reasons, Parliament would never make any such Act. If politicians and their friends and relatives were to be exempted, of course, that would be another matter. It would also create privileges decidedly incompatible with the rule of law.

Except where the revenue is concerned - and this is a cause so lost, I'll not discuss it further - the Thatcher Government has created no explicit legal privileges. But it has made laws, in form binding on all, in essence directed against specific groups. The most scandalous of these, of course, has been section 28 of the Local Government Act 1988. This bans the promotion of the teaching in any schools maintained by it of the acceptability of homosexuality as a pretended family relationship. True, there were Labour Councils pushing the ratepayers' money at any group with the word "gay" in its name. True, this had to be stopped. But why this alone, when there was other political funding besides? What about the funding of anti-smoking groups? These are political. I, for one, find them infinitely more offensive than a few proselytising homosexuals. What, for that matter, about the promotion of knicker sniffing, or any other minority sexual taste that the Labour left might one day care to buy into its "coalition of the disadvantaged". If a law was needed, it should have been a general prohibition laid on the funding of anything controversial beyond a certain point. Instead, a law was made, useless for any other purpose than heaping indignity on an unpopular minority of our fellow subjects.

LAWS LAID DOWN IN ADVANCE

The panic following the Hungerford Massacre made a tightening of our gun control laws inevitable. Under the Firearms (Amendment) Act 1988, it became a serious offence to own, among others, semi-automatic rifles and pump-up shotguns. It's a shame the Government gave in so readily to the panic. It's a shame there are any controls at all. But this is beside the point. Taking away the right to bear arms may be oppressive, but it isn't in itself contrary to the rule of law. Under section 21 of the Act, the Home Secretary was enabled to make a scheme of compensation for those surrendering or otherwise disposing of their newly prohibited weapons. Delegating legislation is politically dangerous, but, again, not contrary to the rule of law. Under the scheme eventually made there was to be a flat payment of £150 per gun, or a payment of fifty per cent of the average retail price of the gun in the summer of 1987. Taking property without just compensation is theft. But this I deal with below. For the moment, I'll discuss sections 21 (a) and (b) of the Act. These provide for compensation *only to those owners who lawfully acquired, or contracted to acquire, their guns before the 23rd September 1987*.

The Act was passed in the spring and summer of 1988. Possession of the weapons prohibited under it became an offence on the 30th April 1989. No one who bought any such weapon between the 23rd September 1987 and last Sunday - as I write - was breaking the law. Anyone who did buy one has been punished as if he had.

When laws can be made tomorrow that penalise what was lawfully done yesterday, there's an entire end to limited government. The only safe course lies in anticipating what may be said, and doing it. As above, if by other means, the distinction between the law of the land and what the government wants is abolished. This much the Home Office cheerfully admits. It was known long in advance, we've been told, that certain weapons were likely to be banned. Anyone who didn't immediately take account of this has only himself to blame.

Laws *ex post facto* are expressly forbidden under Article I, 9:3 of the American Constitution. It used to be assumed they were equally unconstitutional here, whatever the theoretical right of Parliament to make them. The modern view is made quite plain in section 139 of the Criminal Justice Act 1988. This mainly does something rather nasty that I shall discuss below. Subsection (8), however, reads: "This section shall not have effect in relation to anything done before it comes into force". What a splendidly cool admission of the coming tyranny!

LAWS ENFORCEABLE BY THE COURTS

1. There's an old parliamentary device called Attainder. It's a means by which penalties - sometimes death, sometimes a fine - can be imposed without due process of law, the Bill going through Parliament like any other. Naturally, it was a device shockingly

abused from beginning to end. It hasn't been used in centuries. Yet if section 21 of the new gun law isn't in effect a little Act of Attainder, I don't know what is.

2. The Local Government Finance Act 1988 is the one forcing the Poll Tax on us. When I first learned I was to be put against my will on a computerised register, I couldn't believe I was awake and living in England. But, again, this is only frighteningly oppressive and politically stupid. Giving false information to the people compiling these registers is an offence, carrying fines that range from £50 to £200. Under section 23 and Schedules 3 and 11 of the Act, these fines are to be imposed by tribunals set up by the authorities collecting the Tax. Though a tribunal may at any time quash or amend its sentences, there is to be no automatic right of appeal to the proper courts. Anyone who doesn't supply every last detail wanted by the registration officers has been made subject to the penal jurisdiction of a town hall committee. But this jurisdiction will at least bear some resemblance to legal proceedings. There is worse.

3. Under section 27 of the Transport Act 1982 - given effect in the summer of 1986 - the Police are empowered to hand out fines to motorists whom they believe to have been speeding or committing some other traffic offence. The money involved is negligible - £24 at the most. The principle is a disgrace. Penalties are now imposed without the ghost of due process. I'm told that, in many European countries, the Police have still wider judicial powers: they even collect the fines. But there hasn't been a properly limited government anywhere in Europe since the middle ages. Foreigners are so used to misgovernment, it's no surprise if they stand by grinning while their wallets are gone through by men in uniform. What they're willing to put up with is no precedent for us.

PROSECUTION AT A PROCEDURAL DISADVANTAGE

One of the acknowledged glories of the common law tradition is its procedural safeguards in criminal trials. An accused person is presumed innocent until found guilty. The Court is forbidden either to rely on involuntary confessions or to construe silence as an admission of guilt. In the absence of a truly voluntary confession, the prosecution must make out its whole case without assistance. Any other evidence offered by it must have been obtained without general searches or other means contrary to right or custom. For at least the graver crimes - and preferably in any matter affecting life, liberty or property - trial must be by independent Jury of the Accused's peers. I can't say that these safeguards were still securely in place before 1979. The cumulative growth of executive and, especially, of Police power has already largely eroded them. But it is true that the past ten years have seen a revolution in criminal procedure. Consider again:

INNOCENT UNTIL PROVED GUILTY

1. Section 1 of the Drug Trafficking Offences Act 1986 brings into English law the penalty of the Criminal Confiscation Order. Some-one is found selling heroin, and is arrested, tried and convicted according to law. Trying to stop the sale and use of recreational drugs is oppressive in that it isn't called for on the grounds of individual or public justice. It's also dangerous by reason of the subsidy it places on all real criminal activity. But, as with the possession of weapons, this has nothing directly to do with the rule of law. It's what now follows conviction that is so outrageous. The Court may direct an inquiry of the Defendant's assets insofar as these may be the fruits of the crime of which convicted or *any other* similar crime and exceed £10,000. The prosecution submits a statement of assets, particularising those which it alleges to have been come by dishonestly. It's up to the defence to challenge each of these allegations. If it fails to challenge them, or doesn't challenge them to the Court's satisfaction, the assets are confiscated.

Except that the courts administer it, this is as gross a denial of due process as any of those listed above. Taking away the proceeds of what may well be, but haven't been properly decided, criminal acts is nothing but a kind of judicial attainder. Leaving all challenges

to the defence is an exact reversal of the traditional burden of proof. Everyone knows the advantage of this is in ordinary argument. A clever flat-earther stands up in company. "The earth is flat" he asserts. Someone laughs. "Prove to me that it isn't" he demands. On the defensive, he has to prove nothing himself, but only to deal with individual - and perhaps half-baked - objections. In court, it makes the job of prosecution so delightfully easy, that no one but a fool can have believed the procedure would remain confined to drug offences. Section 71 of the Criminal Justice Act 1988 extends it to cover every indictable offence.

2. Section 139 of this Act creates the new offence of having a knife in a public place without "good reason or lawful authority". This does away with what now evidently seems the cumbersome requirements of section 1 of the Prevention of Crime Act 1953, whereby the prosecution was put to the inconvenience of proving that any knife found was indeed an offensive weapon within the meaning of the Act, or was carried with intent to commit a crime. Now, it merely needs prove possession in public of a sharp or pointed implement that isn't a folding pocket knife with a blade of three inches or less. This done, it's up to the defence to prove "good reason or lawful authority".

The Prevention of Terrorism (Temporary Provisions) Act came into force last March 15th. Section 9 makes it an offence to handle money for any person, "knowing or having reasonable cause to suspect that it may be used by that person for the purposes of terrorism". This offence carries an unlimited fine or a sentence of up to fourteen years in prison. Murder, theft, intimidation - these are offences that ought probably to carry the same penalties whatever the motive behind them. But, in any case, someone who knowingly transfers or helps to transfer funds for the commission of a crime should be regarded as an accomplice, and so liable to be punished. What, however, do the words "reasonable cause to suspect" do except make a crime of stupidity? If an English bank clerk quietly takes in money for an American group called Kill A Brit For Ireland Inc., maybe he is assisting in the commission of a crime. Caught taking in money for the Patrick Sarsfield Foundation, he's in serious trouble unless he can prove his ignorance of Irish history.

This bizarre provision isn't the effect of sloppy drafting. It's deliberate Government policy. Said Douglas Hogg, justifying it in the Commons: "My feeling is that to accept an exclusionary subjective test ... would be to erect too high a hurdle for the purposes of securing convictions". It used to be a boast of the common lawyers that the purpose of English law was to secure justice, not convictions. Better that ten guilty men go free, said Blackstone, than one innocent be made to suffer. I believe I could quote Mr Hogg's own father to the same effect.

NO SELF-INCRIMINATION

The Police don't often beat confessions out of suspects. They don't often need to. At most, a few veiled threats are enough. Usually, all that's needed is sustained questioning of a suspect, alone and in the unfriendly surroundings of a Police Station. What is required, then, is that no one should be questioned without access to legal advice. In America, the courts regularly throw out indictments where the Police haven't observed this requirement to its letter. Here, section 58 of the Police and Criminal Evidence Act 1984 does give an arrested person the right to consult a solicitor at any time. But, in the case of "serious arrestable offences", this right can be deferred for up to 36 hours; and the whole period of questioning between arrest and before any charge must be made can be extended to 96 hours.

A member not merely of the Bourgeoisie, but arguably also of the Establishment, I rather hope I'd be treated with the fullest, wariest respect if ever arrested. For all the Act lays down, others haven't been so lucky. In 1985, following the Broadwater Farm riots, a boy of thirteen was interrogated alone in a Police Station for three days. Wearing only underpants and a blanket, he eventually confessed to murder. He might possibly have been guilty. But the judge was so aghast, he felt he had no choice but to direct an acquittal. This, however, was a use of discretion, not, as in

America, the application of a fixed rule. For lack of one, it stands to reason the Police will go on pressuring suspects too young or ill-informed to be worth being frightened of.

THE RIGHT TO SILENCE

There is an essential part of the foregoing. Just as a suspect traditionally can't be pressured into giving evidence against himself, neither does he have to risk being duped into doing so by skillful examination. Nor can his remaining silent be construed as any admission of guilt. I treat this separately, however, by reason of the current debate over its continuance.

There have been periodic clamours against the right for twenty years. It lets sophisticated criminals get away far too often, we're told. But this is the first Government to act on the clamour. In 1988, an Order was laid before Parliament allowing the Judges in Northern Ireland to make what they pleased of a suspect's silence under prior interrogation or in court. From extended Police questioning to plastic bullets, there's little tried in Ulster that doesn't eventually find its way to England. It's only ever a matter of time and opportunity.

In one part of the law, indeed, the right has already been lost in England. Under section 1 of the Criminal Justice Act 1987, the Serious Fraud Office was set up. Section 2 of the Act allows this body to require a person under investigation for serious or complex fraud, or any person who is reasonably thought to have information relevant to such a fraud, to attend before it and answer questions or furnish information. Anyone failing to comply commits an offence. Though statements made under compulsion can be used only to contradict other statements made later by the defence in court, documents surrendered may be used by the prosecution for such purposes as it may think fit. The writers of the standard commentary on this Act - Emmins & Scanlan, p. 6 - are driven to say: "Thus significant inroads are made on the privilege against self-incrimination and the maxim that 'no one shall be required to be his own betrayer'."

NO GENERAL SEARCHES

The Fourth Amendment to the American Constitution is a codification of English law as stated in the various cases connected with John Wilkes. I cite the whole Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

I cite the relevant parts of section 19 of the Police and Criminal Evidence Act 1984:

- (1) The powers conferred by subsections (2), (3) and (4) below are exercisable by a Constable who is lawfully on any premises.
- (2) The Constable may seize anything which is on the premises if he has reasonable grounds for believing -
 - (a) that it has been obtained in consequence of the commission of an offence; and
 - (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed ...
- (3) The Constable may seize anything which is on the premises if he has reasonable grounds for believing -
 - (a) that it is evidence in relation to an offence which he is investigating *or any other offence*; and
 - (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.
- (5) The powers conferred by this section are in addition to any power otherwise conferred.

Beyond saying the italics are mine, I don't think I need point out anything further here. Looking at these two documents one after the other, I'm left speechless. This second is the modern law of England.

MEANS CONTRARY TO RIGHT OR CUSTOM

If I testify in court, I do so under two great sanctions. First, I swear by my God or my honour, whichever I decide the greater, that I will tell the truth. Second, if caught lying, I face being prosecuted for perjury. The assumption behind this first is that I understand the difference between truth and falsehood. That behind the second is that I can be held legally responsible for what I say. Section 34 of the Criminal Justice Act 1988 provides that an accused may be convicted on the uncorroborated evidence of an unsworn child. Perhaps, as was extensively argued at the time, children are less prone to telling lies than was always assumed. Certainly - and I don't recall this being mentioned - they can, with complete personal impunity below the age of ten, have someone convicted of what are currently viewed as the most atrocious of crimes. They don't even need to appear in court, but can say all they need over closed circuit television. It was Esther Rantzen and her friends in the gutter press who demanded this denial of natural justice. But it was the Government that willingly gave in to it.

TRIAL BY JURY

This Government doesn't like Jury trials. The bloody nose it got in the Ponting trial has kept it out of the criminal courts as much as possible ever since. Also, while it didn't begin the progress towards the abolition of Juries, it has done much to hasten its speed.

1. Sections 37 and 39 of the Criminal Justice Act 1988 have made theft of a motor car and common assault and battery offences triable by magistrates alone. The excuse given for this was that Crown Courts were too overloaded for there not to be a certain shedding from the list of indictable offences. Between 1979 and 1984, we were told, indictments rose by 48 per cent. But this wasn't the only answer to the problem. There were at least two others. The first was to stop creating so many new offences. The second was to build and staff more courts. This would have been expensive. But what is expense to a Government that takes and spends upwards of £150 billion every year? If the Department of Trade and Industry was allowed to spend £13 million last year on what was essentially Conservative propaganda, what is the objection to giving a few dozen million extra to the Lord Chancellor's Department? Which is a more basic function of the State - financing Lord Young's vanity or providing justice?

2. Section 118 of the Act abolishes the right to peremptory challenge in Jury trials. Much was said last year about how careful challenging could alter the composition of a Jury in favour of the defence - as if this were anything new and unnatural. Under the old common law, an accused had the right to challenge thirty-five Jurors without showing cause. Anyone who has looked into Howell's *State Trials* will know how extensively this right was used in the 17th and 18th centuries. It was there to ensure a more subtle and reliable fairness in the composition of a Jury than could be achieved by the means of showing cause to the Judge. To be fair, the right had already been substantially taken away. The number of peremptory challenges was reduced to twelve in 1925, to seven in 1948, and to three in 1977. But it has fallen, as ever, to this Government to take the decisive step, and reduce the number to zero. The prosecution, of course, keeps its old right of unlimited peremptory challenge.

If anyone wants to contest this, I'm open to argument. I really would like nothing more than to believe I'm hopelessly in the wrong and that we are returning to those values which - far beyond any mere expansion of territory or power - set this country apart from all others. But I don't think I can be accused of having misunderstood the drift of things. Whatever was promised, whatever may now be said, the Thatcher Government has brought into being the full coercive apparatus of a police state. As yet, this has had scarcely more to do than stand in reserve. Prosperity and a lingering habit of obedience have kept us sufficiently governable. But let either of these falter, and then, in their regular, familiar use, we shall see the potential of the new powers made actual.