

BLAIR'S LAWS: AN AUDIT OF A DEPRESSING DECADE

The significance of numbers

Mere numbers sometimes tell a story eloquently. Most civilized nations make laws reluctantly, recognising that any law is a form of violence – a type of coercion by the state which should be avoided if at all possible. To make a lot of laws says a lot. It says that the legislature does not trust individuals or existing institutions. It says that the legislature thinks that it is the best arbiter of the public good. In a common law jurisdiction such as the UK used to be, it indicates that the legislature does not trust the judges to produce bespoke solutions to the new problems inevitably generated by society's growing complexity. All this should be profoundly worrying to anyone concerned about fundamental freedoms.

Blair has been the most fecund spawner of new law ever. Over the decade of his increasingly Presidential reign, an average of 2685 new laws were enacted each year. That is almost seven and a half laws each day, or one every three and a quarter hours. This represents a 22% increase over the average for the preceding decade.

These figures do not include the many thousands of new laws automatically grafted into the UK law by virtue of the UK's membership of the European Union. In 2006 alone there were over 2100 new European regulations affecting the UK. The total since 1997 is 4785 – 13 every day¹.

And what are we to make of the change in the pace of legislation? The longer Blair stayed at the helm, the faster new laws appeared. If what was done in the early years was any good, one would intuitively expect it to be the other way round. Surely it denotes a Prime Minister in love with power; intoxicated with the ability to compel and control.

The numbers of enactment alone don't tell the full story of this hysterical over-legislation. Statutes under Blair became far longer. In 2006 five Acts totalled more than 100 pages, three more than 200, one more than 300, one more than 500 and one more than 700.

As well as being an effective piece of political litmus, giving a result devastating to Blair's reputation, the volume of legislation created some massive practical problems. There are three important groups who need to know what the law says. First, there are the bureaucrats who have to generate systems for disseminating and implementing the law. They, together with the lawyers who feed parasitically on legal complexity, have been the principal beneficiaries of Blair's mania for law-making. They have become more numerous, although more confused and less effective. Second, there are the judges, who have the unenviable job of trying to make sense of the legislation. Their disgust with the trend towards more law oozes out of almost every Court of Appeal judgment dealing with the appalling Criminal Justice Act 2003. And then there is the public. It is rather important that everyone knows or can easily know the limitations placed by

the State on his behaviour. When the judges say that the law is dangerously incoherent, there are constitutional worries going far beyond mere inconvenience.

The significance of method

It is tragically necessary to assert some trite things that appear in Chapter 1 of any school book on politics. They have been forgotten in the Blair years. Here is one. A decent, confident government, properly recognising its relationship (servant) to the legislature (master), legislates in major matters primarily through Acts of Parliament. Over many hundreds of years a simple and effective system for Parliamentary scrutiny of legislation has evolved. The mechanics do not matter here. The point of this system is the point of Parliament itself: no legislation without representation. And one can't be properly represented unless the representative knows what legislation is being proposed.

Parliamentary time is tremendously valuable, and of course in most democracies it is recognised that for formal or minor legislation there needs to be an alternative system. If Parliament wants to endorse a proposal for a ring road round Wolverhampton, or say that section 4(c)(ii) of the Vole Throttling (Wales) (Amendment) Act should come into force on 1 April, it is appropriate to use an essentially administrative system of legislation to do it. This system in England is the system of delegated legislation – legislation by way of statutory instrument. The overwhelming majority of statutory instruments are subject to the 'negative resolution' procedure, whereby a statutory instrument will become law without any debate unless there is an annulment motion². But even the technical provision for an annulment motion is no real protection against Governmental high-handedness. An annulment motion needs Parliamentary time. Since the Government has control of almost all the available Parliamentary time, the Government can simply block debate by refusing to allow time for debate of the motion, and the statutory instrument will then become law by default.

The system only works if the government has the decency, the discipline and the basic constitutional awareness not to abuse it. Blair's government shamefully abused it. 98% of new laws in the Blair years were introduced by effectively unchallengeable statutory instrument. The statistic is shocking: 98% of the laws restricting freedoms were simply drafted by a government department and administratively rubber-stamped. Whatever this is, it is not democracy.

The most constitutionally significant reform of the Blair era is of course the remodelling of the House of Lords³. Non-UK readers may see the unelected Lords as an insupportable mediaeval anachronism which should have no place in a modern state. But the realities are otherwise. The Lords were (and to some extent still are) valuable because of their strenuous independence. True, on the benches of the Lords, among the blue-blooded scions of ancient houses and the genuinely apolitical grandees of proven merit there were an increasing number of Party appointees, but there must be something about the air there that breeds independence. Even the Party hacks of previously unblinking, unthinking fidelity to the Whips sometimes seemed to acquire a longer

perspective and a real integrity when debating and voting in the calmer lobbies of the House of Lords. Tony Blair smashed up the Lords because he knew that they could be inconveniently independent. It simply cannot be said that the Lords voted predictably like tweeded Tories. Blair's real distaste and distrust for the Lords was generated by what he knew the Lords would do in relation to Bills that sought to truncate other basic freedoms. He knew, in short, that they would behave in that respect much more like barricade-storming students than red-faced feudalists.

Apart from the judges and the Lords, there were few effective bulwarks against Blair's rising obsession with control. The Government has always had at least a comfortable majority in the Commons, and most Labour MPs have been craven lobby-fodder. But towards the end of the Blair years even some of those MPs showed some signs of discontent with some of the plainly unconstitutional edicts the Whips were trying to force on them. The Government's preferred version of the Religious Hatred Bill, which would have made vulnerable to prosecution comedians telling Jewish and Catholic jokes, as well as preachers expounding their holy texts, was defeated after a spirited campaign by an improbable coalition of right-wing evangelicals and profane gag-artists. If you let a previously penned animal taste a bit of freedom, it is never quite the same again. Had Blair stayed on he might have had a harder time from those backbenchers who rebelled over the Bill, realised that the world did not end, and were beginning to see that their responsibility to their constituents did not mean simply shuffling obediently up to sign where Tony Blair told them to sign.

Devolution

Referendums in Scotland and Wales in September 1997 backed devolution, and both now have separate assemblies with limited legislative functions⁴. The Scottish Parliament is much more powerful than the Welsh Assembly, but it is hard for voters to take either seriously. Devolution will remain a mocked and expensive idea rather than a meaningful reality until Scottish and Welsh MPs relinquish their seats at Westminster and the local assemblies really have to run things themselves. That is not going to happen soon. Blair's 'devolution' is constitutional window-dressing.

Human Rights and the Rule of Law

The Human Rights Act 1998 was one of the legislative flagships of the Blair years. It became effective in 2000. It effectively imports into UK domestic law the European Convention on Human Rights. It is not a bad piece of legislation, but, with a few important exceptions, has had relatively little effect on the substantive law of the UK. This is because UK judges have been reluctant to say that the basic principles of fairness and common legal sense that it embodies were new to them. The most obvious effects of the Act have been on the bank balances of lawyers and the length of court lists. First the bank balances. It is not hard for any half-competent lawyer to see a lucrative human rights angle in most legal questions. The human rights points are

usually forensically vain, but before they are exposed as such some exhilarating fee notes are often submitted. There are signs that the run-of-the-mill human rights market is flattening out, mainly due to withering winds of judicial disapproval. Then there are the court lists. The Human Rights Act has caused painful swelling of the lists in the Administrative Court. Much of the increased bulk is immigration work.

Does the enactment of the 1998 Act indicate that the Blair government was passionately and fundamentally concerned with basic human values? Most emphatically not. This is (almost amusingly) illustrated by those few but very important cases where the Act has made a real difference. They are almost all cases in which the judges, wielding powers given to them by the Act, have declared to be unlawful key pieces of government legislation or the decisions of government ministers – usually relating to the terrorism legislation or to the rights of suspects.

The government's response to these cases has been depressing and illuminating. Instead of saying graciously that they will re-examine the decision or the enactment in the light of the judges' ruling, they have generally said that the judge is wrong (sometimes in strident personal terms), and threatened to enact further legislation in order to sidestep the ruling.

Blair's government has used many techniques to undermine basic liberties and the systems that exist to protect them, but there is nothing more worrying than the full frontal assault on judicial independence and the judges' right to have the final word on the construction of legislation. Again, this is basic constitutional stuff. The rule of law demands an effective separation of powers. The government's denunciation of judges who have the effrontery to apply the law speaks volumes about the government's view of where power should reside. Whatever the demerits of the Human Rights Act, no one could deny its real value in frustrating some of the government's more constitutionally offensive schemes.

The legal profession and access to justice

The legal profession matters. It is not merely a writhing community of parasites. It plays an important constitutional part. Lawyers are the voice of the public in disputes between the public and the state (for instance in criminal proceedings), the voice of individual parties in disputes with other parties, and an important source of information about rights and obligations. A society with a flaccid legal profession is a society with fewer safeguards against injustice.

Blair's government loathed lawyers, and particularly barristers. This was mainly because they stood up so effectively to the government before those judges, but also because the government intrinsically disliked and distrusted the small businessman with his inconvenient habit of independence and his basic distaste of regulation. And so the government set about trying to make the legal profession more malleable. It reduced criminal barristers' fees to levels that no plumber would dream of working for, resulting in an entirely predictable haemorrhage of morale from the criminal bar and creating monumental problems in recruiting good candidates. It encouraged the Crown Prosecution Service to use its own in-house lawyers for much prosecution

work, seriously impoverishing the independent Bar which had previously done the work. The effect of changes in public funding have radically altered the structure of the solicitors' profession. Small High Street practices have been decimated. Survival in the modern market means moving to a large, corporate structure. It is not good for clients and it is not good for the lawyers who work there. But the government loves it. It is far easier to control a few big organisations.

The big commercial firms of solicitors did splendidly under Blair. To a large extent this was a function of Gordon Brown's prudent economic management and of the generally buoyant international economy. If an economy does well, and trade flourishes, there are more contracts to draft and transactions to advise on, and the flash City players prosper accordingly.

The Government's rhetoric about 'Access to Justice' was beyond parody. Lord Woolf proposed a number of reforms to the system of civil litigation⁵. The thesis behind them was that civil litigation was too slow, too complex and too expensive. Justice delayed, said Lord Woolf, was justice denied. And if someone was deprived of a remedy because he was too intimidated by the Byzantine convolutions of civil procedure, that was dreadful. He was right. His proposals were largely adopted, and became the Civil Procedure Rules⁶. They make good sense. Out has gone *Jarndyce v Jarndyce*: in have come claim forms in plain English. But simplify and streamline as much as you like, you can't get rid of the lawyers completely. To wave Lord Woolf's Report in one hand, and with the other rip away Legal Aid is either monstrously cynical or dismally ignorant. But this is what the government did. It doesn't affect the sharp-suited City boys, of course. None of their work is publicly funded. Nor does it affect any of the real legal Fat Cats, so loathed by the leader writers: Few have got either fat or feline on Legal Aid. It affects, as most of Blair's reforms have done, the little, powerless people at the bottom of the pile. A good example is personal injury work. The little old lady with the cliché Colles fracture caused by a slipshod highway authority who probably voted Labour in the belief that it stood for the little against the large will now limp along to her solicitor (probably in a big city-centre firm now, rather than just around the corner), only to be told that although her case is a reasonable one, there is no Legal Aid to support it. The Government proposed no-win-no-fee arrangements to plug the gap, but for many cases (notably small personal injury claims and most types of clinical negligence claims), they just don't make economic sense. The result is that many perfectly good claims never get contested. The little old lady goes without the money she is entitled to.

There is no need for this. A competently administered system of public legal funding could and should be self-funding. The truncation of legal aid is the classic example of politics trumping justice: of policy being written by the tabloids. There will always be votes in kicking the lawyers.

This theme – knee-jerk legislation dictated by political opportunism – is seen even more depressingly in the changes to the criminal law instituted by the Blair regime.

Criminal law

Criminal law matters. In no other arena is the real nature of the law – as a truncator of freedoms – seen so clearly. An unjust decision in a civil court generally sees someone paying over money he does not owe or not receiving money to which he is entitled. An unjust decision in a criminal court can result in someone being locked up with his own chamber pot and permanently stigmatised. In criminal litigation the State itself (borrowing the Queen’s name for respectability) is ranged adversarially against an individual. It is in the Crown Court that you see what the State really is.

What the Blair state really was was a profoundly interventionist state which legislated in order to get Sun readers to vote Labour. In Blair’s ten year rule well over 3000 new criminal offences were created. Nearly two-thirds of those were created by way of secondary legislation. Many were introduced in the course of much heralded campaigns: against re-offending rates, against anti-social behaviour, against dangerous offenders, and so on. There was significant investment of money into the criminal justice system: the UK now spends a higher proportion of its GDP on law and order than it ever has done. It has set itself targets, and loudly congratulated itself for meeting them. Some progress has been made. There are more police than ever before; the number of drug users undertaking treatments has increased, and the time between arrest and sentence for young offenders has been slashed.

But examples of real success are few and far between. Look further, and you see, beyond the smoke and mirrors, a dramatic failure to make a real difference. A measured and unimpeachably independent study by the Centre for Crime and Justice Studies at King’s College London commented drily: “...Labour has been adept at setting targets that are rather less significant than they at first appear...” It cited in particular the falls in car crime and burglary that appear on all Labour election brochures. These crimes, the study noted “had been falling for a number of years before 1997....it was reasonable to assume that these downward trends would continue under Labour, more or less regardless of any criminal justice innovations it introduced.....”⁷ The same is true of the much vaunted general decrease in the official crime rate. This “is again to be welcomed. What is less clear is whether Labour’s record expenditure and criminal justice reforms have had much to do with this decline. It is also notable that Labour’s explicit target of a 15 per cent reduction in [British Crime Survey] crime was unambitious in relation to the trends of previous years. Given that this target coincided with a dramatic increase in criminal justice expenditure, it is reasonable to ask what exactly Labour achieved for this major financial outlay.”⁸

Nestling within this carefully drafted apolitical prose are some searing denunciations. “...It is...apparent that Labour has made elementary errors in understanding the nature of the task [of reducing reoffending], confusing itself and others over the difference between re-offending and re-conviction, and, in the process, creating targets that are at best incoherent and at worst largely meaningless...”⁹ And what about the campaign against ‘Anti-Social Behaviour’. Well, this “was a ‘problem’ largely invented by Labour.....Labour has become lost in the arbitrariness of its

measures of anti-social behaviour....[I]ts flagship [Anti-Social Behaviour Order] policy....is looking increasingly discredited as a mainstream response....” |

There has been widespread and vocal judicial discontent at the tidal wave of criminal legislation. Sentencing, particularly since the Criminal Justice Act 2003, has become nightmarishly complicated, and the provisions for the sentencing of ‘dangerous offenders’ have contributed significantly to the grotesque overcrowding in Britain’s prisons – a problem apparently unforeseen at the time the legislation was passed.

But even more worrying than these practicalities is the fact that the government seemed either to have lost sight of, or to care nothing for, some of the fundamental principles which have characterised the British legal system.

In a speech in June 2002 Tony Blair said that “the biggest miscarriage of justice in today’s system is when the guilty walk away unpunished.” That is a terrifying statement. It represents an abandonment of the most basic principle of civilized legal systems – that it is better for a guilty man to be acquitted than for an innocent man to be convicted. That principle – embodied in the burden and standard of proof – has been the law for many hundreds of years. Many of the provisions introduced by Blair – notably the provision in the 2003 Act for adducing the previous convictions of defendants – tend to undermine it. Some of the hasty anti-terrorism legislation rushed through in the aftermath of 9/11 and 7/7 is similarly offensive to elementary notions of fairness, and has been savaged by the judges.

Are we safer as a result of Blair’s reign? Of course not. It is generally agreed that so far as ‘ordinary’ crime is concerned, those hugely expensive initiatives of his have been a washout. And Blair’s illegal war in Iraq has undoubtedly massively increased the risk of terrorist attack in the UK.

Are we fairer? Quite the opposite: some of the basic checks and balances, so carefully engineered over the centuries to avoid injustice, have been ripped away in a decade.

Other areas of law

The big commercial enterprises, by and large, have been well served by the Blair government. Although some in the City moan about it, the tighter rule of the financial regulators and better control of money laundering have increased foreign confidence, and therefore investment. Small businesses, of course, have been penalised heavily. Provisions for paying tax on bills rather than receipts have created sometimes fatal cash flow problems. The burden of compliance with the rising tide of health and safety and employment legislation has also proved crushing. The woeful failure of the anti-monopoly legislation and the spinelessness of the planning authorities in the face of the sweeping Tesco-ization of the UK have forced many small businesses out of the marketplace.

Family finances have been periodically tinkered with, but no massive changes have been made. Civil Partnerships have been introduced¹⁰, giving rights of financial provision on break up and death similar to those of married couples. The legislation was met with predictable howls from the religious lobby, but the moon does not seem to have turned to blood.

Summary

Tony Blair came to power with a majority that allowed him to do anything. The power proved to be dangerously intoxicating. The UK has been engulfed by an unprecedented wave of legislation, much of it hasty, ill-considered, reactive and oppressive. Probably irreparable damage has been done to the British constitution and to some ancient and seminal principles. The UK has become a more dangerous and a less congenial place. We are greyer, meaner and more tawdry than before. Blair multiplied laws and suffocated goodwill.

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References

¹ Professor Len Sealy: On-line paper published by Sweet and Maxwell Ltd., 4 June 2007

² There is an 'affirmative procedure' which means that a statutory instrument will not become law unless a draft is approved by both Houses. But it is little used.

³ House of Lords Act 1999

⁴ Creatures of the Scotland Act 1998 and the Government of Wales Act 1998

⁵ His final report, Access to Justice, was published in July 1996

⁶ The first version was published in 1999.

⁷ *Ten years of criminal justice under Labour*: an independent audit. Centre for Crime and Justice Studies, King's College London, January 2007, p. 74

⁸ Ibid, p. 75

⁹ Ibid, p. 48

¹⁰ Civil Partnership Act 2004