

THE STATE OF OUR LIBERTY:

CIVIL LIBERTIES AND HUMAN RIGHTS IN THE UK

The 19th Norfolk Lecture given by Shami Chakrabarti at the University of East Anglia to the UEA law school and Norfolk Law Society on Friday 28th November 2003

You no doubt remember the Christmas cracker joke—

“In heaven:

The cooks are French.

The policemen are English.

The mechanics are German.

The lovers are Italian

And the bankers are Swiss.”

Well Ladies and Gentleman, where exactly would we be if:

The policemen were increasingly unfettered.

The judges deferential.

The human rights standards American.

The Home Secretary authoritarian.

And the new champion of liberal values- Michael Howard?

It is the hugest privilege to be addressing you as the still nearly new (if slightly worn) Director of Liberty. This lecture has in past years been given by many very learned commentators and no doubt they will come again. This evening however, something a little different- the rather personal observations of someone who has spent her working life at the interface of law, policy and politics- a witness to a steady deterioration of British liberal values through the false dawn of the Human Rights Act and on into the dark and dangerous fog of the War against Terrorism.

Both the Act and the War shall be principal characters in what follows. As a Home Office lawyer, I had high hopes for the Act during its conception and legislative passage. I worked on its implementation and continue passionately to believe in its underlying values. It was a long time in the coming. For many years both main political parties winced at the “democratic deficit” that would be caused by handing such dynamite over to un-elected Judges. Despite my LSE education, and probably due to my Home Office experience, I came to believe that some notion of fundamental human rights might be all that would ultimately distinguish democracy

from mob rule. By the cruellest twist of fate however, when the infant Act had barely toddled to its feet the horror of September 11 2001 came to pass. This was the second day of my new employment at Liberty.

Now the Human Rights Act is three years in force and Britain and the United States have been waging the War against Terrorism for two years. It is an important time to ask critical questions about their effect on every area of the Constitution and society. Has the Act and more importantly the underlying values enshrined in it really taken root? Is it loved and cherished by its political parents? Is its future secure?

I hope not to ruin your weekend but those of a nervous disposition might consider changing channels now.

Let us begin but not end with our Courts.

Firstly- I think its clear that the Courts are most comfortable and confident when operating the Act in traditional spheres of influence or “comfort zones”.

It is no coincidence; it seems to me, that the case that is so commonly referred to as the high watermark of section 3, the most dramatic use of the powerful new rule of construction to “read legislation compatibly so far as it is possible to do so”. No coincidence at all that this should arise in the context of criminal due process. This of course was *R v A* – the rape shield case where the malleability of the relevant provisions of the YJCE 1999 were tested to (and some would say beyond) the limit to allow broader cross-examination of a complainant as to sexual history and a fair trial to the accused.

Much has been said in subsequent case law, some of it difficult to dispute, about areas of policy in which the courts and government respectively have differing levels of competence.

Some times the term “high policy” is used to separate e.g. socio-economic policy and polycentric administrative decisions from those relating to eg. the justice system. The instinct may seem fair enough. But I make two comments upon it:

1. Human Rights lawyers and judges must be aware of the policy contained in all aspects of the law. There are many (perhaps too many) in our British public debate for whom the world of criminal justice is one of “high policy”. There was

indeed a clear and relatively laudable policy aspiration behind the offending provision in *R v A* namely to prevent the irrelevant and humiliating questioning of women in rape trials.

2. The spheres of competence approach cuts both ways. It allows submissions that are too vague and numerous on behalf of the potential violators of rights that this or that decision is cost sensitive to public administration and therefore worthy of that unwelcome spectre at any victim's table- judicial deference. I don't suggest for a minute that there isn't room and indeed justification for judicial sensitivity to the many competing interests facing public authorities- merely that an appropriate degree of latitude should be informed more by the rights at stake (e.g. the right to a fair criminal trial in *A*) than any pre-ordained gentleman's agreement about turf.

This is I think, the approach in fact adopted in my favourite ever domestic human rights case which (and this may surprise some) did not involve a defeat for or indeed challenge to the Government. This is *Mendoza v Ghaidan*, the Rent Act discrimination case from the Court of Appeal last November.

This brings me to my second comment about the judicial response to the HRA. There is some welcome confidence to use the Act as a means of "catching up" with the values of society and the modern will of Parliament.

Paragraphs 2 and 3 of Schedule 1 to the Rent Act 1977 (as amended) provide two possibilities for the protection of surviving relatives of deceased tenants. Paragraph 2(1) allows the statutory tenancy to pass to a surviving spouse. For these purposes, *"a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant."* In cases where paragraph 2(1) does not apply, paragraph 3(1) allows a *"family"* member who has been residing with a tenant for two years before the death to enjoy the lesser protection of an assured tenancy. Mr Mendoza and Mr Walwyn-Jones had lived together since 1972. On the basis of the trial Judge's findings of primary fact, Buxton LJ found it *"inescapable...that, save for the relationship being between two persons of the same sex, they were living together in the way that spouses live together."*

Crucially, the House of Lords had considered the very statutory provision and near-identical facts as recently as 1999. In the case of *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27, the House had found that someone in Mr Mendoza's

position (i.e. “*in a very close, loving and monogamous relationship*”) qualified as a family member for the purposes of paragraph 3 but was not akin to a spouse for the purposes of paragraph 2. Further, the Judicial Committee was split in going as far as it did.

Counsel for Mr Mendoza (the appellant) argued that *Fitzpatrick* must be revisited in the light of Articles 8 (right to respect for home) and 14 (right against discrimination in the enjoyment of Convention rights) of and Article 1 of the First Protocol (peaceful enjoyment of property) to the European Convention on Human Rights as introduced into the equation by the Human Rights Act. In addition to the small matter of House of Lords authority against him, Commission on Human Rights and Court of Justice decisions were also far from helpful. It may then, have seemed a small mercy that his opponent was prepared to concede that (following *Wilson v First County Trust (No2)* [2002] QB 74), legislation should be construed compatibly even as between two private parties.

The appellant (supported by the oral intervention of Senior Counsel for Stonewall) argued a breach of Article 14 in the context of the interest in his home, putting him in a less secure position than a heterosexual surviving partner in otherwise identical circumstances. Thus section 3 of the Human Rights Act must be employed to give the words “*as his or her wife or husband*” the non-discriminatory Convention-compliant meaning.

The Respondent resisted this analysis in the following way. Article 8 is only concerned with State interference with the home and thus has no role in a dispute between private landlord and tenant. Further, there was no imminent threat to Mr Mendoza continuing to live in his home. He went on to argue for judicial deference (in this case deference to Parliament in dealing with the competing interests of landlord and tenant interests, housing market fluidity and family protection).

Both judgments deal with the first two arguments robustly. Buxton LJ reminds us that Article 8 contains obligations of a “positive” nature that require more than the absence of active State interference. Further he adopts a purposive approach to the right and finds it attaching to more than “*the envelope of bricks and mortar*” and extending “*to the rights and security of tenure in that real property*”. Finally and relying upon the recent *Michalak v London Borough of Wandsworth* [2002] EWCA Civ 271, he finds that the legislation itself has entered into the ambit of Article 8 (at

least for the purposes of engaging the discipline of Article 14). Keene LJ runs further and clearer on this point:

“It would be too narrow an approach to hold that Article 8 is only engaged where the court is proposing to make an eviction order. The tenant is exposed to a greater risk of eviction where his security of tenure is reduced, and that greater risk is enough for the court to have to consider whether there is a breach of Article 8.”

However, many a Convention victim has come this far only to be defeated by extensive ramblings about difficult policy and deference to democratic organs (the same organs that passed the clear and carefully crafted scheme of the Human Rights Act). Thus the Court’s comments about why deference would not avail the Respondent in this case are particularly important and of value to practitioners well beyond the context of anti-gay discrimination. Buxton LJ supplied three reasons in particular:

- The Convention views discrimination particularly seriously. Once the differential treatment is made out, it is for the discriminator to establish an objective and reasonable justification for it.
“In seeking to discharge that burden, it is simply not enough to claim that what has been done falls within the permissible ambit of Parliament’s discretion..”
- Properly returning to *R v DPP, ex p Kebilene* [2000] 2 AC 326 for guidance on the principle of deference, he reminds us of Lord Hope’s observation that the *“discretionary area of judgment”* is much more recognisable in areas of social or economic policy than *“where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection”*. Whilst general housing policy involves complex matters of social or economic policy, issues of discrimination fall squarely into Lord Hope’s latter high constitutional category. *“In such cases deference has only a minor role to play”* (Buxton LJ).
- Nothing more than assertion had been offered in support of an essentially flawed argument that either the interests of landlords or heterosexual families are furthered by the deprivation of same-sex partnerships.

The deadly, shapeless mist of deference amply dealt with, the more visible obstruction of unhelpful Strasbourg jurisprudence was barely a challenge for Buxton LJ. The part of his judgment which deals with the 1986 Commission decision in *S v United Kingdom* is particularly empowering reading for English lawyers in the wake of earlier Court of Appeal instincts to leave the most difficult unfinished business to Strasbourg (even in the context of little doubt as to the inevitable conclusion as in *Anderson v SSHD* [2002] 2WLR 1143). Buxton LJ had little difficulty in dismissing *S* as an old case based on a misapprehension of the policy behind a UK statute. Surely this is what was meant by “*Bringing Rights Home*”?

“Sexual orientation is now clearly recognised as an impermissible ground for discrimination, on the same level as the examples, which is all that they are, specifically set out in the text of article 14.”

Having found potential for a clear violation of Articles 8 and 14 of the Convention (Article 1 of Protocol 1 being more problematic and left unresolved), Buxton LJ moved swiftly by way of Lord Steyn’s emphasis on the breadth of section 3 of the Human Rights Act (*R v A* [2001] 2 WLR 1546) to a finding that the words “*as his or her wife or husband*” are capable of including same-sex partners.

It is a wonderful if not revolutionary judgment. I hope that it is upheld in the House of Lords and that the Government will intervene to bolster it along with its own proud record of attacking anti-gay discrimination. I have encouraged the many aspiring human rights lawyers that cross my path to read the judgment for its analysis of textbook precision as to how various concepts (section 3, horizontality, deference) should operate. It also bursts with the inspiration and discipline that the principle of equal treatment brings to modern societies.

Sadly this cannot be said of another Court of Appeal judgement from just a few weeks earlier. *A and Ors v SSHD*. This brings me to my final observation about the Human Rights Act as operating in the Courts.

To be of full value, a Human Rights instrument must be more than a tool for protecting the courtroom and helping the law to catch up with the mood of government and popular opinion. It must also protect the most unpopular and therefore vulnerable minorities and by so doing- democracy and the rule of law.

In the *A* case which of course concerns the internment of foreign terrorist suspects under the Anti-Terrorism, Crime and Security Act 2001 and the corresponding derogation from Article 5 of the ECHR, the LCJ categorised the Government's policy as to:

"in effect reverse Chahal v UK in the case of suspected international terrorists"

You of course remember that the *Chahal* case established that it would be a breach of Article 3 of the Convention to deport someone to face torture at home. Derogation from Article 3 is not possible even in times of "public emergency" under Article 15 of the Convention, so the wizard wheeze was to derogate from article 5 (the right against arbitrary detention) and to detain indefinitely without trial instead.

Interestingly, no attempt was made by the Government to derogate from Article 14, though later, in anticipation of defeat before the Special Immigration Appeals Commission, an attractive submission of "implied derogation" was made.

At times, it has been suggested that this isn't really detention at all, the incarceration being in a "three-walled prison". The detainee being free to leave at any time as long as he leaves to take his chances with the torturers back home.

As this internment policy is applied only to non- Britons (in direct parallel with the United States approach of detaining only non-Americans in the law-free zone that is Guantanamo Bay) and delivered by amended immigration rather than criminal justice or even conventional terrorism legislation, it is categorised by the Government and accepted by the Court of Appeal to be an immigration measure.

The allegation of discrimination under Articles 5 and 14 of the Convention (British nationals being just as capable of terrorist acts as foreigners) evaporates, it would seem, because immigrant and British citizen terrorist suspects are not in analogous positions.

Both classes may be suspected of the most heinous crimes and be equally dangerous. There may be insufficient or oversensitive evidence for an old-fashioned criminal trial in either case. However, it is permissible to subject the smaller class to internment because they are immigrants with no right to remain in the UK.

Magically and aided by deference in the sphere of national security, the ground of discrimination becomes its own justification and Britain sends a signal to aspiring

suicide bombers all over the world that everything that they have been told about the hypocrisy and corruption of liberal western democracies may be true.

One of the Government's key political defences of the internment policy lies in the Special Immigration Appeals Commission (SIAC), an administrative tribunal whose governing legislation I worked on as a Government lawyer. The Commission was created in 1997 (again in response to the *Chahal* case) to provide an immigration deportation appeal where previously there had been none- in national security cases.

The Commission was created as an attempt to balance the interests of national security and natural justice. No traditional rules of evidence apply, the Commission being concerned with intelligence rather than proof. The appellant and his lawyers are excluded from the crucial closed secret parts of the hearing. At such times a security-vetted Special Advocate appointed by the Attorney General tests the intelligence in the interests of justice.

The Commission designed for deportation is now applied to indefinite incarceration but its task is limited to scrutinizing the Home Secretary's "reasonable suspicion" that the appellant is in some way connected to international terrorism. There is no question of particular charges or need for proof. In one of her Hamlyn lectures last year Baroness Kennedy prophetically referred to the use of lawyers and judges in such a process as their co-option into a bureaucrat's fiction.

A few weeks ago SIAC gave decisions as to reasonable suspicion in the first ten internment appeals. Suspicion and therefore detention was upheld in all ten cases but there was a further and even more worrying progression. During the course of the hearings, concerns developed that Home Secretary suspicions about internees may have been founded in part upon intelligence obtained by torture in e.g. Camp Delta and the Middle East. Indeed Home Office submissions were that this could not be ruled out.

SIAC ruled that:

- The Home Secretary is under no obligation to satisfy himself as to whether intelligence has been gained by torture or not.
- On any issue as to whether or not torture has been employed, it is for the detainee to prove the allegation (so the Belmarsh detainee barred from the

secret intelligence against him must show that someone being tortured at Camp delta fingered him).

- Even where torture has clearly taken place, neither the Home Secretary nor SIAC is barred from looking at intelligence so gained. “It is all a matter of weight and degree”.

Critical as I am of this judicial response, hopeful as I am that it will be rectified by the House of Lords and perhaps not too very long after the second anniversary of this detention, how can I not understand it?

How can I not sympathise with courts having to make such sensitive decisions in a climate of political judge bashing that would make even Michael Howard blush? Sadly, not every senior Judge nor public figure in this country has the moral courage displayed by Lord Steyn in his F.A. Mann Lecture three days ago. He of course asked whether *“our government ought to make plain publicly and unambiguously our condemnation of the utter lawlessness at Guantanamo Bay?”*

So then to the Executive, the same Government that brought rights home via the HRA in its first flush of youthful exuberance and idealism.

This year’s Labour Party conference was titled “A future fair for all”. However in Blair’s Britain the notion of “all” offers no place to that most demonised non-human being- the asylum seeker. Nor does this interesting notion of fairness appear to protect anyone accused of a crime.

The concern of the 21st century criminal justice system, the Prime Minister told us, is not so much about the innocent being convicted but in the guilty going free. His fresh Criminal Justice Act with the greater admissibility of previous convictions at trial will no doubt achieve the desired result.

In January of this year and in blizzard conditions, the Government implemented a policy of denying a whole raft of asylum seekers (none of whom are allowed to work lawfully) any access to State support or accommodation. It now seems that the policy of forced destitution under section 55 of the Nationality, Immigration and Asylum Act 2002 was only the beginning.

Yesterday, a new Asylum Bill was published. If passed it will introduce yet further forced destitution for asylum seekers- now including families whose children may be taken from them. Appeals are to be cut back and judicial review ousted. Claimants may be electronically tagged. Inadequately documented arriving asylum seekers face criminal sanction and imprisonment.

None other than my former boss, the new leader of the opposition has called this measure illiberal and uncivilised. Whatever his reasons or record, I rather agree with him.

Wednesday's Queen's speech also heralded a draft Bill on Identity Cards to be published in the New Year as part of the Home Secretary's plan to win this particular battle incrementally. As with other illiberal measures its first compulsory phase will be limited to foreigners. However this time the plan is not limited to the wretched asylum seekers. In likely contravention of Treaty law, EU national residents are also to be included.

The ID card debate to date, has proved an interesting case study as to the health of our culture of rights and freedoms in the UK. The card has been periodically mooted as a magic bullet for terrorism, "asylum overload" (yes such a phrase really exists the modern Home Office) and benefit fraud. It is the solution looking for a problem, the fairy dust for the creation of that dream sold to us by successive populist Home Secretaries- the risk free society.

The risk free society is a seductive notion and no less attractive for being an illusion. Who wouldn't wish for a world free from terrorism, crime, drug addiction, poverty and unhappiness?

The difficulty lies in the route one must take in pursuit of this particular utopia. We travel through a landscape of increasing suspicion between neighbours, the categorisation of nuisance or even difference as anti-social or sub-criminal behaviour, the ever-greater use of criminal sanction as the societal lever of first resort and of course the so-called "re-balancing of criminal process" whereby ever greater latitude is to be granted to police, public and prosecution authorities at the expense of that most precious value governing relations between individual and state- the presumption of innocence.

This path has been sold to us with increasing rigour by successive Home Secretaries over the last ten years. It has brought us at least thirty-three criminal justice bills in that period and such developments as the naming and shaming of miscreants (including minors) by public authorities and parts of the press, more and broader police powers and criminal offences, the gradual merging of criminal, civil and administrative process, anti-social behaviour orders, child curfew orders, drug testing orders, imprisonment of parents of truanting children, electronic tagging and so on and so on.

Further, when coupled with breathtaking technological advancement (CCTV, RFID chips and biometrics etc.), this authoritarian climate presents a huge threat to traditional but relatively unprotected notions of personal autonomy and privacy. On the road to the risk free society surely those with “nothing to hide should have nothing to fear”.

Forget that this notion (as with ID cards themselves) would mark a fundamental shift in the relationship between individual and the state. Forget that we used to think that each new proposed state intervention should be patently justified in some way. Instead of asking what's right (let alone necessary or effective) about ID cards we fall into first asking what is wrong with them.

I haven't time this evening to do justice to this debate. However, I do ask whether we want to go quietly into a life of answering to the State for our very existence and identity? Do we have confidence in the way in which such a registration system and the limitless information capable of being collected in it would be used not just today but a hundred years from now? And have we really yet to learn the lessons of history and international experience as to the huge dangers for race equality and relations that almost certainly follow?

Of course, the Great British compromise that is the Human Rights Act expressly preserved parliamentary sovereignty by way of the inviolability by the Courts of clearly incompatible primary legislation. Further, by way of the compatibility statement required of any Minister “in charge of a Bill” under section 19, Parliament was entrusted with the role of first (if not last) Court of Human Rights.

How ably has this role been performed? Predictably at a time of massive Governmental majority, the conditions have not been ideal. Further the level of rights'

literacy of parliamentarians is woeful compared to that in other countries including the United States. All too often only the vaguest of general “human rights concerns” are expressed in relation to the most draconian of measures (such as asylum bills) whilst bills engaging powerful private lobbies (such as financial services) may result in a parliamentary human rights debate consisting of the vigorous waving of rival QC’s legal opinions.

Both approaches are far from ideal in my view. The value of the Human Rights Act to any backbench parliamentarian should be as a matrix for scrutiny, a tool for calling the government to justify proposed policy.

Yet, Parliament recently approved a number of Orders under RIPA and ATCSA. These allow a raft of public authorities greater access to communications data (details of who we speak to via telephone and email). They further allow the use of “covert human intelligence sources” (informants and moles) by such agencies as the Egg Inspectorate. The explanatory notes to all of these Orders explained the measures as “giving ECHR cover to activity already taking place”. Hardly a justificatory approach to either parliamentary scrutiny or the Convention and rather reminiscent of the “technical state of emergency” declared by Mr Blunkett for the purposes of derogating from the right against arbitrary detention for foreign internees in the autumn of 2001.

The state of emergency (technical or otherwise) of course continues, but the noises from parliament are not all passive. I am pleased to note that today the Joint Parliamentary Committee examining the draft Civil Contingencies Bill (to which I gave evidence) has rightly warned of its lack of adequate parliamentary and judicial safeguards and recommended no less than fifty changes to the Bill. The Bill which would replace the emergency powers legislation that served us through the Second World and Cold Wars. It would allow executive amendment (by regulations) to our laws (including the Human Rights Act) in an extremely broad range of circumstances including those of large-scale protest. Further, such regulations are to be treated as primary legislation for the purposes of the Human Rights Act, replacing parliamentary with executive sovereignty in the context of rights protection.

We should all be heartened by the Committee’s report and hope that the Government takes heed. Parliamentary sovereignty and the rule of law are more important than ever in dangerous times. No government should seek a blank cheque for its

intentions (however benign) and should reflect on how constitutional poverty might facilitate oppressive government in years to come.

But am I painting an overly negative or alarmist picture of the dangers of legislative largesse to the executive by way of exceptional powers? Surely we can trust the authorities not to misuse anti-terror laws, to resist the temptation of allowing the exceptional to become the norm?

Forgive my ending with an anecdote from my first week as Director in September of this year.

An arms fair was held at the Excel centre in the Docklands area of London. Unsurprisingly a number of peace protesters wished to demonstrate around the fair. Calls to Liberty's offices (from journalists and members of the public) suggested that protesters were being stopped, searched and impeded by way of unspecified anti-terror laws. Enquiries to the Metropolitan Police met with flat denials that these laws would ever be used in such circumstances. But still the reports of routine stopping and searching (and indeed holding for up to forty-five minutes at a time) came thick and fast. Eventually, one of our staff lawyers attended the scene, saw the police operation in full flow and collected a pile of notices issued to completely peaceful protesters under section 44 of the Terrorism Act 2000.

At this point the Metropolitan Police began to "refuse to comment on operational matters".

Section 44 of the 2000 Act is a sweeping measure allowing stop and search without the normal Police and Criminal Evidence Act requirement of suspicion. It is activated not by legislative order but by the authorisation of an assistant chief constable (or commander in the Metropolitan Police). Such an authorisation may be made if it is "expedient" to preventing terrorism and must be confirmed (or rejected) by the Secretary of State within 48 hours. The authorisation designates an area for such stopping and searching and lasts no more than 28 days.

The measure was taken through Parliament by Jack Straw (when Home Secretary) and has a clear underlying rationale and utility in situations of strong intelligence as to a specific and focussed threat. Imagine that you are policing central London and receive clear intelligence of a planned attack on say Parliament on the day of the

Queen's Speech. Normal PACE powers only allow stop and search under suspicion. What you wish to do is to cordon off Parliament Square and Millbank and perform an outer body and bag search on everyone seeking to enter the specific area. No individual or particular group need feel singled out and few of us would object to such an operation in that context.

However, no judicial warrant or even parliamentary or public notice of such an authorisation was provided for in the statute.

Faced with Liberty's letter before action the Metropolitan Police finally stated that - yes, the entire Metropolitan Police Area had been designated under section 44 of the 2000 Act. Not, the Police went on to say "in response to any specific threat, but as part of our policy of high visibility policing in the capital".

The resulting litigation has already revealed that such authorisations for stop and search without suspicion across London have been made and confirmed since February 2001 (long before September 11) on a rolling and continuing basis. The case is currently pending in the Court of Appeal.

As I speak to you this evening, normal PACE powers may or may not apply in Norfolk. We really have no way of knowing for certain. Londoners however, remain subject to the continued suspension (by administrative edict) of ordinary restrictions on police power.

Benjamin Franklyn famously described those who would sacrifice liberty for a little temporary security as deserving of neither. Forgive my putting the case even higher than that. So readily and constantly to denigrate liberty in pursuit of security, ultimately serves to secure neither and will likely compromise both.

ENDS