

Changing the Rules: A JUSTICE debate

Tuesday 18 October 2005

Lord Steyn of Swafield:

The debate this evening has the title 'Changing the rules: the judiciary, human rights and the constitution'. Mercifully, it does not speak about changing the rules *of the game*. As my very first statement on behalf of JUSTICE I would wish to state without equivocation that the maintenance of the rule of law is *not a game*. It is about access to justice, fundamental human rights and democratic values.

I accept, of course, that in judging on such matters judges make mistakes. Fortunately, however, there are advantages: they do all their own work, they do their work in public, and they always make their true reasons public. If they make mistakes those mistakes are almost instantly correctable. For my part, as a lawyer who came from South Africa, I would want to say that England has, in comparison with other countries, a superb judiciary which is at all levels of high ability and dedicated only to the neutral and impartial examination of issues in the public interest.

Sometimes the criticisms aimed at judges are not well merited. Let me give you one example. Over the last 20 years there has been a flood of legislation about criminal justice. It is a political football. Almost every year there is a huge new Criminal Justice Act. Year after year half-baked ideas are adopted in haste, puffed up to be the ideal solution and routinely abandoned the next year. The quality of much of the legislation has been described by eminent textbook writers as scandalous. So, to the bewilderment of the public and judges, the position in regard to criminal justice continues from year to year. It is a little unfair to blame it on the judges as politicians so frequently do.

Tonight it is my very special honour and privilege on behalf of JUSTICE to pay tribute to my predecessor, Lord Alexander of Weedon QC. His accomplishments and public services are legion and well known. His contribution to the development of JUSTICE over a long period has been enormous.

I propose, however, to single out as one of his greatest achievements his superb lecture of 2003 about the lawfulness of the Iraq war.ⁱ One knows, of course, that the government earnestly desires a closure on this issue, but that is not possible. While there are different views on this occasion even Mr Walter Wolfgang would be free to express the opinions for

which he was charged under the Terrorism Act. Possibly his name will live on when the names of some now in charge of our affairs are long forgotten.

In his 2003 annual lecture Lord Alexander delivered a most devastating critique of the legality of the invasion of Iraq. He pointed out that there was no threat to the UK or US. He noted that there were *then* no current links between the odious Saddam Hussein regime and Al Qaeda. He analysed the constantly shifting grounds for intervention. Rightly he concluded that none of those grounds had the slightest plausibility.

He showed that the theory that the earlier Resolution 678, preceding the driving of Iraq from Kuwait 12 years earlier, had no relevance to the contemporary international position. The sole reason for harking back to it was that it was impossible to obtain Security Council approval for the intervention in Iraq.

For all arguments some support can be dredged up, and the Attorney-General had some limited support. But in my view Lord Alexander's view reflected the overwhelming view of international lawyers and was undoubtedly correct.

Lord Alexander was entitled to conclude as he did that in its search for a justification in law for war the government was driven to scrape the bottom of the legal barrel. I am in full agreement with everything Lord Alexander said.

While I have not discussed the matter with Lord Alexander I am inclined to think that he would agree with a passage in the 1988 Turin lecture 'Pursuit of the Ideal' by Isaiah Berlin. Earlier in his career Berlin adopted a rather relativist position: often he was sceptical even about the most fundamental universal values. But by 1988 he had changed somewhat: he described what he called the requirements of a decent society. He explained:

Priorities, never final and absolute, must be established. The first public obligation is to avoid extremes of suffering. Revolutions, wars, assassinations, extreme measures may in desperate situations be required. But history teaches us that their consequences are seldom what is anticipated; there is no guarantee, not even, at times, a high enough probability, that such acts will lead to improvement. We may take the risk of drastic action ... but we must always be aware, never forget, that we may be mistaken, that certainty about the effect of such measures invariably leads to avoidable suffering of the innocent. So we must engage in what are called

trade-offs – rules, values, principles must yield to each other in varying degrees in specific situations. Utilitarian solutions are sometimes wrong, but, I suspect, more often beneficent. The best that can be done, as a general rule, is to maintain a precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices – that is the first requirement for a decent society; one that we can always strive for, in the light of the limited range of our knowledge ... A certain humility in these matters is very necessary.

It may be that without that quality of humility, which involves accepting the folly of the invasion of Iraq, the extrication from Iraq will prove extremely difficult.

About Iraq I would add only one matter. After the recent dreadful bombings in London we were asked to believe that the Iraq war did not make London and the world a more dangerous place. Surely, on top of everything else, we do not have to listen to a fairy tale.

ⁱ 'Iraq: the Pax Americana and the Law', JUSTICE/Tom Sargant Memorial Lecture 2003, published in *JUSTICE Journal*, Vol 1, No 1 (May 2004).