Books

CIVIL LIBERTIES LAW: THE HUMAN RIGHTS ACT ERA by Noel Whitty, Thérèse Murphy, and Steven Livingston, London, Buttterworths, 2001, xxxii and 409pp, ISBN 04–065–5511–7

In the early northern spring of 2002, two cases briefly dominated media headlines in the United Kingdom. In the first, supermodel Naomi Campbell was awarded damages in her action against *The Mirror*, after the newspaper published details of her treatment for drug addiction and photographs of her leaving a Narcotics Anonymous meeting in Chelsea.[1] In the second, Lord Woolf lifted the injunction previously obtained by Blackburn Rovers footballer Garry Flitcroft against *The People*. The paper had obtained interviews with two women with whom Flitcroft, a married man, had had sexual liaisons and the footballer had attempted to prevent publication of the kiss and tell stories.[2]

In addition to the prurient interest in the facts surrounding the peccadilloes of the rich and famous, (or in Flitcroft's case, the sexual escapades of the relatively obscure), these two cases could be said to exemplify the inherent genius of the common law. In each instance, the legal basis for the action meant to protect the privacy interests of the plaintiffs, was the traditional common law action for breach of confidence. Here, a basic liberty of the subject was given protection not through the creation of a new cause of action, or through the invocation of some constitutional textual norm, but by using the capacity inherent in the common law to grow to meet new circumstances.

For present purposes, however, the real significance of these cases is the way in which they demonstrate not the genius of the common law, but the thoughtful insights, theoretical innovations, and carefully contextualised arguments of *Civil Liberties Law: The Human Rights Act Era.* In their discussion of privacy in Chapter Six of this terrific book, the authors, Noel Whitty, Thérèse Murphy and Stephen Livingstone, offer a detailed analysis of the traditional case law under which breach of confidence actions have been used to create an ersatz privacy protection. They underline not just the doctrinal development but offer a careful and considered critique of the common law position, an insightful reading of the *European Convention on Human Rights* privacy provisions and caselaw, and a deeply contextualised reading of the positioning of privacy in several broader and interconnected contexts. They conclude their discussion as follows:

> The uneasiness surrounding privacy may, in part explain why this chapter has answered very few questions definitively, and also why it has raised far more questions than it has answered. At the same time, however, no amount of

1 *Campbell v MGN Ltd, The Times Law Report* (29 March 2002).

2 See eg. Steven Morris, 'Footballer Loses Year-long Fight for Privacy' *The Guardian* (30 March 2002); Mark Lawson, 'Whose Life is it Anyway?' *The Guardian* (30 March 2002).

> uneasiness can detract from privacy's enduring appeal or importance. It should not be forgotten, for example, that in recent years privacy rights have been a key site for politicizing discrimination and procuring greater equality, especially in the fields of reproductive freedom. All the signs are that privacy will retain its central position in the H(uman) R(ights) A(ct) era — indeed, the social and legal value placed on privacy may well be a major force in determining the wider culture of freedom in 'information society'.[3]

This passage embodies all the strengths of this book and underlines the valuable contribution made by the authors to this field of law. This is not, as the title indicates, and as the authors clearly set out, merely a book about the new UK *Human Rights Act (HRA)*. Instead it is a work which sets out to detail the rich tradition of civil liberties in UK law before the *HRA*, and attempts to contextualise the *HRA* and debates surrounding it. Thus, Campbell's drug addiction and Flitcroft's extramarital sexual adventures will need to be understood not simply in terms of breach of confidence, but as examples of the ways in which the public/private divide is and will be articulated and re-defined. We need to understand tabloid readers and editors as players in the game of democratic politics and sexual partners as possible defendants or plaintiffs, depending on how or if we decide to 'legalise' the intimate sphere in a particular way.

The book does not offer answers as much as it raises basic and fundamental questions about government, governance and governmentality. It interrogates, in complex yet clearly enunciated legal contexts, the difficult issues of citizenship, state control, and the public/private distinction, among others. In short, the authors examine and critique our legal and political understandings about the balance and struggle between law and liberty, between citizenship and democracy on the one hand and what used to be called the repressive and ideological state apparatuses on the other. In doing so, they offer useful information about the state of the concrete legal rules in a variety of areas and about debates about the politics of law in the UK. More importantly, they incite the reader, by way of their analysis of the law and politics of civil liberties, to rethink one's own position as citizen and lawyer. What the authors identify as the *Human Rights Act* era bring all of these questions into a new focus and give a new, more clearly articulated public and political role to law and legal actors.

The *HRA* is an intriguing legal instrument. It is an 'ordinary' statute and at the same time an extraordinary piece of legislation. Among other things, it brings into UK law the protections of the *European Convention on Human Rights*. It imposes norms of statutory interpretation which give primacy to readings which are consistent with the *HRA*. It allows courts to make declarations of incompatibility between rights and statutes and it requires the Minister of the Crown introducing a measure in either House of Parliament to make a written declaration, before second reading, about the compatibility of the legislation and protected rights. Finally, it makes it unlawful for any public authority, including courts and tribunals, to act a manner incompatible with rights in the *European Convention*. Clearly this is no ordinary statute.

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3 At page 328.

Debates about the *HRA* in the UK have a strikingly familiar tone and substance. For many, the introduction of the detailed protections of the rights of citizens heralds a new era under New Labour, an epoch of constitutional near revolution, a rethinking of the traditional roles of courts and legislatures, a reconfiguration of citizenship in Britain within the New Europe. For others, the *HRA* epitomizes the worst of all possible scenarios — the abandoning of Parliamentary sovereignty, judicial dictatorship and perhaps most perniciously, the Europeanization of Britain. One of the most important aspects of this book is the attention which is given to all sides in the general debate and to the complexities of more specific controversies. The authors are not one-eyed supporters of the *HRA* as constitutional panacea. Nor are they immune to concerns about the judiciary's innate anti-democratic structures. Instead they are skeptics in the best philosophical and political traditions. Law is for them neither the be all and end all of constitutional citizenship, nor is it an insurmountable obstacle to democratic social and political life. Law, like life, is complicated, contradictory, pro-and anti-democratic in its potential and often in its concrete form. For Whitty, Murphy and Livingstone, this simply means that we must engage with context and complexity, not hide from it with ideological and simplistic rhetoric about constitutional revolution or conservation.

Similar debates on issues of legal revolution and stasis in Australia surround High Court decisions on implied, (or not), rights of free speech, the need, (or not), for a Bill of Rights, and even concerns about government practices and international human rights norms, (or not). Revolution and reaction, if not rife, are at the very least in the constitutional and political ether. The tyranny of the judiciary, civil liberties as central to an Australian understanding of constitutional citizenship, 'internationalizing' Australian law and the potential loss of sovereignty and national identity, these are easily translated and transposed across related legal traditions. These constitutional conversations clearly echo each and every one of the discursive tropes which surround the *HRA* in the UK. For this reason alone, *Civil Liberties Law: The Human Rights Act Era* is essential reading for anyone concerned about the present state and future prospects of law and democracy in this country.

What is most intriguing, sometimes mildly infuriating and ultimately rewarding, about the analysis offered by the authors is their refusal to opt for easy answers, or in most cases for any answers at all. They study areas such as public order (Chapter 2), terrorism (Chapter 3), fair trial questions (Chapter 4), prisoners' rights (Chapter 5), privacy (Chapter 6), the secret state (Chapter 7) and freedom of expression and equality (Chapter 8) and they do so with regard to law in all its contexts. This is a book about detailed, nuanced, careful and deeply contextualised legal, political and social analyses of issues vital to determining ultimate democratic values of legality and legitimacy. It refuses easy solutions and glib, unsatisfying 'black letter' simplifications. This does not mean that there is no 'law' here. There is an extensive table of cases, exhaustive tables of statutes and international instruments, a detailed bibliography and a set of footnotes which is in and of itself both an intellectual gold mine for future study and a testament to the scholarship which informs and graces this book.

The authors abjure simplifying reductionism and instead opt for intriguing syntheses of opposing views, exposing contradictions within law and legal scholarship and opening up new pathways for others. What is particularly fascinating is the way in which the distinct subject matter of each chapter can be and is intertwined and given further study in relation to the others. Thus, for example, the authors write that

> Defending the cause of human rights in the context of a perceived terrorist threat, especially when the threat is credible, remains a difficult task. There is likely to be significant public support for harsh anti-terrorist measures, and many of the traditional forums of resistance to state power prove hostile or ineffective. However, ... human rights discourse has a role to play even in the most hostile environments, and can operate simultaneously at different local, national and international levels. (p161)

All readers will be familiar with the legal history of British anti-terrorist law and practice, the legacy of internment, shoot to kill policies, special 'Irish' tribunals, and miscarriage of justice cases. What becomes clear upon reading this book is that the true story, of the law and politics of 'anti-terrorism', can only be known and understood if we think, as holistically as lawyers can, about issues of free speech, public order, fair trials, the organs of the state security apparatus, prisons as places of public and legal struggle, privacy from surveillance etc. It is not possible to comprehend, even momentarily, the subtleties and nuances of the law and politics at play here in the field of 'anti-terrorism' unless we can, as the authors remarkably do, think about these issues as inextricably intertwined. They are connected not just between and among themselves as areas of legal complexity, but more crucially, they co-exist in the matrices of discourses which we must and do employ to construct our democracy on a daily basis.

The political rhetoric and legislative hysteria of the 'post-September 11' new world legal order clearly allow us to grasp the centrality of the issues discussed and analyzed in this book. Law reform proposals in this country, the 'anti-terrorist' package of surveillance, imprisonment, expanded police powers etc. should make us think long and hard about the lessons of history and the lessons of law. Struggles for and about civil liberties must be engaged with actively by a politicised, informed and involved citizenry, of which lawyers are but one part. Whether we learn these lessons, as Whitty, Murphy and Livingstone urge, in order to build institutional structures which enhance our lives as citizens and enliven our sense of belonging as the 21st Century unfolds, is uncertain and unclear. This book will not offer answers to these questions. Instead it succeeds admirably in achieving a more difficult result. It makes us think.

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