

A THINNING BLUE LINE? POLICE INDEPENDENCE AND THE RULE OF LAW

**The Police Foundation John Harris Memorial Lecture, delivered by
Shami Chakrabarti, Director of Liberty, on July 2, 2008**

It really is the most daunting of honours to give this year's Police Foundation Lecture. It is daunting as a professional troublemaker to follow such a spectacular line of senior police officers, politicians and judges. It is daunting to look out at this audience of fine minds and outstanding public servants. It is an honour to give a lecture in the late Lord Harris' name.

A bad old joke that I remember from childhood reinforced stereotypes from around the world. Heaven, we were told, comprised British policing, German technology, Swiss administration and French cuisine. Predictably enough, English cooks and French mechanics were harshly treated in the comic view of hell but it is the comment on British policing that always stuck with me.

Growing up as I did in a minority ethnic family in the 1970s and 1980s, I was well aware of some of the more turbulent moments in police history – particularly in the context of sensitive public order situations. Nonetheless my parents and I never doubted that there was something inherently benign and civil libertarian in the British police tradition – something of truth in the incorrect international stereotype to which I refer.

Only later, as a law student at the LSE where Professor Robert Reiner is still the greatest scholar of police history and policy, did I see that benign pro-democracy policing hadn't just sprung from a gentle national character. It owed a great deal to the wisdom of policing pioneers and to the history and traditions of the service.

It is worth remembering I think, that whilst funded by the executive, the Bow Street runners were affiliated, not with the government, but with the magistrates. Thus from the very inception of the service, it tended towards the rule of law not the ruling government or party.

Professor Reiner's work gives a great deal of credit to visionary Home Secretary Peel and to the first two Commissioners of the Metropolis – Rowan and Mayne¹. I too support the traditional approach of 'policing by consent' and the Peel principles of non-partisanship and accountability to the Rule of Law.

¹ Robert Reiner, *The British Policing Tradition: Model or Myth* (1992) in *Social Changes, Crime and the Police*, Edited by Shelley & Vigh

More recently, as law and order has moved up the political agenda, so the pressures on the modern service and its independence have increased. Rarely does a day go by without a new proposal for what seems like political rather than legal 'accountability' on the one hand, or a serving officer advocating legislative action on the other.

Yet umpteen new criminal offences, police powers and other apparently broad laws from Parliament have been matched by targets, indicators and circulars from government. This evening I hope to examine the role of policing in a democratic constitution and argue that even – or especially – in the 21st century, policing should serve the rule of law rather than the interests of the executive. In this traditional way, I believe it perfectly possible for professional police discretion and fundamental rights and freedoms to march hand in hand.

Reiner reminds us that Peel's Metropolitan Police Act of 1829 was met with some hostility and a fear that, as in France and elsewhere, policing might become an agency of the government. Thus Peel and the early Commissioners deliberately insulated the service from direct central and local government control. They created a doctrine of constabulary independence, characterising the police as autonomous professional agents of the law – not the government. This was reinforced by regulations restricting political involvement.

Conversely, if accountability was not to politics, it was to the law. This law took the form of the Act of Parliament establishing the force, the constraints on police power set by Parliament and the courts, and the structuring of police discretion (relating to stopping, arresting and investigating suspects and so on) by Commissioner rules rather than Home Office guidance.

Looking back at these roots of modern policing, it seems to me that they sprang not from mere historical accident, but a profound understanding on the part of Peel, Rowan and Mayne, not just of the essence of consent-based policing, where public tranquillity is even more important than law enforcement, but of the nature of democracy itself.

There is no democracy without elections but as the persecuted people of Zimbabwe know all too well, democracy cannot thrive on formal elections alone. I like to think of democracy as a piece of machinery with both fixed and moving parts.

The moving parts represent the elected limbs of a constitution; executive and legislature, at central, regional and local levels. They move and change with the public will, both generating and reflecting the heat and light of partisan ideas and debate. However the fixed parts are just as important. These represent those elements of democracy that uphold enduring values and functions that cannot be 'de-selected' without compromising the constitution itself.

Populist politicians and even some police officers sometimes vent frustration at a seemingly distant 'unelected' judiciary and decisions that seem contrary

to the public mood. At such moments, the more sensible bite their tongues, but they should do so not out of mere good manners or etiquette, but with an eye to what life would be like in a society of elected or otherwise politically affiliated judges. What hope there for opposition politicians and a whole range of vulnerable people when the mob assembles at the court door?

For in order for democracy to flourish for more than a brief moment, fundamental rights and freedoms and the rule of law must be protected by independent professionals. Not just the right to free and fair elections but interconnected rights to speech, protest, privacy, conscience, association, equal treatment, fair trials and against arbitrary detention and inhuman and degrading treatment.

It is easy to see politicians and judges as the moving and fixed parts of the machine respectively. However the constitutional positioning of the police service is equally important. It seems clear to me that in contrast with other systems, the British policing tradition places the service under the rule of law rather than the political pillars of the constitution.

This is not to confuse police and judicial functions. I am no fan of Mr Blair's 'summary justice' instincts which would give investigative, prosecutorial, trial judge, jury and sentencing functions to a police officer on the spot. Nor can the relationship between investigators and prosecutors on the one hand, and the judiciary on the other, be too cosy in an adversarial fair trial system. My point is simply that these professionals have something important in common – namely service to the rule of law, which in turn requires ruthless political non-partisanship and freedom from interference.

More complicated still, in a system of parliamentary sovereignty, ultimately it is elected political legislators who 'make the law' in what the Lord Chancellor referred to last week as the 'High Court of Parliament'. That is of course quite right. However it seems to me that the relevant relationship here is between Parliament – which frames laws – and professional constables, who are both bound by them and charged with enforcement. The relationship is of course mediated by the courts. It seems to me that in a democracy of checks and balances, this is not a relationship in which the executive should have too great a role save as initiator of legislation.

There are huge practical benefits to such an approach. It is far easier for the whole community regardless of race, class or political affiliation to feel served and protected by a demonstrably non-partisan police force. This is especially important in crimes where race may be a factor or in tense public order situations in times of strife.

Policing thus provides comfort and certainty in changing and difficult times. Majority and minority communities may feel periodic anger with government and opposition parties of the day but can develop long-term trust in a service that applies the law of the land with an even hand, sensitive only to the most effective use of discretion and resources in particular situations. Indeed, one might argue that the very essence of democracy requires a critical public to

grow weary and sceptical of elected governments whilst maintaining faith in permanent institutions such as the police.

Further, the ambitions of public tranquillity, and law enforcement require that police officers – like judges – serve and protect minorities, however unpopular or even criminal, alongside the much-mythologized, decent, hard-working mass. A certain insulation from the swings of public opinion as measured by headlines and opinion polls is surely as important as sensitivity to the needs of individual victims at community level.

Recent decades have brought profound challenges to the independence and non-partisanship envisaged by Peel. Some trace ‘politicisation’ in terms of both of political interference in operations and police participation in politics to the dark days of the miners’ strike. Yet Professor Reiner calls this period of national co-ordination with a political or public order objective, a phoney rather than a real war.

Like Reiner, I see the real threat to independence as coming somewhat later. In 1993 a young, ambitious shadow responded to Home Secretary Howard’s challenge to an authoritarian political duel. There began the modern law and order arms race where the two largest political parties vied to be the toughest on crime, with its wider causes relegated to status of sub-clause.

With the advent of the New Labour Government in 1997, law and order policy was further elevated in the ladder of political priority. However, I wonder whether the strategy of crafting so many broad and creative new police powers was not with hindsight as dangerous for the service as for lawyers and civil libertarians.

For with the Blair slogan of ‘asking the police what powers they wanted and giving them’², came the raised expectations of a criminal justice system that might cure all of society’s ills including fear, crime, nuisance and irritation, let alone the substance abuse, truancy and other social problems lurking below the surface.

So the quid pro quo for the higher profile of law and order, as well as the panoply of new powers, orders and offences that made the lawyers’ blood boil, was increased political interference. Home Secretaries both give and taketh away. The price for all those blank cheques on police powers was a high one in terms of passing the political buck for social problems and the invidious operational encroachment of targets, key performance indicators, circulars and guidance. In short, the traditional boundaries of clear and proportionate laws from Parliament were replaced by kilometres of executive red tape.

Some, but by no means all of the most senior officers in the land seemed to embrace the new increased political and media attention, not merely as respondents to heated policy debates but often as principal protagonists.

² Cf the Labour Party Document of 2005 “Tackling Crime, Forwards, not Back”

During the 2005 General Election campaign, when most senior public servants entered official or unofficial purdour, the Metropolitan Commissioner announced his support for identity cards – a controversial key plank of the governing party’s campaign rejected by opposition parties³. Many of us saw this intervention as so overtly partisan that some commentators remarked that there were now two Blairs in the election.

Later that year, in the wake of the London bombings, as at so many anxious moments in the capital’s history, the public placed their hopes and fears in the hands of the police. The Association of Chief Police Officers (ACPO) responded with a press release containing an ambitious, if not greedy shopping list of new police powers, with 90-day pre-charge detention at the top⁴.

As luck would have it, the former Prime Minister was happy to reach for the blank cheque yet again. Indeed some suspect that the press release may not have come as a complete surprise to Number 10. Yet was this any way to press for greater police powers in a democracy? What next (some of us wondered)? Should an Association of Generals demand the time and location of Britain’s next military intervention?

Some junior officers appear to be following the trend. Recent high profile convictions for various heinous crimes have been followed by court-door media pronouncements, not only by grieving families, but by investigating officers criticising the Human Rights Act or calling for a universal DNA database.

Sometimes public airings of police service frustration at the law or the judiciary can be especially counterproductive. A case in point was some of the reaction to the recent *Davis* decision from the House of Lords Appellate Committee⁵. This of course concerned the degree to which anonymous witnesses may be employed to secure criminal convictions and opened up some perennial but acute issues about how to encourage intimidated informants and witnesses to come forward and bring their persecutors to justice whilst preserving the fairness of a criminal trial. It is in no one’s interests, I would suggest, that corners are cut and the wrong people convicted whilst the guilty roam free.

The House of Lords decision was against convictions based solely or decisively upon anonymous witnesses that inevitably, the defendant and his lawyers may not challenge. However their Lordships were perfectly sensitive to the problem of witness intimidation and left the door open to Parliament and others to address it with a whole range of potential societal, investigative, pre-trial and trial-based tools that I don’t have time to explore here.

³ Cf “Top police officer backs ID Cards” *Guardian*, 18 April 2005

⁴ Cf “Police ask for tough new powers” *Guardian*, 22nd July 2005

⁵ *R v Davis* [2008] UKHL 36

Suffice to say that senior police calls in the media for ‘emergency legislation’⁶ might arguably place undue pressure on elected politicians in a democracy. Further, hyperbolic references to the decision as ‘catastrophic’⁷ could hardly have helped either respect for the rule of law or the ambition of encouraging vulnerable and intimidated informants to approach the police.

Coming as they do from the citizenry – as Peel intended – I have no doubt that serving officers must have strong, varied and contradictory views about all manner of home affairs and other political debates.

However there would seem to be real and unresolved questions about the parameters and methods for the appropriate expression of those views, if non-partisanship is still to be maintained. Further, if contrary to my own instincts it is considered sensible and ethical for officers to air their views in such a public manner, questions then arise about which views are permitted to be aired.

The latest debate about extended pre-charge detention for terror suspects is a case in point. Once more in the high political drama that has sadly become of Britain’s evolving terror laws, Government sought to pray in aid police support for a highly controversial proposal. Once more there appeared to be a range of policing views of the 42-day policy from within the serving and retired force.

Thus the ‘official’ views of both the Metropolitan Police and ACPO became so politically and constitutionally significant, that it must be reasonable to ask about the process of internal consultation and deliberation which led to the final position taken.

The Metropolitan Police example is perhaps both more straightforward and sensitive simultaneously, as we are told that the 42-debate and dissent within it, may soon feature in a putative legal action by Britain’s most senior Muslim officer⁸. In any event, from 2005 onwards, the Commissioner had made little secret of his own view in favour of further extension of the period during which suspects can be held without charge.

However a number of terror plots have arisen well outside the Metropolis and the views of other Chief Constables on the subject of extended detention became politically significant.

It is far from easy for an outsider to conduct any real research into the structures and workings of ACPO. However its website⁹ reveals a perhaps surprising constitution not under statute but as a private company limited by guarantee. My understanding is that there are currently 280 members of the Association, consisting of Assistant Chief Constable and higher ranks in the

⁶ “Anonymity for Witnesses is Essential”, *Telegraph*, by John Yates, Assistant Commissioner of the Metropolitan Police, 24th June 2008

⁷ Reference made by Bob Quick (Head of Scotland Yard’s Counter-Terrorism Command) and reported by the BBC on 24th June 2008.

⁸ Cf “Sidelined Officer in race discrimination claim against Met Chief Sir Ian Blair” *Daily Mail*, 26th June 2008

⁹ <http://www.acpo.police.uk>

44 forces of England, Wales and Northern Ireland, as well as some senior non-police staff from national police agencies.

Importantly, we are told that the Information Commissioner has confirmed that the Freedom of Information Act does not apply to ACPO. However the Association is funded by a Home Office grant, contributions from each of the 44 police authorities, membership subscriptions and proceeds of its annual exhibition.

The company's statement of purpose speaks of 'equal and active partnership with Government and police authorities' (both creatures of statute), and of 'leading and co-ordinating' the direction and development of the police service in England, Wales and Northern Ireland.

"In times of national need", we are told "ACPO – on behalf of all chief officers – co-ordinates the strategic policing response." Company objects include providing leadership to the entire Police Service, the development of 'Doctrine', recognition as a 'principal voice of the service', co-ordination of the strategic policing response, the professional development and other member services and the development of the ACPO brand 'globally'.

The website also suggests a structure involving business area committees, a Cabinet and then a Chief Constables' Council as the highest decision-making authority within the organisation. Evidence given to the Parliamentary Committee scrutinizing the Counter-Terror Bill suggests that varying views of the 42-day detention policy were discussed at the Chief Constables' Council¹⁰.

Of course little is known outside about the debate and deliberations which took place. However we do know that the body meets four times a year, that 20 Chief Constables may constitute a quorum and that if matters are put to a vote, motions are carried by simple majority on a show of hands¹¹. In theory at least, Council decisions (which are then intended to bind the public pronouncements of ACPO members) may be passed with the support of only 11 Chiefs, though one must hope that this was not the position in the present case.

ACPO publishes advice and guidance on a large number of policing issues and contributes 'decisions' and 'comments' to a wide range of contemporary public debates. In the light of this and its own stated aim to be 'the principal voice' of policing in the British public mind, I wonder whether it might not be time for an examination of its proper role in our system and culture of policing.

Is ACPO an external reference group for Home Office Ministers? Is it a professional association protecting the interests of senior officers? Is it a public authority which issues guidance and good practice to local forces? Is it a national policing agency? Is it a campaigning pressure group arguing for greater police powers? It might well be any of these but should it be all?

¹⁰ Evidence to the Counter-Terrorism Bill Committee, Report of Proceedings, 22 April 2008

¹¹ Articles of Association of the Association of Chief Police Officers

Where is its constitutional grounding in either statute or common law policing tradition? Is it subject to judicial review in the courts? When if ever did Parliament have the opportunity to debate, scrutinize or reform the role of one of the most powerful publicly funded bodies in Britain?

So in the highly charged political and media environment of law and order, there are questions about the ethics, authenticity and accountability of the 'voice' of the service in the public mind as well as my own concern for non-partisanship.

Meanwhile legislative and political developments simultaneously undermine the doctrine of constabulary independence. The Police Reform Act 2002¹² created Home Secretary power to call for a Chief Police Office's suspension. The Police and Justice Act 2006¹³ increased Home Secretary power to intervene in 'failing police forces' without the objective assessment of HMIC.

Ongoing political debate tempts us towards even greater political rather than legal accountability though now perhaps at local rather than national level with the Conservatives going as far as the suggestion of directly elected Commissioners¹⁴.

It seems to me that 'localism' too brings its own dangers if forces are to be accountable to locally elected politicians for their priorities, and I believe Ian Johnston of the Police Superintendents' Association shares some of those concerns. For a vivid hypothetical of such local 'peoples' policing', imagine the priorities of a future far-right elected commissioner, authority or council; probably not equal protection for all members of the community under the law.

Accountability to the law does not mean insensitivity to community priorities and needs. It just places judgment and discretion in the hands of officers as individual policing professionals, even if often working in concert under the coordination of a senior officer or chief constable.

Jan Berry made this point most persuasively in an interview following her recent retirement as Chair of the Police Federation:

"We are policing to meet targets rather than really understanding what it is the public needs. We have a generation of police officers who don't know any other way. Common sense is being eroded. One of the basic tenets of the job is that operational policing is undertaken by police officers who swear an oath of allegiance. They are "officers" rather than "employees". That means that as a police officer, I have a personal responsibility and am accountable only to the law for my decision. So in theory, my Chief Constable cannot for instance, order me to go and arrest someone- I have to go and make up my own mind about it. But in practice, the target culture is making this increasingly impossible. There are people in the civil service who seem to want to break

¹² c.30

¹³ c.48

¹⁴ Cf "Commissioners should be elected, says Tory police report" *Guardian* 3rd April 2007

the “office” of constable so that they can better dictate what it is that officers do.”¹⁵

She goes on to remind us that not every legislative reform has broadened police power. Some have actually shut down both police discretion, fundamental fairness and common sense simultaneously with quite perverse results. To quote her again:

“Young officers go to deal with an incident involving two, three or four youths- the sort of incident that could, and I would say should, be dealt with some strong words of advice, discussions with parents and lessons learned by everyone. But in this climate, they are encouraged by the system to deal with it by reporting it as a crime and prosecuting the offenders. It all spirals into a caution, a court appearance...as a police officer you formalise these things because you can then demonstrate you are doing your job.

The things that can't be quantified- reassuring a member of the public, quelling a situation before trouble arises- things that I would say are at the heart of good policing can't be measured, so aren't seen as important. Young officers will not have done the sort of policing that I did, where I learned to develop my instincts. All they know is “sanctioned detentions”, “offenders brought to justice” and “targets”. Their ability to use common sense and their discretion has been removed.”¹⁶

Quite so Jan. Not for the first time in our five or so years of public and private engagement, we completely agree.

By way of conclusion, perhaps this outsider and I hope critical friend of British policing, might make some practical suggestions.

First may I add my voice to those of Sir Ronnie Flanagan¹⁷ and others seeking a drastic reduction in Whitehall targets and other red tape. A clearer, sharper statute book, accessible to constable and citizen alike, is the correct approach to limiting police discretion under the law. As a general rule of thumb – if a great deal of written guidance is required for the exercise of a power, the statutory discretion itself is too vague or broad.

With that in mind, there should be a moratorium on further additional police powers, at least until the existing bulging compendium may be properly evaluated and rationalised.

Calls for further central and local electoral accountability of police forces should be resisted in favour of alternative independent mechanisms for ensuring good governance, financial probity and so on, and enhancing the professional skills and sensitivity of the office of constable.

¹⁵ “You’re Destroying Us” *Daily Mail* 5th June 2008

¹⁶ Ibid

¹⁷ Sir Ronnie Flanagan’s Independent Review of Policing, published on 7th February 2008

There should be a proper police and public debate about the nature of non-partisanship in the current climate, with a view to setting ethical guidelines for police officers of all ranks who may be called upon or tempted to speak publicly on matters of contested opinion rather than hard fact.

There should be some parliamentary examination of the proper role for a body such as ACPO under our best traditions and policing arrangements. What should it be for? How should it be constituted in law and held to account?

I can certainly sympathise with chief constables who might prefer the microphone to the truncheon and see why ministers love the feel of a bullet proof vest. I can only ask those with senior roles in policing and politics to beware the real dangers of continued constitutional cross-dressing.

Surely it must be a hallmark of any democracy – let alone the oldest on Earth – that those with guns and uniforms stay out of politics and politicians refrain from interfering with the operation and enforcement of the law.

It has been an enormous privilege for a human rights' campaigner to give this lecture. Both my invitation and your patient hearing are testament I think, to the benign and civil libertarian policing tradition founded in this country so long ago. It is a tradition that has protected the freedom and safety of so many people for the best part of 200 years. Long may it continue.