

## COMMON TRACK SEVEN

### AN ESSAY IN HONOUR OF KEVIN BOYLE

(An excerpt from a chapter of G Gilbert, F Hampson and C Sandoval (eds), *Strategic Visions for Human Rights. Essays in Honour of Professor Kevin Boyle*. Routledge London 2011)

## DOING HUMAN RIGHTS: THREE LESSONS FROM THE FIELD

### INTRODUCTION

I first met Kevin Boyle who has [died](#) – on Christmas Day – as long ago as 1981. ‘Met’ is a rather grandiose term to use for an interaction which involved one question from a Masters student in a large crowd to an academic whose effortless presentation to the Cambridge Irish Society had already dazzled, enthused and intellectually intimidated all those present. I do not remember what the theme of the talk was, much less my question or the answer that was given – but I do vividly recall the style of the man: fluent, charming, intelligent, engaging and – perhaps above all these to my mind – committed.

Here seemed to be a new way to do law: get on top of all the stuff, the cases, the statutory provisions, the complex scholarship – all the ramparts with which law protects itself from external scrutiny – and then deploy them not to mystify and stifle the people but rather to empower and therefore to enrich them.

Years later, when we were both serving on the same British-Irish Association committee, I have another strong image, of Kevin Boyle and I wandering up and down some college quad, with him lecturing me sternly but with great sympathy about an intellectual cul-de-sac I was motoring up (maybe it was Herbert Marcuse) which he had reversed out of, spotting the dangers, twenty or so years before. All said in the nicest possible way, enthusiasm taking the place of pomposity or of any sense of superiority. I could have been anyone as Kevin Boyle recalled his dalliance with the extreme left, his intellectual growth, his belief in the possibility of practical action to build a better world not through the defeat of law or its subversion but through this valuable use that could be made of it, in the right hands.

### THREE LESSONS

Just before he died his colleagues at Essex University published a Festschrift in his honour. This common track is drawn from my contribution to that book. It details how it was that, through reading Kevin Boyle and scholars like him, I came to learn three things about law and human rights that have stayed with me through my professional career.

The first of these lessons is that the proper function of human rights work should be the empowerment of the vulnerable and the marginalised. Of course it is a subject which is interested in philosophical ideas like autonomy and liberty, and which might indeed also rightly require of its proponents a display of technical virtuosity in the field of legal analysis from time to time, but what ultimately makes this body of work tick is the beating heart for the weak that lies at its core. This insight has (for me anyway) the important consequence that human rights talk should itself be viewed as functional, that it (and indeed the values of equality of esteem and dignity that lie under it) stands for a perspective on the world that is as particular and challenging as it is virtuous: the poor not only need and deserve but *are entitled to* their life chances, just as much as are those whose various accidents of birth, genetic make-up and education mean that that they are able to do much with their freedom and autonomy.

Second, and Kevin Boyle could hardly avoid this growing up where he did when he did, there is the self-evident fragility of law, its vulnerability to being captured by the powerful, even in a decently-functioning democratic society much less one that is pockmarked by sectarian division. What this means for human rights lawyers is that judges often disappoint, that in the fleshing out of the grand instruments of right and wrong courts can sometimes open up disturbing gaps between law and justice. Judges can be wrong either because they have in this way ignored the demands of law but they can also be wrong (in a wider, non-legal sense) when they have reluctantly buckled before them to a law which is harsh but unavoidable. Of the two the first is the greater wrong, it being personal to the decision-maker on the bench rather than systemic, but the activist lawyer needs always to be alive to the possibility of judicial decisions being wrong in both senses. The first requires a legal response, the second a political one.

This is the third of 'Boyle's laws' – that in human rights law politics should always matter. The rights, rules and regulations that bubble to the surface in a case, framing the principle

that needs to be identified and the context in which the facts are first found and then applied, exists always in a particular here and now. Cases in the law reports are like skeletons laid bare – they tell you about the bare bones but you need the rest of the body if you want to know truly what has gone on in the particular life that is laid out before you in all its cadaverous opacity.

## THE GOAL

In this essay, I ask how we practitioners of human rights law should be doing our subject in this the age of our hegemony, a time when (having been marginalised and distorted by the demands of the cold war) the idea of human rights has finally come to enjoy the near pre-eminent position that was originally designed for it in the system of international governance that emerged at the end of the second world war. Of course among Kevin Boyle's many lives has been an internationalist one, strongly dedicated as he has been (especially in his work with Mary Robinson) to the nurturing of the universalistic potentiality of human rights.

But my focus here is narrower, on the interaction between law, politics and human rights that has been played out in Britain's Human Rights Act. Finally coming fully into force in October 2000, we have now had over ten years' experience of its impact. Taking three areas close to Kevin Boyle's heart – the right to protest; the right to liberty; and Northern Ireland – the essay assesses (within an inevitably limited space it is true) how the Act has performed in these fields, how it has connected with politics, how the judges have engaged with power in ways that might otherwise not have been possible, above all how (if at all, as say in exam questions) it has served the weak and the vulnerable. Does the Human Rights Act represent a respectable, indeed a productive way, of doing human rights? At a time of flux, not all generated by the Right but from the Left as well, should it stay or should it go?

## THE RIGHT TO PROTEST

An odd spin-off of the energy of Britain's civil society is that its activist members worry a great deal about whether the country has become or is becoming deeply illiberal, more hostile to freedom at best, a downright police state at worst. The Human Rights Act rarely figures in such pessimistic reflections yet it has been directly causative of a House of Lords

decision which has gone a long way towards the democratisation of policing in (at least) England and Wales. In *R (Laporte) v Chief Constable of Gloucestershire*<sup>1</sup> a large-scale protest had been planned outside a particular air base and the police had made a variety of plans under various statutes in order to cope with the demands of the occasion. When local police became aware that among those travelling in three coaches from London were members of a 'hard core activist anarchist group'<sup>2</sup> (alluringly known as the 'Wombles'<sup>3</sup>), they stopped and searched the vehicles some way from their destination. The senior officer on the spot then could not resist insisting that the buses – together with all their occupants – return immediately to London, ordering a police escort just to make sure. This is what did for the authorities when the matter eventually worked its way to the House of Lords via a judicial review of the decision. The imposed reversal was way over the top, but so too had been stopping the buses in the first place.

Turning to the language of human rights it was held that the restriction on the claimant's freedom had not been prescribed by law. It had been quite wrong to fall back on old common law powers in a situation like this and in any event it had been misapplied, there having been no imminent breach of the peace when the buses had been brought to a halt. All those old cases which appeared to empower the police to do what they want (chief amongst them *Piddington v Bates*<sup>4</sup> and *Moss v McLachlan*<sup>5</sup>) – so excoriated over the years by generations of civil libertarian students and lecturers – needed to be critically revisited, the late Lord Bingham even going so far as to describe *Piddington* (under which picketing has been controlled by these common law powers for over forty years) as an 'aberrant decision'.<sup>6</sup>

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<sup>1</sup> [2006] UKHL 55, [2007] 2 AC 46.

<sup>2</sup> *Ibid* para 5 (Lord Bingham of Cornhill).

<sup>3</sup> White Overalls Movement Building Libertarian Effective Struggles – it may be their brand strategists started with the acronym first and worked backwards.

<sup>4</sup> [1961] 1 WLR 162.

<sup>5</sup> [1985] IRLR 76.

<sup>6</sup> n 1 above para 47.

It seems clear from reading *Laporte* that the law lords felt that the police had now so much statutory capacity when it came to managing protest that there was absolutely no need for them to continue to fall back on the common law, that they could not continue to be the beneficiaries of new and wider laws while clinging to the old informal ways whenever it suited them.

*Laporte* is a fine decision but what impact will it have?

The key police officer who had made the decision to turn back the buses had admitted to the court that he had not thought a breach of the peace imminent at the moment he stopped the buses; rather he had been seeking to obviate the imminence that he was sure would arise later, if the buses were allowed to proceed. But suppose he had written a different kind of statement which emphasised how fearsome the Wombles were and how perpetually on the edge of violence the security briefings had told him these 'terrorists' invariably were? On this occasion, fortified by the way earlier cases had embedded themselves in the collective police mind, he did not think he had to.

As *Laporte* works its way into the training manuals, his successors in this type of situation will know that their mantra must henceforth not be 'what is reasonable' but what is 'imminent'. Even Lord Bingham, in robustly sceptical form in *Laporte*, 'acknowledge[s] the danger of hindsight, and ... accept[s] that the judgment of the officer on the spot, in the exigency of the moment, deserves respect.'<sup>7</sup>

The case will only work effectively when every police officer knows that his or her assessment of what is imminent, and then of what is reasonable to pre-empt that which is judged imminent, is open to being carefully reviewed in court especially where the effect of the police power has been to interfere with or otherwise undermine what appears on the face of the facts to be the exercise of a right of peaceful protest. To bed down the victory in *Laporte*, more cases are needed, and more determined civil activism to test its effect. The police need also to be brought into the frame, with senior officers being involved in the task of inculcating civil libertarian values and a strong understanding of imminence into their junior officers.

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<sup>7</sup> *ibid* para 55

This tendency towards judicial deference to the constable on the spot, doing his or her best in the throes of what he or she says is an unexpected crisis, has always been the biggest obstacle to accountability in the field of public protest. It is an understandable if frustrating feature of all such *ex post facto* analyses.

The Human Rights Act story can be disappointing with less justification where there is a larger dimension to a case than that of a police officer handling the unforeseen, and the judges fail to see (or choose to ignore) it.

One of the most disturbing decisions of all under the Act is *R (Gillen) v Metropolitan Police Commissioner*.<sup>8</sup> The power under scrutiny here was the highly controversial one in sections 44-47 of the Terrorism Act 2000, enabling the police to exercise stop and search powers of persons and vehicles without the need for the usual reasonable suspicion with regard to the specific individual being subjected to them. The law – driven by the imperatives of counter-terrorism – was recognised by Parliament as draconian and as a result an authorisation procedure of some complexity was embedded in the Act. In particular this sought to limit the reach of the provisions both geographically and in terms of their duration. However from the moment of its coming into force, the metropolitan police had sought and been given the right to use these powers throughout London, and had then simply continued to renew them as and when the time-period for their exercise came close to expiring. The extraordinary had become the norm with disconcerting speed and the power.

Section 44 pushed its way to the front of the arsenal of powers available to the police – ostensibly only aimed at terrorism, its breadth and manipulability made it the provision of choice for the harassed officer in search of a justification for an action thought necessary or even merely desirable.

When the matter reached the lords by way of a judicial review launched by a student cycling to an arms protest and a press photographer covering the same event, both of whom were stopped and searched under its provisions, it might have been expected that the key issue would have revolved around the abuse of parliament's will arguably revealed by the automatic rather than highly selective deployment of these provisions. There was nothing

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<sup>8</sup> [2006] UKHL 12,[2006] 2 AC 307.

happening when the two claimants had been stopped, no breach of the peace or unfolding emergency to which police officers were having to react. The protest at issue had nothing to do with terrorism or any of the controversial matters said to underlie the use of subversive violence as a political tool. Instead, impressed by the evidence they heard from the police and the Home Office of the importance of these kind of disruptive powers and of the scale of the ongoing terrorist threat, and citing the 'relative institutional competence' of the authorities in the field,<sup>9</sup> the law lords unanimously concluded not only that the powers were being lawfully used but that their deployment was *in accordance with* the human rights of those subjected to them.

*There was no 'deprivation of liberty' at all for article 5 purposes and the rights to privacy, expression and assembly in articles 8(1), 10(1) and 11(1) had been properly and proportionately restricted in the public interest if they were engaged at all.*

Mildly concerned though certain of their lordships were about the possible manipulation of the law in a discriminatory fashion (against persons of Asian origin particularly<sup>10</sup>), the tragic trump card in the hands of the defendants had surely been the London terrorist attack of 7 July 2005, which had occurred a little over six months before argument in the case. The idea of ruling out spot checks on entry to the tube network – or to put it another way of insisting that all those entering the underground be searched<sup>11</sup> – did not appeal. But as a result, little thought was given or concern expressed about the chilling effect of the law on ordinary protest despite the clear way in which the factual matrix with regard to each claimant demonstrated this possibility. Section 44 continued to dog the work of journalists and the activity of protesters, inoculated again human rights attack as it appeared to be,<sup>12</sup> until brought down by a combination of the European Court of Human Rights in Strasbourg

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<sup>9</sup> *Ibid* para 17 (Lord Bingham).

<sup>10</sup> *Ibid* para 47 (Lord Hope of Craighead); para 80 (Lord Brown of Eaton-under-Heywood).

<sup>11</sup> See *ibid* para 77 (Lord Brown).

<sup>12</sup> See the continued controversy over its use against photographers: 'Snap that tested terror laws to breaking point' *Guardian* 12 December 2009.

and the Coalition government's acceptance of the Strasbourg critique shortly after taking office.<sup>13</sup>

It is tempting to suggest that the claimants pursued the wrong legal route in *Gillan*, that they should have launched a common law action for assault or even false imprisonment.<sup>14</sup> But this approach was tried and found wanting in the more recently decided *Austin v Metropolitan Police Commissioner*<sup>15</sup> –the 'kettling case', another salutary warning not to put all one's human rights eggs in the judicial basket.

The facts were so long ago that they preceded 11 September 2001, arising out of the May Day protests of that year during the course of which very large numbers of people (including passers-by as well as demonstrators) were held by the police for some seven hours in and around Oxford Circus. The action was said to be necessitated by the exigencies of the moment and of the police inability otherwise to control the thousands of protestors converging on Oxford Circus at that time, but the authorities had known all about the likelihood of demonstrations in London that day and on the police's own estimation there were six to twelve times as many police officers on the ground as there were 'hard core demonstrators looking for confrontation, disorder and violence'.<sup>16</sup>

So how could matters have been allowed reach a point where such a vast crowd of civilians could find themselves trapped by the police within a small area for so long without food, water, toilets or access to shelter? The lords found (once again unanimously) that there had been no advance intention to cordon the area off, that it had been an on-the-spot response to a developing situation, and that (here is the bizarre point from the human rights perspective) because the purpose had been well-intentioned there had been no 'deprivation of liberty' of those affected for the purposes of article 5.

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<sup>13</sup> *Gillan and Quinton v United Kingdom* 12 January 2010

<sup>14</sup> n 8 above para 36 (Lord Bingham).

<sup>15</sup> [2009] UKHL 5, [2009] AC 564.

<sup>16</sup> *Ibid* para 4 (Lord Hope).

As Lord Hope put it, 'there is room, even in the case of fundamental rights ... for a pragmatic approach to be taken which takes full account of all the circumstances.'<sup>17</sup> Their lordships felt on the facts the police had had no alternative, looked into the right to liberty in search of an appropriate exception to deploy, and finding none decided to invent one by the device of attenuating the meaning of 'deprivation', albeit to the point (it might be thought) of absurdity.<sup>18</sup>

Where *Gillen* and *Austin* both fail is in the level of generality at which they engage with the facts before them. Viewed narrowly, each is involved with police officers exercising their discretion at a particular moment, to cope with events as they are unfolding before them – a protest is underway outside an arms fair; the throngs are converging on Oxford Circus. But in neither case ought the issues to be viewed in isolation in this way. In each factual situation that is thrown up by the two decisions, a proper assessment requires a broader picture to be taken into account: the over-easy manipulation of terrorism laws and their potential for discriminatory treatment in the first; the aggressive treatment of protestors by over-hyped police believing themselves to be otherwise at an operational loss in the second. (We have seen a lot of that lately with regard to the policing of student protests.)

Each case would seem to be wrong in both the senses discussed above, wrong in their analysis of the law and wrong too in the injustice of their results. *Laporte* shows that this wider contextualisation is achievable even within the courtroom. *Gillen* and *Austin* remind us that human rights cases can do harm as well as good, and that, appreciating this, human rights activists should be careful not to become too dependent on litigation as a tool of change.

The idea of human rights functions in many ways which are both effective and quite separate from litigation: the Convention moderated the law on proscription between publication of the relevant white paper in 1998 and enactment of the consequential law in 2000 by forcing the insertion of an independent control on the banning of associations which was afterwards to allow the *People's Mojahadeen Organisation of Iran* successfully to

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<sup>17</sup> *Ibid* para 34.

<sup>18</sup> 'It would appear to me to be very odd if it was not [to] be open to the police to act as they did in the instant circumstances, without infringing the article 5 rights of those who were constrained' *ibid* para 64 (Lord Neuberger of Abbotsbury).

challenge their own banning order.<sup>19</sup> Like Chris Patten in Northern Ireland before them,<sup>20</sup> two senior police officers Hugh Orde<sup>21</sup> and Denis O'Connor<sup>22</sup> have been able to pin the label of 'respect for human rights' on progressive changes which they wish to bring about within the police force. Just as a human rights victory in court may be the start of a struggle, so a defeat does not prove the uselessness of the term, in these days particularly when progressive politics has precious few other phrases to hand.

## THE RIGHT TO LIBERTY

Nowhere is the importance of the interrelationship between law, politics and human rights clearer than in the story of how the policy of *de facto* internment introduced in the UK after 11 September 2001 has proved unavailing.

In the febrile atmosphere that followed the Al-Qaida attacks in the US on that day, it can hardly be doubted that without the constraining hand of human rights the British authorities would have gone for an even more draconian response than that speedily encapsulated in the Anti-terrorism, Crime and Security Act 2001. This measure introduced a form of executive detention for foreigners suspected of terrorist activity against whom it was not thought criminal proceedings could be taken. It was not internment proper because those affected could notionally choose instead to leave the country, albeit it was clear that the only states likely to receive them would put their rights to life and/or not to be tortured at risk. Indeed this was why they were being held rather than expelled after 11 September, a human rights advance in itself which had been made possible by the extra-

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<sup>19</sup> *Lord Alton of Liverpool (In the matter of the People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department* (PC/02/2006, 30 November 2007). See further, confirming that no appeal was possible, *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443.

<sup>20</sup> *A New Beginning. Policing in Northern Ireland. The Report of the Independent Commission on Policing for Northern Ireland* (September 1999), ch 4: 'It is a central proposition of this report that the fundamental purpose of policing should be ... the protection and vindication of the human rights of all' (ch 4.1).

<sup>21</sup> 'New Acpo chief wants Human Rights to be put at Core of Policing' *Guardian* 22 June 2009 available at <http://www.guardian.co.uk/politics/2009/jun/21/hugh-orde-acpo-human-rights> (last visited 13 December 2009).

<sup>22</sup> Her Majesty's Chief inspector of Constabulary, *Adapting to Protest*. 'A number of recommendations have been made throughout the report to ensure that relevant human rights principles are firmly embedded within the framework of Public Order policing' (p 65): available at <http://inspectorate.homeoffice.gov.uk/hmic/docs/ap/G20-final-report.pdf?view=Binary> (last visited 13 December 2009).

jurisdictional effect the Strasbourg court had given to the European Convention as early as 1989 and then again in 1994.<sup>23</sup>

A second human rights feature of the law was the derogation entered in respect of the departure from the right to liberty that the executive knew it was asking Parliament to enact. This constrained the country to do only what was proportionate to deal with what needed to be asserted to be a public emergency threatening the life of the nation.<sup>24</sup> Once again it is not difficult to guess at the unconstrained powers that the emergency may have been thought to warrant in the absence of this piece of human rights discipline. In the legislative debates themselves, anxiety about the law was reflected in the deployment of the language of human rights side-by-side with more a more traditional British emphasis on liberty and freedom.<sup>25</sup> Despite the intensity of feelings generated by the 11 September attacks and the urgent timetable imposed by government, the Bill emerged from the process with a commitment to a review of its own most controversial features (including in particular the detention powers) within one year of its coming into effect.<sup>26</sup>

Under the usual rules of parliamentary sovereignty the courts would have had no involvement in oversight of the fundamentals of this system of detention – their role would have been at best to act as a kind of sceptical *ultra vires* referee positioned well back from the field of play. But the Human Rights Act permitted a direct frontal challenge, and after one false start in the Court of Appeal,<sup>27</sup> and following a powerful report from the statutory review team which would no doubt have calmed nerves,<sup>28</sup> the House of Lords produced its famous Belmarsh decision, on 16 December 2004.<sup>29</sup>

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<sup>23</sup> *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v United Kingdom* (1996) 23 EHRR 413.

<sup>24</sup> Under article 15, and embedded in the Human rights Act at s 14.

<sup>25</sup> I have discussed this at greater length in C A Gearty, 'Human Rights in an Age of Counter-terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 *CLP* 25-46.

<sup>26</sup> s 122.

<sup>27</sup> *A and Others v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335.

<sup>28</sup> Privy Councillor Review Team, *Anti-terrorism, Crime and Security Act 2001 Review: Report* HC 100 18 December 2003.

<sup>29</sup> [2004] UKHL 56, [2005] 2 AC 68.

As is well-known, however, and crucially from the perspective of the argument about the intertwining of law and politics that I am making here, their lordships did not strike down the law and free the Belmarsh detainees.

Rather their declaration of incompatibility in respect of the relevant provisions of the 2001 Act left the matter of what to do next squarely with ministers, parliament and the court of public opinion. The judges did not deny there was an emergency, something which the majority considered would have been beyond their 'relative institutional competence.'<sup>30</sup> Rather their insistence was that what was chosen to deal with the ongoing terrorism crisis should be within the broad framework of human rights law including its emergency wing, and that throwing foreign suspects into prison indefinitely while taking no action against their exact British equivalents had been neither rational nor proportionate.

Government did act after the Belmarsh verdict, introducing a general law which was intended to supersede the offensive detention powers in the 2001 Act with a regime of 'control orders' that feel short of detention but which was designed nevertheless to impose a range of restraints on 'suspected terrorists' (British and non-British alike) against whom it was still not considered possible or desirable to proceed under the criminal law in the normal way. The measure was greeted with great hostility in Parliament, particularly in the House of Lords, and was much amended before it could escape the clutches of its sceptics and receive the Royal Assent as the Prevention of Terrorism Act 2005.

There is a strong argument that in the width of its reach and in the range of controls it can impose, the 2005 Act was and is in some ways worse than the more draconian but more narrowly focused law that it supplanted. But once again this is to ignore the ameliorating effect of human rights. Extreme control orders (which require derogation from the European Convention) were so hedged about with additional safeguards when the law was going through Parliament<sup>31</sup> that not one has been made since the Act came into force.<sup>32</sup> All

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<sup>30</sup> Lord Bingham at para 29; cf Lord Hoffman at paras 88-97 who, famously, took a different view.

<sup>31</sup> See s 4.

<sup>32</sup> See Lord Carlisle of Berriew QC, Fourth Report of the independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (3 February 2009), especially para 12 (accessible at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/lord-carlisle-fourth-report.pdf?view=Binary>) (last visited 14 December 2009).

other (non-derogating) control orders have been subject to what must have seemed at times to government ministers to have been perpetual judicial review, both as to the procedure before they are made and as to their individual content.<sup>33</sup>

Six years on, we can say with reasonable confidence that the judges have slowly suffocated the anti-terrorism control order system to death, with the handy pillow they have had to hand being the Human Rights Act.

In the early cases, the system itself was allowed to survive unscathed while the judges picked around its edges.<sup>34</sup> Then came *Secretary of State for the Home Department v AF, AE, and AN*.<sup>35</sup> In this case, the core of the non-derogating control order regime was undermined, possibly fatally, by the unanimous decision of a nine strong lords' bench that such orders could not be made on the basis (solely or to a decisive degree) of evidence given in closed sessions to which the person to be made the subject of such an order did not have access. This was to be the case even where the evidence against the proposed controlee appeared to be overwhelming, and it could moreover be achieved by reading down the Prevention of Terrorism Act 2005, ie by enforceable interpretation rather than an unenforceable declaration. True some of their lordships were reluctant to go this far but they felt their hand had been forced by clear Strasbourg authority on the matter, recently delivered.<sup>36</sup>

What are we to make of this story?

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<sup>33</sup> As an example, only slightly extreme, the subject of a control order - AF - has had eight substantive hearings and been to the House of Lords twice: see *Secretary of State for the Home Department v AF, AE and AN*, n 35 below.

<sup>34</sup> Principally *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46, [2008] 1 AC 440; *Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45, [2008] 1 AC 385; *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499.

<sup>35</sup> [2009] UKHL 28, [2009] 3 WLR 74.

<sup>36</sup> *A v United Kingdom* European Court of Human Rights 19 February 2009 about which Lord Hoffmann in particular is scathing: see [2009] UKHL 28 at para 70 *et seq.* Lord Rodger of Earlsferry contributes a three sentence speech, the last of which reads: 'Even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentorum locutum, iudicium finitum* - Strasbourg has spoken, the case is closed' (para 98).

The government (first Labour and now possibly even the Coalition) seems close to giving up the ghost on control orders completely.<sup>37</sup> If this is the eventual outcome it will have been a triumph of concentrated and determined defence of freedom and liberty which would certainly not have happened without a large coterie of committed parliamentarians (from both houses), civil libertarian activists and engaged members of the media, but which also owes its existence to a surprisingly progressive judicial branch armed with a Human Rights Act that was able to turn mere dismay at government action into a tangible legal product.

It could not have done this without the oversight of the Strasbourg bench able to keep at least some of their recalcitrant British (junior?) colleagues up to the mark. We should remind ourselves that this story could change at any moment: one of the tragedies of a liberal democracy's treatment of subversive violence is how easily it allows atrocity to set the legislative and executive agenda. But the evisceration of the control orders has survived the serious attacks of July 2005 and it is surely not being unduly optimistic to believe that if there are future mass attacks then it may be that the criminal law will be what will be reached for first.

#### NORTHERN IRELAND

Our third area involves three cases, the first very disappointing, the second a triumph in the way it was shaped (if not in its result from a technical human rights law point of view) and the third a decision that seems at first sight to have nothing to do with Northern Ireland but which has made possible the recovery of what should have been (but scandalously was not) one of the enduring lessons of 'the troubles'.

The disappointing case is *in re Mc E*.<sup>38</sup> As a result of covert electronic surveillance of solicitor-client discussions at a police station in Northern Ireland, a solicitor was charged with incitement to murder and acts tending and intended to pervert the course of justice.

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<sup>37</sup> Even before the judgment in the case the Counter-Terrorism Act 2008 had marked a shift towards a renewed emphasis on the criminal process. The Home Secretary has responded to the decision by ordering a review of the powers: see *Guardian* 16 September 2009 accessible at <http://www.guardian.co.uk/politics/2009/sep/16/control-orders-review-alan-johnson> (last visited 14 December 2009). Note however that the security services are as I write fighting a strong rearguard action to preserve them.

<sup>38</sup> [2009] UKHL 15, [2009] AC 908.

Serious certainly, but what is this about covert surveillance? The antennae of the Northern Ireland legal community are rightly sensitive to attempts to intrude upon the privileged communications between a lawyer and his or her client, with this having been one of the main battle lines in the fight for justice over thirty years of civil strife.

No explicit legislation could be found authorising such action, and when the case reached the lords the senior law lord Lord Philips was emphatic that it should not be allowed, or allowed only with the introduction of specifically designed safeguards. His view was that legal professional privilege was embedded as a human right in the common law and was not capable of being destroyed as a side-effect of legislation not directly addressing the issue.

But this is what his four colleagues decided had happened here: to Lords Hope, Carswell and Neuberger and Baroness Hale, the Regulation of Investigatory Powers Act 2000 had an approach to 'intrusive' surveillance which could be said to apply here, it having been formulated in sufficiently wide terms in that Act to reach the challenged surveillance. While this did not mean that the evidence generated by it could be used in court, no common law bar could be imposed on the workings of the statute. If certain of the senior judges, Baroness Hale for example, thought this result unpalatable but unavoidable,<sup>39</sup> their dissenting colleague had shown in his speech how the logic of their reluctant argument could have been resisted.

Against a background of conflict and mistrust between sectors of the legal profession and the police in Northern Ireland, surely this would have been the wisest approach to take. The decision smacks just a little too disturbingly of those old times when the law lords took an overly benign view of what the authorities felt they had to do in Northern Ireland. At best it is an example of a case which – like – *Austin and Gillen* before it – takes too narrow a view of the factual and legal task before it.

Our second decision is important not because of its outcome but because it happened at all in the way that it did. *In re E (A Child)*<sup>40</sup> arose out of the appalling mob violence that accompanied children on their way to school at Holy Cross Girls' Primary School on the

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<sup>39</sup> *ibid* para 67 (Baroness Hale of Richmond).

<sup>40</sup> [2008] UKHL 66, [2009] AC 536.

Ardoyne Road in north Belfast during much of the early Summer and Autumn of 2001. The school was a Catholic one and the harassing crowds were from an estate of Protestant/loyalist families that bordered parts of the road on both sides.

Reaching for language to capture the degree of horror and upset that these young school children were required to endure, albeit under police protection, to get to their classrooms, all sides found descriptive clarity in the statutory abhorrence of ‘inhuman and degrading treatment’ which is contained within the absolute prohibition on torture and inhuman and degrading treatment to be found in Article 3 of the European Convention on Human Rights. This in itself was valuable, equipping the judges with a means of expressing their disgust in a way that can rarely be found in the dispassionate common law. Particularly important, and given its source (a law lord from Northern Ireland where he had been a long-serving lord chief justice), these remarks from Lord Carswell were especially powerful:

The behaviour of the loyalist crowds along Ardoyne Road which I am about to describe has been termed a ‘protest’ in the documents before the House. It is said that the *fons et origo* was a protest from the loyalists about an issue about which they felt concern ... Whatever the initial cause may have been, however, it is entirely clear that the behaviour complained of far exceeded the bounds of that which could be associated with any legitimate protest. It was utterly disgraceful and was condemned by Kerr LCJ in strong terms in paragraph 63 of his judgment. The term ‘protest’ is accordingly inappropriate, as may also be the term ‘demonstration’ in the circumstances of this case. Nor is it readily apparent that the events should be classified as a ‘dispute’, as referred to in some of the affidavits sworn by police officers. Since those events are described in so many material documents as a protest, I shall continue to use the term, but subject to the caveat which I have expressed.<sup>41</sup>

There is a second point of interest about this case. There was no dispute that the crowds were engaged in actions within article 3, the case reaching the House of Lords on the point of whether the police could have done more to have prevented the ill-treatment. The five House of Lords judges who heard the case were unanimous that the authorities had done

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<sup>41</sup> *ibid* para 21.

what they could. Lawyers for the school children and their families were wrong to argue that the positive obligation to act to prevent third party breaches of article 3 was absolute, as were the interveners the Northern Ireland Human Rights Commission.<sup>42</sup> This must be right – to say otherwise is to forget that rights cannot be turned into obligations so onerous that their blanket protection causes more damage than the original violations.

The point does not arise, of course, where it is the state itself that is doing the ill-treating.

In our third case, *Al-Skeini v Secretary of State for Defence*,<sup>43</sup> six Iraqi civilians were killed by British armed forces personnel in Basra, Southern Iraq, one of them after what Lord Bingham observed in the case had been ‘brutal maltreatment’.<sup>44</sup> When the government refused a public inquiry, the father of one of the deceased Mr Baha Mousa was able successfully to argue for such an investigation before the House of Lords, with the remit of the Human Rights Act being found to extend to the situation in which the deceased had found himself, in the custody in a UK military detention facility and entirely at the mercy of his jailors.

As a result of the sequence of events set in motion by this case, and made possible only on account of enactment of the Human Rights Act, there has been sitting on a regular basis in London an inquiry into the death of Baha Mousa, chaired by the retired Court of Appeal judge Sir William Gage.<sup>45</sup> It would seem that the lessons of that best-known of all Strasbourg cases, *Ireland v United Kingdom*,<sup>46</sup> that techniques of sensory deprivation have no place in the arsenal of the British military, have been forgotten. Also apparently lost has been any collective recall of the ‘solemn and unqualified undertaking not to reintroduce’ the

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<sup>42</sup> *ibid* paras 47-48 (Lord Carswell)

<sup>43</sup> [2007] UKHL 26, [2008] 1 AC 153.

<sup>44</sup> *ibid* para 1.

<sup>45</sup> See <http://www.bahamousainquiry.org/index.htm> (last visited 16 December 2009). The Inquiry is due to report sometime in 2011.

<sup>46</sup> (1978) 2 EHRR 25.

techniques at the heart of the *Ireland* case which Her Majesty's Government gave in the course of that litigation, on 8 February 1977.<sup>47</sup>

It is a salutary reminder of the fragility of law that so great a victory as that secured by the *Ireland v United Kingdom* proceedings in the 1970s should have been so casually cast aside. There can be no better indicator of the fact that case-law, even great cases, can achieve very little in isolation, that to work judicial decisions have to be drilled down, into the training and understanding of those with the responsibility of adhering to them, and done so in a way that makes compliance part of common sense rather than seem to be a buckling before a hostile agency. Lawyers cannot do this on their own – they can create platforms for action but others must then act.

## CONCLUSION

Domestic human rights legal scholarship can and should operate at a number of different levels. There is certainly plenty of scope – indeed need – for technical analysis of the various, sometimes complex, issues that the case-law under the Human Rights Act has thrown up.<sup>48</sup> Barristers seeking to win cases for their clients must make do with what they find, while academics – standing back a little – can try to rework and remould, their driving force being clarity not victory.

This is quite a service for the state to have put at the disposal of the professional advocates and the judges who must choose between the adversaries before them. But human rights scholarship should also always strive to acknowledge the wider context of the cases it puts under scrutiny, their place in the (political, historical) moment that has produced them, the principles that drive (or should have driven) the outcomes that have been arrived at, the values that underpin the judicial performance.

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<sup>47</sup> *Ibid* para 153.

<sup>48</sup> *eg* the mess into which a succession of cases have got housing law and human rights: see for the most recent instalment *Doherty v Birmingham City Corporation* [2008] UKHL 57, [2009] AC 367. A similarly challenging but difficult area is the application of the Convention rights to private bodies: see *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

All human rights legal work of this sort should be socio-legal, even if it must sometimes (on account of the technical focus of the discussion) be only in passing.

But behind even apparently abstruse discussions of complex human rights points are elderly people about to be removed from their care homes or a travelling family trying to remain on their chosen site: there are no 'black letter' cases in human rights law.

It follows from all of this that the academic human rights lawyer should never be afraid to criticise outcomes on grounds of justice in the two senses of the word as we have used it here, a case that is wrong because it has misinterpreted the law and one that is wrong because it has got a bad law right. Nor should such a lawyer reify the language of human rights, regarding every argument made on the term's behalf as necessarily a good one. An understanding of what lies behind human rights can sometimes – perhaps often – lead in the direction of an apparent human rights defeat: *in re E* is a good example of this.

The human rights lawyer should bring passion to his or her subject, but also nuance and a capacity for hard analytical work. The Human Rights Act provides a credible route into the law for such law-activists to demonstrate their skills. Over ten years on, its record suggests that in these relatively barren times for radical, emancipatory politics, it has done a good job on behalf of many – some discussed in the course of this chapter – whose voices would otherwise not have been so clearly heard (perhaps even heard at all).

*But to stay healthy, it needs generations of lawyers as skilled and committed as Kevin Boyle has been through his long and varied career*