



Protecting Human Rights during the rise of right wing ideology – a view from the trenches

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INTRODUCTION

It is fortuitous, happenstance or perhaps a quirk of chronological fate, that I accepted the invitation in June to make these remarks today, on what would become the day after the most egregious legislative action this century, and most certainly one of the most offensive Acts of Parliament in the history of Anglo-Irish relations, was passed.

We are in a moment of sincere distress, with regards to any notion that we might reside in a society whereby human rights are protected, promoted and cherished. I regret to observe that we do not reside in such a society. Yesterday’s legislation, which has the audacity to include the word ‘Reconciliation’ in its title is evidence of that. This law is cruel, callous and immoral. I am confident that in the fullness of time, it will also be declared unlawful, hopefully by our domestic courts, most certainly by the European Court of Human Rights.

The title of today’s presentation, references explicitly the rise of a right-wing ideology, and my intention is to provide an overview as to the role of the legal practitioner in confronting that.

Brexit Britain under the Tories has witnessed an erosion of the authority of the Rule of Law and the independence of the judiciary and the legal profession.

Lord Dyson in his valedictory speech on his retirement on 26th July 2016, a mere 5 weeks after the Referendum result on 23rd June, spoke of his mixed Lithuanian and Bulgarian heritage, and specifically the six months spent by his mother in Bergen Belsen in 1944. He expressed a fear that British tolerance was at risk.

“I am fearful that it is being put under strain by the xenophobia and dangerous forces of hate that have been unleashed in some quarters”.

He concluded that as a fall-back position, he might be entitled to a Bulgarian passport¹.

In my remarks, I want to trace the policies which threaten political stability here indeed ethical morality as well as State compliance with international legal obligations

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/mr-lord-dyson-valedictory-address-20160726.pdf>

and how lawyers here are central to the debate, both in practice litigating the issues and as figures for derision by the State.

I do not seek to recite the decades of 'legalised lawlessness'², conducted in this jurisdiction, be that the unlawful policy of internment, the Special Treatment meted out to the Hooded Men.

Indeed, one of the first casualties of the recent conflict was the Rule of Law itself and the right to a fair trial heard by one's Peers.

Lord Devlin observed "*that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives*"³

This was a reference to the candles that were lit in London in the windows of London houses following the acquittal of the seven Bishops in 1688⁴

I do not seek to review The Prevention of Terrorism (Temporary Provisions) Act 1974, which was subject to a mere 17 hours of debate in the House of Commons before its "draconian powers" were approved⁵.

What I do want to address, is our slow (or not so slow) lurch to the right, and the fact that we are now shackled to a Brexit Britain replete with sewage infused water⁶, lowered food standards⁷, crumbling schools and hospitals⁸, nurses and doctors on strike for safe staffing levels⁹, under a Government who describe human beings as illegal and are sending them to Rwanda or mooring them in prison ships, whilst painting over Mickey Mouse and Baloo from The Jungle Book from the walls of an asylum seeker reception centre The murals were painted over because the

² *Legalised Lawlessness: How Britain is breaking the law with the Legacy Legislation, BLOODY SUNDAY 51 – One World One Struggle* : Niall Murphy Cultúrlann Uí Chanáin Saturday 28 January 2023

³ Devlin, Patrick, '*Trial by Jury*' (1956), p164 [para. 7].

⁴ see Macaulay, *The History of England from the Accession of James II*, (1849) vol 2, at p 389.

⁵ The Bill was announced on 25 November 1974, following the pub bombings by the IRA in Birmingham on 21 November 1974, when then Home Secretary Roy Jenkins warned that: "The powers... are Draconian. In combination they are unprecedented in peacetime." H.C. Debs. Vol. 882 28 November 1974, col. 35 25 November 1974, Mr. Jenkins).

⁶ Fifty-seven swimmers fall sick and get diarrhoea at world triathlon championship in Sunderland 5th Aug 2023 <https://www.theguardian.com/environment/2023/aug/05/investigation-after-57-world-triathlon-championship-swimmers-fall-sick-and-get-diarrhoea-in-sunderland-race>

⁷ Fury as government waters down post-Brexit food standards 13th June 2022 <https://www.theguardian.com/politics/2022/jun/13/fury-as-government-waters-down-post-brexit-food-standards>

⁸ Crumbling England: from schools to hospitals, how bad is the current crisis? 3rd September 2023 <https://www.theguardian.com/education/2023/sep/03/crumbling-concrete-uk-schools-hospitals-how-bad-is-it>

⁹ Junior and senior doctors in England to strike together for first time in NHS history 31st August 2023 <https://www.theguardian.com/society/2023/aug/31/junior-doctors-nhs-england-vote-to-continue-strikes-through-winter>

immigration minister thought they sent the wrong message as they are 'too welcoming'¹⁰. The same government, which whilst attempting to legislate its way out of the obvious problems which Brexit caused with regards to its pre-existing obligations under international law, i.e. the Withdrawal Agreement, had the audacity through the expressed intention by Northern Ireland secretary, Brandon Lewis, to advise the House of Commons *"Yes, this does break international law in a very specific and limited way."*¹¹

Mr Lewis' remarkable admission was met with a warning from Former PM Theresa May who cautioned that it could damage "trust" in the UK over future trade deals with other states. The permanent secretary to the Government Legal Department, Sir Jonathan Jones, government's most senior lawyer, resigned from government in light of the bill, believing that the plans went too far in breaching the government's obligations under international law.

Lord Falconer, himself a former Lord Chancellor and Secretary of State for Justice asked the Government two days later in The House of Lords, whether the Government were in fact, committed to the Rule of Law!¹² Lord Falconer warned that the acceptance that the Government are deliberately breaking international law would be thrown in the UK's face for years.

"Expect dictators to justify murderous breaches of international law by relying on the Lewis mantra: "specific and limited"."

In a celebrated speech in 2009¹³, the late Lord Bingham listed the liberties the European convention protects.

- The right not to be tortured or enslaved.
- The right to liberty and security of the person.
- The right to marry.
- The right to a fair trial.
- Freedom of thought, conscience and religion.
- Freedom of expression.
- Freedom of assembly and association.

¹⁰ Robert Jenrick has cartoon murals painted over at children's asylum centre 7th July 2023

¹¹ Northern Ireland Secretary admits new bill will 'break international law' 8 September 2020

<https://www.bbc.co.uk/news/uk-politics-54073836>

¹² <https://hansard.parliament.uk/lords/2020-09-10/debates/6112E76D-DBC2-4083-B4FB-7E76FD8D495C/RuleOfLaw>

¹³ <http://www.theguardian.com/commentisfree/2014/oct/04/tory-wreckers-out-destroy-human-rights>

“Which of these rights, I ask, would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any them un-British?”

It has been observed that such a step would set the clock back 50 years¹⁴, and one can only consider the wolfish delight with which Russia, Turkey, Hungary and other authoritarian states will greet a repeal of the Human Rights Act. They will say that if Britain no longer enforces the European convention, why should they?

The concept of Cause Lawyering

I intend to illustrate some means by which lawyers here have represented victims and survivors of the conflict to attempt to gain access to justice, through engagement in our courts, and then to assess what can only be described as routine attacks on lawyers as a matter of government policy.

Before approaching either topic, I decided to re-read and reflect on Kieran McEvoy’s seminal article¹⁵ *“What Did the Lawyers Do During the ‘War’? Neutrality, Conflict and the Culture of Quietism”* about what constitutes a cause-lawyer. The cause in question, as he makes clear, is not a narrow political one but rather a commitment to the protection of human rights and upholding the rule of law. Certainly, that commitment and several related traits are discernible in our firm and the current practice of many lawyers, practicing presently, particularly those acting for those who seek access to justice for crimes endured by them during the Conflict.

To recap, some of the characteristics of cause lawyering include:

1. Lawyers who work in the system to shape and challenge laws.
2. Lawyering as a ‘public profession’ where the contribution to society is more than the acquisition, aggregation and deployment of technical skills.
3. Lawyers must face ‘head on’ their broader social, political or moral responsibilities in a society emerging from conflict.

Generally, ours is a society of widespread economic and political disenfranchisement. These are aspects our jurisdiction that politicians in Westminster are loathe to be reminded of. In Brussels and Luxembourg, we may appear at the margins,

¹⁴ www.theguardian.com/law/2014/oct/03/tory-plans-european-human-rights-convention-take-uk-back-50-years

¹⁵ The Modern Law Review (2011) 74(3) 350-384

geographically, economically and politically but in Strasbourg, the North has remained solidly at the forefront of much jurisprudential thinking regarding the responsibilities of individual member states and individual human rights.

Lawyers here, in addition to being under attack during the Conflict, were at the forefront in using the ECHR on behalf of our clients and fearless in taking cases against the British government to the ECtHR in Strasbourg resulting in landmark judgments¹⁶ including *McCann and Others v UK* 1995, *Jordan v UK*, *Kelly and Others v UK*, *McKerr and Others, v UK* and *Shanaghan v UK* in 2001, *McShane v UK* in 2002 and *Finucane v UK* in 2003.

“The Terror Threat” As we know from the experience during the Conflict when this jurisdiction was used as a testing ground for repressive laws and policies and practices as part of the states counter-insurgency strategy, techniques and approaches which as we all know were replicated in the War on Terror.

- Prevention of Terrorism Act,
- Diplock courts,
- Internment and interrogation

In the years since 9/11 a new security agenda has ushered in a plethora of draconian measures which surely speak to the ever-increased importance of maintaining safeguards to protect the citizen as a bulwark against the omnipotence of the State,

There is also a particularly hard edge to policing, be it through

- stop and search,
- surveillance under RIPA,
- the use of informers/CHIS,
- the tension between policing and National Security (and the Security Services),
- Public Interest Immunity applications,
- Closed Material Procedures,

¹⁶ *McCann and Others v UK* (Application no. 18984/91) 27 September 1995
Hugh Jordan v. the United Kingdom (application number 24746/94) [2001] ECHR 327
Kelly & Others v. the United Kingdom (application number 30054/96) [2001] ECHR 328
McKerr v. the United Kingdom (application number 28883/95) [2001] ECHR 329
Shanaghan v the United Kingdom (application number 37715/97) [2001] ECHR 330
McShane v. United Kingdom (application number 43290/98) [2002] ECHR 469
Finucane v. the United Kingdom (application no. 29178/95) [2003] ECHR 328

- the return of the Supergrass,
- pre charge detention limits and so forth.

The State strives to protect on the grounds of National Security but its arguments to do so, do not often make good law – For example, the very public intention of Dominic Raab¹⁷ to repeal the Human Rights Act¹⁸ would not only have political consequences for the constitutional arrangements under the Good Friday Agreement and the subsequent Agreements¹⁹, but would also remove as a legislative mainstay in the tool box of those charged with representing the interests of those brought before the courts in these cloaked circumstances.

The draconian measures currently at the availability of the State to defend itself, in addition to a public debate around the repeal of the Human Rights Act, therefore create a difficult context within which a lawyer must work.

The challenge of the day, today in fact more than any day, is assisting victims and survivors of our recent conflict, to access justice and to obtain truth recovery.

Reflecting again on Professor McEvoy's concept of *CAUSE LAWYERING*, I again recognise the practice adopted in my own firm and others and the ways in which lawyers challenge prevailing political, social, moral or legal power. He describes it as a form of 'moral activism' wherein committed lawyers 'do more' than simply deploy their technical services on behalf of their client. Through pro bono work, strategic litigation, styles of argumentation and public mobilisation beyond the courtroom.

I stress again. The cause being referred to here is not an ideological or party political one. Rather, the cause which is being litigated presently is ecumenical, it has no ideology – it is solely motivated by promoting the human rights of **all** victims, and their Right to the Truth.

¹⁷ Dominic Raab's paper seen as fulfilment of quest to destroy Human Rights Act 14th December 2021
<https://www.theguardian.com/politics/2021/dec/14/dominic-raabs-paper-seen-as-fulfilment-of-quest-to-destroy-human-rights-act>

¹⁸ Human Rights Act reform Research Briefing Published Tuesday, 15 November, 2022
<https://commonslibrary.parliament.uk/research-briefings/cbp-9581/> The Government has published a Bill of Rights Bill which would repeal the Human Rights Act 1998 and replace it with a new framework to implement the European Convention on Human Rights. It was introduced in the House of Commons on 22 June 2022.

¹⁹ Brexit challenge given go-ahead by Belfast court <http://www.bbc.co.uk/news/uk-northern-ireland-37490248>

LEGAL ACTIVISM

To understand what is at stake with the new legislation, I want to provide some brief illustrative examples of the work that our practice has undertaken in recent years, providing advice, assistance and representation in the various legal architectures which discharge the State's obligations under article 2 of the European Convention on Human Rights.

CIVIL LITIGATION Constable Harry Beckett, and an RUC colleague, were shot dead by the IRA in Belfast City Centre in 1990.

Constable Beckett's daughter Kathryn Johnston has instructed our practice to pursue civil litigation against the Chief Constable, invoking her civil rights as underpinned by the ECHR, when it became apparent that the weapon that had been used to murder her father, had been under the safe custody and control of the RUC, before returned to the IRA, who then used the weapon to murder the two police men.

This grotesque fact was reported on in a BBC documentary broadcast in 2015, when the nefarious activities of a shadowy unit of RUC Special Branch was exposed. WERC, the Weapons and Explosives Research Centre, were a division of Special Branch, who retained primacy over exhibits, the most crucial issue for the integrity of the criminal justice and trial process, prior to these key exhibits being submitted for forensic testing at the forensic lab! The revelations estimated by Police Ombudsman to be close to 60 murders, suggest that Special Branch provided false information to investigators with regards to ballistics histories, to suit their over-arching intelligence agenda.

Baroness Nuala O'Loan was definitive in her remarks on the issue²⁰, when she stated; *"Terrorism was not defeated by organisations like WERC. The question is to what extent was terrorism enabled"*

JUDICIAL REVIEW AND POLICE OMBUDSMAN : The Loughinisland Atrocity.

6 men were murdered in June 1994, including Barney Green aged 87, the oldest victim of the conflict, in a rural county Down pub, whilst they watched Ireland play in the World Cup against Italy in New York. It was the most successful sports event in Irish history to that date. Gunmen burst in and raked the bar with 29 bullets from a VZ58 automatic rifle, which the next of kin suspect was imported to Ireland by the British Ministry of Defence. Despite complaining to the Police Ombudsman about their

²⁰ 4. BBC Spotlight: Guns and History – The Weapons and Explosives Research Centre (WERC) 12th May 2015 <http://www.bbc.co.uk/news/uk-northern-ireland-32700914>

concerns in 2004, no report was published until 2011, and on the topic of the arms importation, the report glibly stated '*the Police Ombudsman has no legislative remit to investigate complaints made about alleged military agents*'.

The families successfully challenged the report by way of Judicial Review, citing the investigative obligations on the State under article 2, and had same quashed by the High Court in Belfast in December 2013. A new report was published by a new Police Ombudsman on 9th June 2016²¹ which provided a definitive account on the failure of policing in the 1990's which rather than cauterising the conflict, exacerbated and prolonged it. Dr Maguire found that collusion was an unambiguous feature of the atrocity, a conclusion which would have been denied had they not challenged the previous report by way of Judicial Review.

Indeed, the Loughinisland case has seen the public mobilisation beyond the courtroom, referred to by Professor McEvoy. In June 2012, Ireland had made it through to the European Championships in Poland and remarkably on the actual anniversary, 18th June, they were drawn to play Italy. The families were overwhelmed at the happenstance and instructed me to write to the FAI to enquire could the team wear black armbands²² during the fixture, which was acceded to and provided an opportunity for a communal act of remembrance on an international scale. A documentary film²³ being made by Oscar winning director Alex Gibney on the atrocity and the families fight for truth recovery, was nominated for both IFTA and Emmy best documentary awards and won the Royal Television Society Award²⁴.

INQUEST The Birmingham Pub Bombings 1974 -

The Birmingham Pub Bombings 1974 which killed 21 people including the loved ones of five families we represent. It speaks volumes that these families had to come to lawyers in Belfast – and due to the restraints of the present legal aid arrangements – we have acted pro bono, (another of Professor McEvoy's indicators for cause lawyering), for our expertise and assistance in their pursuit to obtain truth, justice and accountability.

²¹ <https://www.policeombudsman.org/PONI/files/17/17aea3d1-c4c6-4f02-8ebc-4eb39af9b168.pdf>

²² <http://www.belfasttelegraph.co.uk/news/local-national/republic-of-ireland/game-armsbands-mark-loyalist-murders-28761792.html>

²³ No Stone Unturned review – a scrupulous documentary 17th November 2017
<https://www.theguardian.com/film/2017/nov/12/no-stone-untuned-review-documentary-alex-gibney-northern-ireland>

²⁴ [http://www.thedownrecorder.co.uk/pages/index.asp?title=No Stone Untuned picks up Royal Television Society award](http://www.thedownrecorder.co.uk/pages/index.asp?title=No+Stone+Untuned+picks+up+Royal+Television+Society+award)

The families of the 21 victims were bereft of access to justice and did not receive any support nor had the benefit of any investigation – save by their own volition – for 42 years – following the wrongful conviction of the Birmingham 6. Therefore, there was never an inquest.

An Application was made to the Senior Coroner Louise Hunt sitting in Solihull to have the Inquests reconvened as the original Inquest had never been completed due to the convictions of the Birmingham 6. Her decision on 1st June 2016, reopened the Inquests.²⁵

A retired Judge HH Peter Thornton was appointed preside at the Inquest which commenced in February 2019 and concluded on the 5th April 2019. On behalf of our clients the next of kin, we objected to the narrow scope of the Inquest, and indeed successfully judicially reviewed the scope, however the Coroner appealed the finding of the High Court to the Court of Appeal²⁶, and as a result serious concerns persist that the ‘Police and the Authorities’ knew as early ‘late 1975 who put the bombs in the pubs’²⁷, and it wasn’t the Birmingham 6.

We continue to represent our clients and have brought these grave concerns to the attention of the Home Office. We await a consultation with the Home Secretary in the coming weeks which will be the end of a 3 year process of engagement to allow her to make a decision on the request of the families to hold a human rights compliant Inquiry²⁸ into the bombings – independent of the stained investigations of the West Midlands Police which would be capable to examine the surrounding circumstances of the bombings – including fore knowledge and why the investigation got it so atrociously wrong. Our client Julie Hambleton is as passionate, as able and as effective an advocate for the families, and indeed all families, in her opposition to the Government’s Legacy Bill²⁹.

²⁵Birmingham pub bombings inquests to be reopened <http://www.bbc.co.uk/news/uk-england-36424133>

²⁶ CORONER FOR THE BIRMINGHAM INQUESTS (1974) Appellant vs JULIE HAMBLETON and others [2018] EWCA Civ 2081 <https://www.judiciary.uk/wp-content/uploads/2018/09/birmingham-coroner-v-hambleton-judgment.pdf>

²⁷ Special Branch ‘knew’ who the real Birmingham bombers were from 1975 <https://www.thecanary.co.uk/analysis/2019/03/23/special-branch-knew-who-the-real-birmingham-bombers-were-from-1975/>

²⁸ Birmingham pub bombings: Families call for Omagh-style inquiry <https://www.bbc.co.uk/news/uk-northern-ireland-64517507>

²⁹ Birmingham pub bombings: Relatives 'horrified' at passing of Legacy Bill <https://www.bbc.co.uk/news/uk-england-birmingham-66734476>

Northern Ireland Troubles (Legacy and Reconciliation) Bill

On the 14 July 2021 British Government published its proposals in a Parliamentary Command Paper, which proposed ending all ECHR-compliant investigations and instead introducing a broad sweeping unconditional amnesty (more expansive than that introduced by General Pinochet in Chile³⁰).

The legislation will end civil proceedings, inquests and Police Ombudsman investigations, and instead establishes the Independent Commission for Reconciliation and Information Recovery (ICRIR) with far more limited powers to conduct desktop reviews into some legacy cases³¹.

UN experts have raised ‘grave concerns’ regarding the British Government proposals which they assessed as providing for ‘blanket impunity’ and placing the UK in ‘flagrant violation of its international obligations’³². In September 2021, the Council of Europe Commissioner for Human Rights, Dunja Mijatović, raised concerns that the Command Paper proposals would ‘lead to impunity’ and conflicted with obligations under the ECHR³³. The Bill has united political parties from across all spectrums both here and in America, in condemning its cruelty.

The Houses of Parliament Joint Committee on Human Rights (JCHR) published its report following a legislative scrutiny inquiry into the Legacy Bill on 26 October 2022³⁴.

The Summary of the Report notes:

“We have serious doubts that this Bill as drafted is compatible with Articles 2 and 3 of the European Convention on Human Rights (ECHR) (the right to life and the prohibition of torture and inhuman and degrading treatment or punishment, respectively), as well as Articles 6 and 13 (the right to a fair trial and the right to an effective remedy). The former Secretary of State for Northern Ireland (SOSNI) made a statement under section 19(1) of the Human Rights Act 1998 that, in his view, the Bill is compatible with Convention rights. We have serious doubts that this view is correct.” (page 3)

³⁰Impunity and the NI legacy bill – 50 years on from the Pinochet coup 11th September 2023

<https://caj.org.uk/latest/impunity-and-the-ni-legacy-bill-50-years-on-from-the-pinochet-coup/>

³¹ <https://www.gov.uk/guidance/guidance-on-the-northern-ireland-troubles-legacy-and-reconciliation-bill>

³² UN experts voice concern at proposed blanket impunity to address legacy of “the Troubles” in Northern Ireland 10 August 2021 <https://www.ohchr.org/en/press-releases/2021/08/uk-un-experts-voice-concern-proposed-blanket-impunity-address-legacy>

³³ UK government’s legacy proposals must not undermine human rights and cut off victims’ avenues to justice in Northern Ireland <https://www.coe.int/en/web/commissioner/-/northern-ireland-legacy-proposals-must-not-undermine-human-rights-and-cut-off-victims-avenues-to-justice>

³⁴ <https://committees.parliament.uk/publications/30491/documents/175903/default/>

In an expression of legislative thuggery, this Bill has become law and families are now left to pick up the pieces, condemned now to another cycle of litigation against a Government hell bent on affording an immunity to its own soldiers.

MINISTERIAL ATTACKS ON LAWYERS

In addition to the aforementioned callous attacks on victims and survivors, there has been an unnerving pattern of Ministerial attacks on lawyers, which leave me in no doubt that there is a formal policy on attacking lawyers.

Indeed, just last week, the Immigration Minister with the disdain for Micky Mouse, announced a 'Professional Enablers Task Force', which would increase enforcement action against lawyers and legal representatives who help migrants to abuse the immigration system, to a sentence of up to life imprisonment³⁵. Life Imprisonment.

On Monday of this week, Baroness Helena Kennedy KC, one of Britain's most renowned criminal lawyers and a Labour peer, has compared government attacks on the profession to the tactics used by authoritarian regimes and stated that ministers were deliberately creating scapegoats³⁶.

Kennedy said: "I run the institute of human rights for the International Bar Association and one of the things I am seeing all the time is our lawyers under attack under authoritarian regimes. The first thing that authoritarians do is they go after judges that make decisions that they don't like.

"They go after journalists, they go after any of their critics, whether it's [Alexei] Navalny (in Russia) or it's in Turkey or in Iran, they go after lawyers and they end up jailing lawyers and undermining public confidence in lawyers. And so, we should recognise that as one part of the story of how law is undermined and respect for law is undermined. It's about denying accountability."

Justice's report, published on Monday, says there has been a "palpable trend" in the UK over the past five years of increasingly derogatory remarks such as "lefty lawyer" and "activist lawyer".

It highlights examples such as the reaction to the government's defeat in two Brexit cases, and ministers' comments on lawyers challenging immigration policy.

³⁵ Minister Jenrick's statement on illegal migration 5th September 2023

<https://www.gov.uk/government/speeches/minister-jenricks-statement-on-illegal-migration>

³⁶ Top UK lawyer hits out at 'authoritarian' attacks on legal profession

https://www.theguardian.com/law/2023/sep/10/top-lawyer-helena-kennedy-hits-out-at-authoritarian-attacks-on-legal-profession?CMP=Share_iOSApp_Other

“They criticise lawyers who are legal aid lawyers for actually acting for those who couldn’t afford litigation. We don’t want the courts to be the place in which only the wealthy can enjoy justice. What we’re seeing in the insults and abuses of our judiciary – that unelected judges are making decisions – we want unelected judges at one stage removed to be able to make judgments about what is right and what is the appropriate use of power and about who is abusing it and who are abusers of the rules of our society.”

The report refers to concerns raised by some that the supreme court has fallen into step with the government in recent years and says that even if it is mere coincidence, it might give the perception that the UK’s highest court *“has been influenced by ministerial pressure”*.

Among a host of recommendations to protect the rule of law, the report says the government must safeguard judicial independence and the legal profession and reject the use of inflammatory language against them.

Kennedy said: *“Many of the people who are lawyers on the Conservative benches are as concerned as people like me, so this is not confined to ‘lefty lawyers’. This is something that is shared by decent lawyers, lawyers who believe in the rule of law.”*

Then Prime Minister Theresa May’s Tory Party Conference speech in October 2016 – in which she pledged not to allow *“left-wing human rights lawyers”* to *“harangue and harass the bravest of the brave”* set the tone for attacks on lawyers here.³⁷ Her then Defence Minister Michael Fallon, also said: *“Our legal system has been abused to level false charges against our troops on an industrial scale.”* He added: *“It has caused significant distress to people who risked their lives to protect us, it has cost the taxpayer millions and there is a real risk it will stop our armed forces doing their job.”*

In December 2016, several articles in The Sun and The Daily Mail used similar language to attack solicitors working on legacy cases. The Sun has the largest circulation of any U.K. daily newspaper, and The Daily Mail has the second-largest. *“WHY ARE OUR SOLDIERS FACING A NEW WITCH-HUNT?”* asked The Daily Mail’s front page headline on December 9 2016. *“Up to 1,000 retired soldiers in their 60s and 70s face a police witch-hunt some 40 years after they battled terrorism in Northern Ireland,”* the piece opened. *“The news comes only two months after Theresa May pledged that Britain’s forces would be protected from such witch-hunts. The veterans could face new charges, trials and even jail.”* The Sun newspaper ran similar articles on December 8 and 10 2016. Headlines included, *“TANK CHASE LAWYERS AGONY FOR 1,000*

³⁷ <http://www.independent.co.uk/news/uk/politics/theresa-may-tory-conference-speech-applause-attacks-activist-left-wing-human-rights-lawyers-a7346216.html>

SQUADDIES; FIRMS' PROFIT FROM HEROES, and "LAWYERS SCORED £12M IN LEGAL AID.

Lawyers here have been excoriated by the government for taking these cases, but surely the large-scale damages paid out by the Ministry of Defence prove that our successful clients did not invent the facts compelling these settlements.

The concluding remarks of the report by Washington DC NGO Human Rights First³⁸ accurately assessed the temperature, which has not abated.

"Renewed hostility toward human rights lawyers – those representing the families of people allegedly killed by the British military – recalls the Troubles and augurs new danger. History tells us that rhetorical attacks against lawyers by the press and public officials can lead to violence, which, in turn, inhibits the pursuit of justice and undermines the rule of law. The hostility toward human rights lawyers strikes at the heart of the Good Friday Agreement, which embedded respect for human rights into the politics of Northern Ireland. It's especially alarming given the United Kingdom's broader backsliding on its human rights commitments."

In addition to attacks on lawyers, there has also been a concerted and sinister pattern of attacks on the independence of journalists and the right to free speech.

This was addressed by our Divisional Court in 2020, In the matter of an application by Fine Point Films, Trevor Birney and Barry McCaffrey for Judicial Review in the matter of an application by PSNI and Durham Constabulary for search warrants³⁹.

"Quis custodiet ipsos custodes," was written by Jevenal a couple of thousand years ago. It means *"Who will guard the guards themselves,"*. The idea was also explored by Plato, who is associated with the need to speak truth to power.

It is a centuries-old question that when we give authority and power to people to order our society, we need to ask who watches over them? In a modern democracy, where official checks and balances often mean the system regulating itself, the value of a robust free press, is never more important.

Churchill himself said

"A free press is the unsleeping guardian of every other right that free men prize; it is the most dangerous foe of tyranny"

³⁸ A Troubling Turn -The Vilification of Human Rights Lawyers in Northern Ireland June 2017
<https://humanrightsfirst.org/library/new-report-details-vilification-of-human-rights-lawyers-in-northern-ireland/>

³⁹ Fine Point Films, Birney and McCaffrey vs PSNI and Durham Police [2020] NIQB 55
<https://www.judiciaryni.uk/judicial-decisions/2020-niqb-55>

It was with a deep sense of hurt that the Loughinisland families woke to hear the news on Friday 31st August 2018, that Trevor Birney and Barry McCaffrey had had their homes raided and that they had been arrested.

Both men were integral to the making of the documentary *No Stone Unturned*. The film documents the collusion and cover up by the RUC in the murders of 6 men in Loughinisland whilst they watched the Ireland vs Italy World Cup match at Giants Stadium in June 1994.

A Police Ombudsman's investigation highlighted shocking depths of state collusion in mass murder. That the police had elevated the eminence of intelligence to a higher importance than the rights of murder victims.

The families had indeed hoped that the film would inspire and motivate arrests. Those of the murderers who had ruined their lives in June 1994, as the film demonstrated that there exists ample evidence to arrest and prosecute them.

The families are proud of the film, and the sensitive yet hard hitting manner in which it documents the totality of their experience. Indeed the families consider themselves privileged that the facts of their case are crystallised so professionally and comprehensibly so as to be the exemplar means by which the state's policy of collusion can be instructed to the uninitiated observer.

The film names the suspects arrested but ultimately protected by the police. The families know that the film strikes a raw nerve in the security establishment and are proud that they benefit at least from this empowerment after years of being without a voice. The film has provided them with a loud and unimpeachable voice.

The arrests of Trevor Birney and Barry McCaffrey was nothing more or less than a crude attack on the personal lives and work of two journalists who exposed an uncomfortable truth. They were not thieves, as alleged by police. They had not handled stolen goods. They were motivated to excavate the unvarnished truth, which had been denied to the families of those murdered in Loughinisland, for decades. They have exposed the facts of a case that had been buried for so long, and try as the police might, they cannot arrest the truth.

Journalists must be free to investigate and expose issues of public concern. Few subjects could be of more significant public concern than the mass shooting of civilians and the alleged collusion of the police in assisting those responsible to evade justice.

That the only investigative actions arising from the facts exposed in the film, are the arrests of those who exposed, rather than those who are suspected of committed the murders, is a matter of public importance, a fact recognised by the then Lord Chief Justice in his judgement.

Paragraph 55: For the reasons given we concluded that the conduct of this hearing fell woefully short of the standard required to ensure that the hearing was fair. That was sufficient for our decision to quash the warrant. We wish to make it clear, however, that on the basis of the material that has been provided to us we see no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources in this case.

The *Fine Point Films* judgment has been described⁴⁰ as “a vociferous, full-throated endorsement of the central value of journalist source protection in a democracy and a strict application of article 10 ECHR to the powers of police search and seizure in UK law.” The judgment set firm boundaries on the scope of criminal investigations and issue new robust guidance to warrant-authorising courts on the necessity, value and importance of journalists’ rights in our democracies.

CONCLUSION

Lawyers are more than paid technicians.

In addition to being professional and technically excellent, we have moral and social responsibilities, in particular to help the most vulnerable and those who have suffered so egregiously.

We also have broader responsibilities to stand up for the rule of law and the protection of human rights.

Regardless of the political mood being stirred by Conservative government, I can reassure you that myself and other ‘activist human rights lawyers’ will not be found wanting in living up to those responsibilities.

⁴⁰ “*Journalistic privilege in Ireland*” Cian Ó Concubhair Maynooth University Northern Ireland Legal Quarterly Summer Vol. 74.2 (2023) 237–268 <https://nilq.gub.ac.uk/index.php/nilq/article/view/1034/893>



QUB Human Rights Centre

Protecting Human Rights during the Rise of Right-wing Ideology - A View from the Trenches

Niall Murphy
KRW Law

Wednesday 13 September at 14:00
The Moot Court, School of Law
(MST.02.006)



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UNUSED MATERIAL CLOSED MATERIAL PROCEDURES – SECRET COURT

In the absence of state initiated mechanisms to give effect to the State’s obligations under the European Convention on Human Rights, many families sought recourse to civil litigation as a means to access truth recovery and accountability.

Deprived of the opportunity of a criminal trial or an Inquest, the PSNI Chief Constable has sought disproportionate recourse to applications that disclosure obligation be heard in arcane circumstances whereby families lawyers are excluded during a *Closed Material Procedure*.

This is an area of grave concern to lawyers concerned with the protection of human rights, ie the recent growth of secret courts. Almost all criminal and civil matters are held in open court, which means that the press and public are entitled to be present, and where they might be excluded (for example where it is necessary to protect children) the impugned citizen and their legal representative are present to hear and challenge the evidence presented.

However Part 2 of the Justice and Security Act 2013, which came into effect in July 2013, introduced fundamental changes to British law, in any civil case involving national security by creating an extraordinary alternative to the Public Interest Immunity (PII⁴¹) procedure.

The ‘Closed Material Procedure’ (CMP), represents a ‘*carve out from basic principles of equality of arms and open justice*’⁴² by allowing courts to consider any material, the disclosure of which would be “damaging to the interests of national security”.

The radical significance of CMP’s from a rule of law perspective cannot be over-estimated, however infrequently Parliament’s intention was, that it be used. Indeed during the final debate in the House of Lords, Lord Brown, himself a retired Law Lord, and former Intelligence Services Commissioner, warned that the legislation involved such a:

*“radical departure from the cardinal principle of open justice in civil proceedings, so sensitive an aspect of the court’s processes, that everything that can possibly help minimise the number of occasions when the power is used, should be recognised.”*⁴³

The intention of Parliament on review of Hansard was that this repressive anti-terror legislation, was the new world order response to the ‘War on Terror’.

However the facts of the matter in practice are somewhat different to the lofty Parliamentary intentions, and as is often the case, repressive measures are often invoked immediately in this

⁴¹ Public-interest immunity (PII) is a principle of English common law under which the English courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. This is an exception to the usual rule that all parties in litigation must disclose any evidence that is relevant to the proceedings. In making a PII order, the court has to balance the public interest in the administration of justice (which demands that relevant material is available to the parties to litigation) and the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging.

⁴² Turning out the lights? The Justice and Security Act 2013 – Tom Hickman. .

<http://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/>

⁴³ House of Lords - 26th March 2013, Col 1032.

jurisdiction to preserve the interests of the State in concealing their involvement in murder and other crimes. It is a fact that in the years since the inception of this legislation, only 41 such applications have been made anywhere in Britain, yet 15 relate to matters in the north, and NONE of them relate to the War on Terror.

CLOSED MATERIAL PROCEDURE - FACTS

The facility for an application for Closed Material Procedure came into law in July 2013. On 22nd July 2014 Justice Secretary Chris Grayling submitted the first annual report to Parliament on how often closed material procedures (CMPs) had been sought under the Justice and Security Act 2013 (JSA), as he is required to do annually under the Act. Critical analysis by the Laurence McNamara and Daniella Lock, for the Bingham Centre for the Rule of Law in the report *“Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State”* published in August 2014, noted that the report was lacking in details and was merely a statement of numerical facts. Subsequent reports have provided more details and from review, a startling pattern emerges with specific relevance to the preponderance of applications made in the Belfast High Court.

	TOTAL APPLICATIONS MADE	RELEVANT TO NORTHERN IRELAND
2013-2014 ⁴⁴	5 applications made	2 ⁴⁵
2014-2015 ⁴⁶	11 applications made	4 ⁴⁷
2015-2016 ⁴⁸	12 applications made	5 ⁴⁹
2016-2017 ⁵⁰	13 applications made	4 ⁵¹

15 out of the 41 applications have been made in relation to the British Government’s intelligence interests in relation to their role in the conflict in Ireland, 36%.

⁴⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342224/moj-report-closed-material-procedure.pdf

⁴⁵ 1. Terence McCafferty (NI SoS). 2. Martin McGartland (Home Secretary)

⁴⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468375/closed-material-procedure-report-2015.PDF

⁴⁷ 3. Margaret Keeley (MOD). 4. Margaret Keeley (PSNI Chief Con)
5. Michael Gallagher (NI SoS) 6. Simone Higgins (PSNI Chief Con).

⁴⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/568767/report-on-use-of-closed-material-procedure-25-june-2015-to-24-june-2016.pdf

⁴⁹ 7. Eilis Morely (MOD) 8. Anthony Lee (PSNI Chief Con)
9. Roddy Logan (PSNI Chief Con) 10. Higgins (linked to 6/8 PSNI Chief Con)
11. Gerard Hodgins (MOD)

⁵⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664979/use-of-closed-material-procedure-2016-17-report.pdf

⁵¹ 12. Gabriel Magee (PSNI Chief Con) 13. Ryan Hegarty (Plaintiff)
14. Elizabeth Monaghan (Plaintiff) 15. Mary Heenan (Plaintiff)