

PERSONAL REFLECTIONS ON *FROM SCHOOL EXCLUSION ORDERS TO ANTI TERROR LAWS: HUMAN RIGHTS AND THE USE OF LAW IN THE MODERN STATE*

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The title of this one day conference promised the audience a diverse and thought provoking discussion on the relationship between human rights and the law. I approached the day with keen anticipation, not just because it was my first conference, but, as I have an academic background in history, I was enthusiastic to experience legal discussions and arguments. The day's programme embraced a range of contrasting issues including; Italian migration policy, alcohol consumption, control orders, anti-social behaviour (ASB), domestic violence and social housing. Yet, the fascinating feature of the conference proceedings was the relationship between these juxtaposing topics when placed under a human rights lens. The papers presented, and their ensuing debates, fulfilled the promise of diversity and stimulating deliberation.

My own research interests incorporate a historico-legal approach to public order law, political extremism and subsequent police tactics and responses. This conference offered me an opportunity to present a comparative paper that explored human rights issues regarding restrictions on freedom of expression in the 1930s and the present day. Each era experienced its own dangers to national security and public order, and both periods prompted new restrictive legislation and the use of controversial police tactics to deal with their respective threats. When employing what the human rights implications to these responses were, key questions developed, such as, how do you balance conflicting human rights? Can preventative measures be justified from a human rights perspective? How vigilant should we be

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as a community to ensure the controversial rights of others? And, are we all entitled to these rights?

Preventative Measures

The opening plenary was delivered by Vaughan Jones, the Chief Executive of Praxis, (his paper is published in this edition of *Law, Crime and History*) an East London centre that provides advice and support for refugees and migrants from all over the world. He addressed the human rights issues regarding refugees and asylum seekers in the UK, and raised the notion that rights are delineated between the ideology of human rights generally, and the positive and enforceable rights of citizens. In effect, those seeking asylum, usually with no proof of identity, do not have the same level of protection of their rights, as those of citizens, which can lead to distressing treatment, such as long periods of detention. Pam Vallance also identified the issue of discriminatory application of human rights law in relation to seeking diplomatic assurances on the prohibition of torture. The opening plenary and Vallance's paper were complemented by Carlo Panara, who addressed recent Italian policy concerning irregular migration. Panara argued that the 'refoulement' doctrine, which has witnessed Italian lifeguards assist boats of migrants to return to Libya rather than Italy, is in breach of international law, and disregards the passengers' refugee status and their basic human rights. The 'refoulement' policy can also be seen as a preventative approach to deal with illegal immigration.

Preventative measures to tackle crime, disorder or even terror attacks were a key theme of the conference. In my paper, I highlighted police tactics that were used in the 1930s, such as those that were featured and upheld by the courts in *Thomas v Sawkins*² and *Duncan v Jones*.³ These reveal controversial police tactics, such as, entering a public meeting on private premises under the anticipation that a breach of the peace may occur, and arresting a speaker for not closing her meeting under the same expectation, despite no offence actually being committed in either incident. These highlight the extent to which the judiciary were willing to back the breach of the peace powers utilized by the police, powers that Ewing claims have been

² *Thomas v Sawkins* [1935] 2 KB 249.

³ *Duncan v Jones* [1936] 1 KB 218.

gradually extended ever since.⁴ Each of these cases revealed how preventative police measures could restrict freedoms of expression. However, freedoms, such as a right to free speech, were not protected by law in this era. In practice, people had residual freedom, whereby they could act as they wished as long as it did not violate any existing law. Following the Human Rights Act 1998, the rights contained in the ECHR have been incorporated into UK law which gives the Act an important influence on modern instances of anticipatory police action.

For modern examples of preventative police tactics and powers, I highlighted *R (Laporte) v Gloucestershire Chief Constable*⁵ and *Gillan and Quinton v United Kingdom*.⁶ In the first of these cases, the police used stop and search powers on the passengers of three coaches on their way to an anti-war demonstration at RAF Fairford. The police then prevented the coaches from continuing to their destination denying the passengers to exercise their right to protest. The House of Lords held that the stop and search was legal, but, by escorting the coaches away from their destination the police had exercised breach of the peace powers too early, as the threat to the peace was not imminent. In the second case it was demonstrated how counter terrorist laws have been used by the police in non-terror related ways. The controversial s44 Terrorism Act 2000 entitled the police to perform stop and searches without 'reasonable suspicion' in areas authorised by the Metropolitan Police Commissioner and the Home Secretary. Gillan and Quinton, a student protester and a journalist, were both subjected to a stop and search at an arms fair in 2003. This infringement on their personal liberty was a counter terrorism measure. In the English courts the applicants argued that the stop and search violated Article 5 European Convention of Human Rights, but both the Court of Appeal and the House of Lords held that a brief search could not be regarded as a 'deprivation of liberty'. This was contradicted by the European Court of Human Rights in 2010 which ruled that the stop and search was unlawful as it was a violation of Article 8 since it did not respect their right to a private life.

⁴ K. D. Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (Oxford University Press, 2010) p.10.

⁵ *R (Laporte) v Gloucestershire Chief Constable*, [2006] UKHL 5.

⁶ *Gillan v United Kingdom* (4158/05) (2010) 50 EHRR 45 (ECHR).

The most striking example of preventative measures that violate individual human rights was the issue of control orders, highlighted by Stuart Macdonald and Sam Burton. Macdonald discussed the question of making and renewing control orders and the role of the Home Secretary and the courts. The subject stressed the complexity of balancing liberty and security. This balancing act is reflected in the majority of human rights issues discussed, and demonstrates the different levels of threat to security and the subsequent relationship with infringements on personal liberty. In relation to control orders, with the aim being the prevention of terrorism, they represent a preventative measure with the objective of saving countless lives from the possibility of an indiscriminate attack. The level of deprivation of liberty imposed on the suspect is therefore justified by the Government by the degree of the potential danger. But from a human rights perspective, it is important to remember that a *terror suspect* is not the same as a *terrorist*. A suspect has not been convicted of any crime, and a control order is sought when there is not enough evidence for a prosecution. In effect, a control order can punish an individual indefinitely without police interview, charge or trial. Not only does this issue raise ethical questions of imposing a punishment before the execution of a crime, but the inevitability that the innocent, without any terrorist intentions, will also be caught in this preventative system. Burton addressed the principal legal challenges to the control order system with reference to Articles 5 and 6 of the ECHR. He highlighted however, that the Government employment of the control order was restrained, (45 had been issued and 9 were in place at the time of the conference) and despite arguing for the need of modification, reminded us that it was a more humane alternative to detention without trial.

Balancing Liberty and Security

Preventative measures and balancing liberty and security are also issues that affect local communities as well as national security. The issue of legislative responses to ASB was prominent in the papers by Peter Ramsay, Henry Yeomans, Andrew Millie and Leigh Roberts. Yeomans drew comparisons between the temperance movement of the nineteenth century and the modern view of Chief Medical Officer Sir Liam Donaldson, who, as part of the modern medical lobby, argued that all drinking has a

social cost whether connected to sickness or crime. While recognising that in some circumstances alcohol consumption does have this negative effect, Yeomans successfully argued that legislative action, such as the proposed minimum pricing policy, would be unjust to those who consume alcohol responsibly. With the use of statistics from Revenue and Customs and the General Household Survey, he demonstrated that the consumption of alcohol was not necessarily related to its availability, dispelling the notion that raising the price of alcohol would have an effect on its consumption, and therefore have negligible impact on the social cost of alcohol such as crime and ASB. Although this argument has a preventative strand to it, as the advocated policy would aim to inhibit irresponsible levels of consumption and 'binge drinking' in order to protect communities from fear of ASB, the larger issue is the policy's effect on the freedom of those who do drink responsibly. In effect the advocating of any policy that wishes to address alcohol's relationship with crime requires a balancing of rights between the consumer and those who live in fear from alcohol related misconduct.

Ramsay's paper considered the issue of freedom from fear of crime even further and he put forward a case for the right to security being legitimated by the ECHR. He addressed the sociological fears of communities and individuals in relation to the commission of 'offences', such as breaches of ASBOs and public order offences, and the way in which the law has been utilized to protect people from feelings of fear and insecurity. Andrew Millie took a more direct assessment of ASB by examining the role of the Anti-Social Behaviour Order (ASBO) under the previous Labour government and the prospects of reform under the Conservative-Liberal Democrat Coalition. After an examination of political rhetoric, Millie raised tentative optimism for the future of ASB policy which could potentially encourage more local control. Roberts addressed the rights of mentally-disabled tenants and the treatment they receive from social landlords. These issues also reveal the conflicting rights between the vulnerable mentally-disabled tenants, who may be perceived as committing ASB, and the rights of their community and neighbours. But, the issue of ASB is not clearly defined by law, and Roberts emphasised that it could include behaviour that is both criminal and non-criminal. These aspects of ASB policy, very clearly demonstrate that the conflicting claims to human rights is an issue that requires special attention,

and Roberts' paper addressed the importance of protecting the rights of the vulnerable.

My paper also considered the challenging issue of conflicting rights. In the 1930s the marches and parades of the British Union of Fascists and counter-demonstrations by anti-fascist protesters triggered serious public disorder. Although provocative, the fascist marches did not generally breach of any law. However, the frequency and scale of disorder had implications on the peace and security of those living in the affected areas. Fascist speeches also contained anti-Semitic rhetoric, which under modern law would have contradicted Article 14 of the ECHR. The contemporary law that addressed this issue was s5 Public Order Act 1936 which prohibited offensive conduct conducive to breaches of the peace which included the use of threatening, abusive or insulting words or behaviour. These powers previously existed in s4 (13) Metropolitan Police Act 1839 and were also enforced in other regions by local by-laws. This establishes that English law has a tradition of restricting freedom of expression in order to preserve the peace and protect individuals or groups from discrimination. This issue was also addressed in a modern legal context by Peter Ramsay, who highlighted various cases relating to freedom of expression and the principle of the right to security. In *Norwood v DPP*,⁷ Norwood was a regional organiser for the British National Party who visibly displayed a poster in his window bearing the words, 'Islam out of Britain'. Part of Norwood's legal appeal was his Article 10 right to freedom of expression as protected by the Human Rights Act 1998 Sch.1 Part I. His appeal was dismissed partly due to his unreasonable behaviour in displaying the poster and therefore his freedom of expression was curtailed in order to protect the public interest. Ramsay added that Norwood's appeal was dismissed because the harassment, alarm and distress likely to have been caused by his actions, also related to feelings of fear and insecurity, which separated it from the similar freedom of expression case, *Percy v DPP*.⁸

Another aspect of human rights law that warranted distinct attention was the rights of those in the private sphere. This issue was addressed in relation to victims of domestic violence by Ronagh McQuigg. McQuigg demonstrated how domestic

⁷ *Norwood v DPP* [2003] EWHC 1564

⁸ *Percy v DPP* [2001] EWHC Admin 1125: Ms Percy, a protestor against American military policy, defaced an American flag outside an army base used by American soldiers.

violence, generally an 'unseen crime' away from the public sphere, has only recently become a human rights issue despite its violation of Articles 2, 3 and 8 of the ECHR. In domestic violence cases, the prioritisation of rights for an 'unseen crime' becomes a precarious balancing act between the rights of the defendant and the victim. With reference to leading European cases, McQuigg raised hope that the jurisprudence of the ECtHR would influence the UK courts.

Conclusion

Individual liberty and collective security were therefore at the heart of all the papers presented, raising an interesting ethical discourse on conflicting rights in various diverse circumstances. Should liberty be sacrificed for the purpose of strengthened security? Or, should liberty be cherished above all else, even at the cost of security? Although there was a consensus among the speakers and the floor that the protection of human rights was the key to future policy, the answer was not always obvious where individual rights conflicted. Do the rights of young people to socialise on the streets in groups negate the rights of individuals not to feel scared or threatened? This addresses behaviour that is not criminal yet can, and has, affected people's lives. But, punishing perceived ASB was referred to by Millie as 'criminalising the trivial and trivialising the criminal' which has wider implications such as creating a greater disrespect for the law. Also, Ramsay questioned Yeomans' argument against minimum pricing on alcohol. Applying the harm principle, he asked that, if it was proved that minimum pricing on alcohol did reduce crime, would such a policy be justified? There are no easy answers regarding some of the complexities of human rights law, but this conference highlighted the necessity for persistent debate and the need to continue to protect and value our fundamental human rights. It was of valuable benefit to my own research as the recurring themes all resonated in my own work, demonstrating the importance of discussing different methodologies and the value of interdisciplinary research and debate.