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JUSTICE – LESSONS FROM NORTHERN IRELAND?

The most basic assumption in human rights is that Governments should remain responsible for the loss of life of its citizens who have been killed at the hands of law enforcement agents. The ability of citizens to live free from fear and intimidation by law enforcement agents are prerequisites in any democracy; as it is commonly viewed that the very central pillar in a democracy is that the security forces will be the upholders of law and order through which fundamental rights for all will be secured. In Northern Ireland, however, the level of deaths occasioned by the use of lethal force is higher than any other part of the UK and it is the arbitrary taking of life by the state, in particular the level of extra-judicial killings that merits particular scrutiny. Deaths in Northern Ireland have neither been random nor isolated in that Northern Ireland has been a unique state since its inception, where loss of life at the hands of security force agents has gone on unchecked for many years. This has been facilitated by a weak legal system with few effective controls on the use of weapons by law enforcement agents. The extent of power in which the security forces in Northern Ireland have operated has been paramount to the central problem, in that the Royal Ulster Constabulary ('RUC') and the British Army have added a distinct element to the Northern Ireland conflict in facilitating human rights abuses. Two methods in which security forces employed lethal force were:

(A) Customary use of force by the ordinary members of the security forces.

(B) The use of specialised ant-terrorist squads with the specific aim to stake out and kill terrorists.

The deficiencies in the functioning of the criminal justice system and the weak nature of laws surrounding the use of lethal force are identifiable as the two core issues in facilitating human rights abuses in Northern Ireland. A central and reoccurring theme associated with deaths resulting from policing operations has been the nature of the RUC's 'Special Branch' primacy over investigations pursued by the Criminal Investigations Division ('CID') which resulted in the RUC giving priority to the recruitment of informers and controlling covert undercover operations rather than conventional policing matters. A fundamental flaw adopted by this policing mechanism was the quest for intelligence overpowered the prospects of brining agents and handlers to justice. A frequent theme in past human rights violations in Northern Ireland was the system of an accepted use of informers and handlers who enjoyed an unencumbered power of targeting. This system of law enforcement has been challenged by the evolution of Article 2 of the European Convention on Human Rights by the European Court of Human Rights. The intensity of the jurisprudence from the Court in recent times has highlighted the persistent desire for the development of the ECHR as an instrument for individual protection, always ensuring its protection remains practical and effective. However, a fundamental flaw with regional human rights systems like the ECHR is its apparent inability to deal 'effectively' with systematic human rights abuses.

INTRODUCTION

The most basic assumption in human rights law is that Governments should remain at all times responsible for the loss of life of citizens who have been killed at the hands of law enforcement agencies (Cassese, 1999). The ability of citizens to live free from fear and intimidation by law enforcement agents are prerequisites in any democracy; as it is

commonly viewed that the very central pillar in a democracy is that the security forces will be the upholders of law and order through which fundamental rights for all will be secured (Hamilton, Moore and Trimble, 1995). In Northern Ireland, however, the level of deaths occasioned by the use of lethal force is higher than any other part in the United Kingdom and it is the arbitrary taking of life by the state, in particular the level of 'extra-judicial' killings that merits particular scrutiny (Rolston, 1999 and Skinner, 2000). Deaths in Northern Ireland have neither been random nor isolated in that in that Northern Ireland has been a unique state since its inception, where loss of life at the hands of the state has gone unchecked for many years (NiAolain, 2000). This has been facilitated by a legal system with few effective controls on the use of weapons by law enforcement agents (Jennings, 2000). Jennings identifies the methods in which the security forces employed lethal force was:

(1) Customary use of force by the ordinary member of the security forces.
(2) The use of specialised anti-terrorist squads with the specific aim to stake out and kill terrorist (1990; cit. ibid).

The extent of power in which the security forces in Northern Ireland operated has been paramount to the central problem, in that the RUC and the British Army has added a distinct element to the Northern Ireland conflict. The deficiencies in the functioning of the criminal justice system and the weak nature of the laws surrounding lethal force are identifiable as the two core issues in facilitating human rights abuses in Northern Ireland (Walsh, 1988; cit in Tomlinson, Varley and McCullagh, 1988). More specifically the vagueness of the law surrounding the legalities of the use of force and the absence of effective jurisprudence detailing specific rules regarding the use of lethal force has been instrumental in ensuring that state actors would remain immune from prosecution and unaccountable for their actions (Spjut, 1996). In an attempt to categorise these killings for analytical purposes Rolsten (1999) places them into six categories.

(a) Planned 'Shoot to kill' operations.
(b) Excessive use of force in a public order situation.
(c) Individual action by armed members of the state forces.
(d) Collusion with loyalists in advance of deaths.
(e) Actions by loyalist acting alone, but security force cover up after the event.
(f) Other reasons – including dereliction of duty.

The governing statue for the use of lethal force in Northern Ireland is the *Criminal Evidence Act* (Northern Ireland) 1967; section 3 of which permits any one to use *"such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or of persons unlawfully at large."*

The frequent rulings from the Courts of Justice invoked grave concern in that it appeared to be giving the security agents open power to deal with suspected terrorists how they wished (Jennings, 1990). The various cases brought before the courts highlighted the extent to which the criminal justice system was willing to dilute the law in order to protect the RUC (Walsh, 1988). Despite the implementation of the Hunt Committee Recommendations in 1969 for reform by the separation of the Minister of the Home Affairs role and responsibilities to that of the policies and practices of the RUC, followed up by a reform of the prosecution system in 1972 by the establishment of an independent office of the Director of Public Prosecutions for serious crimes, serious malfunctions still manipulated the judicial system in favour of allowing excessive force in supposedly self-defence operations in which the RUC were engaged (1988; cit. ibid). It might seem more likely that removing the prosecution powers from the RUC for serious crimes might have meant more prosecutions of police officers for such grave crimes, Walsh (1988) identifies two fundamental flaws that lead to a continuation of the same practices post the establishment of the DPP's office:

(a) It appeared that the DPP required a much higher standard of proof in cases against the security forces than civilian cases, despite the DPP stating in the Bennett Committee in 1979 that no such double standard existed. However, the general approach adopted by the DPP's office in taking case was to access whether a prosecution would likely to succeed, on the sheer lack of cases involving police officers using lethal force instead of a lesser form of force highlights that there must be some level of belief that a police officers word in court would be taken as fact (1988; cit. ibid).
(b) Whilst the DPP is independent from the police, they were heavily dependent upon the police in a practical sense in that all investigations carried out was done so by the RUC irrespective of whether the compliant under investigation was against the RUC. The RUC's investigations in complaints made against themselves are somewhat disappointing, between 1976 – 1979 there was 1,585 complaints of assault against the police, less than 5% were upheld by the RUC's Internal Disciplinary System (Baker Report, 1984).

Another potential failing of these limited reforms was the fact that the DPP was ultimately responsible to the Attorney General, who was a member of Government, which meant that he/she would have to balance the consequences of investigating police officers would have for the stability of the state and political complications for the Government. This was highlighted by the requirement of all cases involving fatal shooting by police officers to be referred to the DPP before prosecutions could begin (1988; cit. ibid).

Spjut has argued that there has been a gradual erosion of the principles contained in Section 3 of the CLA and has resulted in the following:
(a) The concept of proportionality became so fluid that it facilitated the use of lethal force by law enforcement agents for almost any crime even if it was only a vague notion of a terrorist crime.
(b) A relaxation of the need for an immediate threat of violence allowed police officers to intervene with lethal force in advance of suspected crimes.
(c) The minimum force principle similarly was diluted in favour of the use of lethal force so much so that Courts in Northern Ireland would no longer consider alternatives to lethal force such as arrest (Spjut, 1996).

This has had the profound subsidiary effect that security forces were enabled to engage with supposed terrorists in situations that would that they enable them the full protection of the law due to the elasticity and elusiveness of the concept of "reasonableness".

A central and reoccurring problem associated with these types of killings has been the nature of Special Branch's primacy over investigations pursued by the Criminal Investigations Division (hereafter 'CID') which has resulted in the RUC giving priority to the recruitment of informers and controlling covert undercover operations rather than conventional police matters of crime solving (Hirsch, 2002). A fundamental flaw adopted by this policing mechanism was the quest for intelligence overpowered the prospects of bringing agents and handlers to justice. A frequent theme in past human rights violations in Northern Ireland was the system of an accepted use of informers and handlers who enjoyed an unencumbered power of targeting (2002; cit. ibid). The level of friction between the Army's Force Research Unit and the RUC's Special Support Unit for control of covert policing operations ultimately has meant that there has been an elimination of civilians, not in the guerrilla activity, but regard to security forces as threat to state policy (Ellison and Smyth, 2000).

The Good Friday Agreement ushered in one of the most momentous transformations in the political and legal landscape in Northern Ireland, central to this transformation was

a sea of change to the justice system. By 2006 it is hoped that a new prosecution service the PPS (Public Prosecution Service for Northern Ireland) will be fully established and functional to replace the current DPP. How effective the new PPS will be at delivering justice and human rights remains to be seen, however, several factors are casting a shadow over its intended reformist function such as:

- The slow pace of reform, especially when compared to other reformed institutions such as the police service the PSNI.
- The delayed publication of the draft code of ethics and a draft code of practice for the new PPS. [compared with the PSNI they had there code of practice published in Feb 2003].
- A lack of transparency in the reform process to date. The Justice Act 2002, which is the legislation bringing forward these reforms, requires the Director of the new PPS to prepare a report at the end of each financial year. The current office has indicated that it will not publish a report until transition to the PPS is complete – December 2006 at the earliest. This restrictive interpretation of the requirement undermines the office's efforts to be more open and publicly accountable and to address public concerns about the process.
- The rejection by the Government of the recommendation made by the Criminal Justice Review Group for the new PPS to provide reasons for the non prosecution of individuals in controversial cases. Additionally in the Shannaghan case the European Court of Human Rights criticised the policy of refraining from giving reasons for declining to prosecute.

Whilst the new PPS will represent a positive step towards a more just and accountable justice system in Northern Ireland, it remains open as to whether further reform will be required.

The European Convention for the Protection of Human Rights and Fundamental Freedoms can be described as one of the greatest achievements of the Council of Europe, which often is a contributor to human rights law not only regionally but also at a global level (Gomien, 1996). To be effective, a treaty guaranteeing human rights must necessarily dynamic. No other area of international human rights law is challenged as great and as urgent today as the right to life.

"The most important right that anyone has, a right that is due merely by virtue of existing as a human being, is the right to that existence, the right to life" (Irwin, 1999 and Mowbray, 2002).

Article 2(1) consist of two separate obligations:

(a) A positive obligation to protect life by law and
(b) A negative obligation on public authorities to refrain from taking human life except in the very limited circumstances outlined in Article 2(2) (Clayton and Tomlinson, 2000 and Clayton and Tomlinson, 2003).

A key and constituent part of the positive obligation to protect life under national law is the establishment of an effective enforcement system of law (Soering v UK). Therefore, an extension of this would be to take all reasonable steps to prevent the taking of life by the provision of adequate police or security forces. However, in *X v Ireland* it was held that the state is not under an obligation to provide personalised protection as to do so would be interpreting the ECHR in a manner that would be unduly burdensome.

In *McCann and Others v the UK* the first case before the Court involving Art 2, ushered in a new era in the area of law enforcement and a new model of state responsibility

emerged (NiAolain, 1995). In this early case it was contended by the applicants that Art 2 should impose a burden on the state to 'protect life', which they argued this should entail the provision of an adequate level of training and to exercise strict control over the operations their security forces become engaged in. Although the Court did conclude by 10 votes to 9, that the control and organisation of the British led anti-terrorist operation in Gibraltar did not comply with Article 2; they did not adopt the language of the applicants, both the majority and the minority scrutinised the authorities' obligation and control of the challenged anti-terrorist operation as a fundamental element in assessing whether Art 2 has been complied with.

Article 2 does not only apply in situations involving terrorist operations but it has subsequently been applied to violent situations not involving terrorist in *Andronicou and Constantinou v Cyprus.*

In *Egri v Turkey* the security forces had set out to ambush the applicant's village in east Turkey. The applicant was killed by a stray bullet during a sporadic exchange of gunfire between the security forces and members of the PKK. The Commission and subsequently the Court unanimously found a violation on account of the planning and conduct of the operation. The judgement clearly elaborates on the need for domestic authorities, when planning these operations to have regard to the dangers posed to innocent bystanders from both security personnel and the suspected terrorist/criminals against whom the operation is directed (Mowbray, 2002).

In *Asvar v Turkey* the Court has also made clear that state liability may also arise for the actions of civilian volunteers acting in association with full time security forces. This ruling is to be welcomed as it seeks to ensure that states are accountable for both the regular security forces but also more importantly the civilian volunteers. The judgement highlights the potential dangers to human rights posed by the latter category of persons. This is increased where the civilian volunteers are armed, operate in areas where they have a strong personal relationship with victims and suspects, and are subject to limited supervision.

The justification for the imposition of the positive obligation upon states to take appropriate care in the planning and control of security forces' operations to minimise the risk to loss of life are two fold:

(a) Under Article 2(1) states are required to 'protect' everyone's right to life. This requirement is not satisfied merely by enacting laws seeking to protect the right to life, it also demands affirmative actions by officials (NiAolain, 2002.
(b) The circumstances where the deprivation of life are permitted under Article 2(2) have, rightly, narrowly been construed by the Court. Consequently the states have to ensure that the use of force by their security personnel, both regular and civilian, meets the standards of being 'no more than absolutely necessary' for dealing with the three categories of situations where deadly force may be justified.

Additional protection the Court have read in to Article 2 has been the duty to investigate killings. The duty to investigate was first articulated by the Grand Chamber in the McCann case. The Court held that, "… there should be some form of effective official investigation when individuals have been killed as a result of the use of lethal force by agents of the State. The Court has gradually in subsequent cases broadened the circumstances where the obligation arises. The definitive case to date on the duty to investigate has been in *Kelly and Others v United Kingdom*. The Grand Chamber enunciated a twofold justification for the duty to hold domestic inquiries: 'the essential purpose of such an investigation is to secure the effective implementation of the domestic laws

which protect the right to life and in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.

Whilst the Court has not laid down a precise standard form of inquiry, it is possible to identify the Court's minimum requirements. Whether a violation has occurred will depend upon the circumstances of the particular killing, the process of the specific investigation. In *Velikovia v Bulgaria* the applicant alleged that there had not been a meaningful investigation into the deaths of her long term partner whilst he was detained in police custody. The Court held that there were a series of unexplained fundamental omission, including the investigator failing to obtain the estimated time of death from the forensic expert called to the scene and the failure to interview several key witnesses, throughout the investigation. The Court found in *Gulec v Turkey* that there must be a strong level of hierarchical independent when security agents are being investigated between those implicated in the alleged wrong and those carrying out the investigation. Similarly in *Orhan v Turkey* the Court found that security officers investigating other officers within the one police station constituted an ineffective investigation and consequently found a violation.

It is not enough for domestic authorities to simply begin an investigation expeditiously they must also pursue their inquires with determination and avoid undue delays. In *Yasa v Turkey* the Court found that there had been an ineffective investigation into armed attacks on the applicant and his uncle, whom had been killed, even though both incidents had been subjected to immediate police inquiries. The violation was found because after two days of investigating the attack on the applicant the local police concluded that it was not possible to identify those responsible and in respect of the applicant's uncle the investigation appeared to have ceased after seven days. The final set of requirements noted in *Kelly* concerned the involvement of the victim's family or its results. These elements are designed to safeguard against the dangers of introspective investigations leading to secret reports. In *Gulec* the Court criticised the investigation in to the applicant's son, in part because the applicant was not able to participate in the process. The Court expressed similar criticisms of the Director of Public Prosecutions' failure to explain why he had decided not to initiate criminal proceedings against any of the security personnel involved in the shooting at Loughgall that were challenged in *Kelly*.

CONCLUSION

Whilst Article 2 of the European Convention has evolved to encompass a higher more intergrated level of protection providing the individual access to an international order of human rights norms when their domestic legal system fails them, there is one inherent weakness with the European Convention that is common to most regional human rights instruments and that is its inherent inability to deal with systematic human rights abuses. The intensity of Article 2 jurisprudence from the European Court of Human Rights highlights a persistent desire for the development of the ECHR as an instrument for *individual protection* – always seeking that its protection remains practical and effective. Clearly domestic security force authorities now need to more aware of human rights implications when engaged in the planning and control of operations where loss of life may be involved. In Northern Ireland's case where the establishment of a new police force, the Police Service of Northern Ireland, and a limited reform of the criminal justice system it remains to be seen if human rights are mainstreamed.

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