

ESSAY

INTRODUCTION:

MAKING HOPE AND HISTORY RHYME: THE CORY
INQUIRY AND TRANSITIONAL JUSTICE IN
NORTHERN IRELAND

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I. INTRODUCTION

History says, Don't hope
On this side of the grave.
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up,
And hope and history rhyme.

The Cure at Troy, Seamus Heaney¹

In 1993, a report issued by the Lawyers Committee for Human Rights (now Human Rights First) began its initial chapter with the following account:

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1. SEAMUS HEANEY, THE CURE AT TROY, A VERSION OF SOPHOCLES' *PHILOCTETES* 77-78 (1990).

During the evening of Sunday, February 12, 1989, Patrick Finucane, a 38-year-old Belfast solicitor; his wife, Geraldine; and his three children aged 9, 13, and 17 were eating dinner and watching television in the kitchen of their home in North Belfast. At approximately 7:25 p.m., a loud noise came from the front door. Finucane and his wife jumped up from the table, and Finucane opened the glass fire door leading to the front hall. Halfway down the hall two masked figures dressed in black with camouflage jackets advanced with drawn pistols. Mrs. Finucane, who was standing just behind her husband, attempted to activate a panic alarm behind the kitchen door. According to Finucane's eldest son, his father's last act was to throw himself up against the door. Two or three shots shattered the glass and hit Finucane in the chest and stomach, leaving him lying face up on the floor. The gunmen entered the kitchen and shot Finucane in the head and neck about a dozen more times, at least once and probably more from a range of about 15 inches. At some point, Mrs. Finucane was herself wounded in the ankle, probably by a ricocheting bullet. The children were unharmed physically but witnessed everything.²

The next day the Ulster Freedom Fighters ("UFF"), a loyalist paramilitary group, claimed responsibility for the murder.³

The Lawyers Committee report went on to explain that the security forces then operating in Northern Ireland had colluded in the killing. It stated first that: "There is substantial evidence suggesting the British Army's complicity in Finucane's murder."⁴ In addition, it noted:

There is also substantial evidence pointing to the involvement of the RUC [the Royal Ulster Constabulary, then Northern Ireland's police force] in the form of knowing acquiescence or perhaps even instigation. Two independent sources told us that the RUC had a double agent in the Ulster Defense Association (UDA) [a related loyalist paramilitary group]. According to these sources, the double agent informed the RUC

2. LAWYERS COMM. FOR HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL DEFENSE IN NORTHERN IRELAND 24 (1993).

3. *Id.* at 25.

4. *Id.* at 3.

that Finucane was a target, assuming they would prevent the murder from taking place.⁵

Patrick Finucane's murder was but one of six cases that Canadian Justice Peter Cory was later called upon to investigate.⁶ These, in turn, involved but seven deaths out of over 3,000 killings associated with "the Troubles,"⁷ the era of violent civil strife that plagued Northern Ireland roughly from 1968, when peaceful civil rights protests were met by rioting, through 1998, the year the Irish and UK governments concluded the "Good Friday Agreement," and with it a substantial reduction in political violence.⁸ Every one of these deaths is unique and tragic. Yet the six cases that Justice Cory was called upon to examine were singled out for several reasons. Each instance, in some measure, involved a victim or victims that was high-profile or symbolic, entailed evidence of collusion between paramilitaries and British or Irish state authorities, or raised suspicions that the relevant government actors had been actively seeking to suppress the truth, and so remained a matter of "grave public concern."⁹ On these bases the Irish and UK governments, in the follow-on Weston Park Agreement of 2001, among other things agreed to "appoint a judge of international standing from outside both jurisdictions to undertake a thorough investigation of allegations of collusion in the cases . . ." ¹⁰ The judge of international standing was Peter Cory.¹¹

In the Essay that follows, fellow Canadian Justice Rene Pomerance offers a fresh perspective on why Justice Cory's effort was a high point, yet one that remains incomplete, in Northern Ireland's ongoing quest for transitional justice. Her effort fittingly pays tribute to Justice Cory's unwavering commitment to his

5. *Id.*

6. Pomerance, *infra*.

7. *Table NI-SEC-04: Deaths (number) due to the security situation in Northern Ireland (only), 1969-2015*, CAIN WEB SERV., <https://cain.ulster.ac.uk/ni/security.htm#04> [<https://perma.cc/4K5T-MYTJ>] (last visited Oct. 18, 2020).

8. For one of many books on the Troubles, see David McKittrick & David McVea, *MAKING SENSE OF THE TROUBLES* (2012).

9. *Implementation Plan issued by the British and Irish Governments on 1 August 2001*, CAIN WEB SERV., <https://cain.ulster.ac.uk/events/peace/docs/bi010801.htm> [<https://perma.cc/R9N8-GT3U>] (last visited Oct. 11, 2020) (detailing the British and Irish governments' plan to implement the Good Friday Agreement).

10. *Id.*

11. Pomerance, *infra*.

charge, qualities she witnessed firsthand as his then assistant. Importantly, it also provides new and disturbing information about British government attempts to impede his work, especially with regard to the murder of Patrick Finucane. Justice Pomerance's contribution also sheds light on why Justice Cory's recommendations have yet to be fully implemented.

This essay will attempt to place Justice Pomerance's account in context. It will do so by concentrating only on the especially sensitive Finucane case, yet from several broader perspectives. First, it will highlight Justice Cory's achievement by contrasting his investigation with the failed inquiries that came both before and after. Next, it will emphasize the features of Justice Cory's inquiry that made it a breakthrough, notwithstanding the alarming resistance it met as provided by Justice Pomerance. Most importantly, this piece will underscore how Justice Cory's challenge, though yet unmet, continues to provide the one basis for the only just resolution of the Finucane murder.

II. THE FAILURE OF PRIOR INQUIRIES

Cory exemplifies an old practical challenge recognized in a still-pioneering academic field—transitional justice. Ruti Teitel, who wrote the (leading) book on the topic, states that: “[t]ransitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹² Mechanisms to realize transitional justice in a given jurisdiction reflect a broad range of options. In certain cases, starting with the Nuremburg and Tokyo War Crimes Tribunals, at least some accused of humanitarian and human rights violations have been subject to criminal trial, including the death penalty. In other situations, various considerations lead to the opposite approach of granting a general amnesty. Any number of approaches have fallen in between, perhaps most famously the South African Truth and Reconciliation Commission, through

12. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUMAN RTS. J. 69, 69 (2003). For a comprehensive analysis of transitional justice, see RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

which amnesty was granted, but only to the extent that individuals fully disclose their wrongdoing.¹³

By contrast, the approach to transitional justice in Northern Ireland has been delayed, contested, and anything but coherent. To an extent, the confused situation reflects the fact that the predecessor regime, which oversaw previous wrongdoing, remains in power. As it was, peace presented possibilities but in and of itself did not point in any obvious direction. In particular, the 1998 Good Friday Agreement, which effectively brought an end to the Troubles, simply did not address the thorny issue of how best to deal with the legacy of over 3,000 unsolved political killings.¹⁴ As far as a general initiative, little occurred until 2005. That year the reformed Police Service of Northern Ireland, the successor to the Royal Ulster Constabulary, launched its Historical Enquires Team (“HET”), to investigate these deaths, and make findings that, given sufficient evidence, could be prosecuted by the Director of Public Prosecutions (“DPP”).¹⁵ Supplementing this initiative are investigations by the Police Ombudsman of Northern Ireland (“PONI”), which focuses on allegations of misconduct by the police.¹⁶

These efforts have yielded much new information, yet have not come without controversy concerning their slow pace, the impartiality of the HET in particular, and ongoing disagreement as to what should be done on the basis of the evidence uncovered. The 2014 Stormont House Agreement, which reestablished Northern Ireland’s shared executive, sought to deal with these and other issues. Among other things, the Agreement calls for the establishment of a new independent Historical Investigations Unit (“HIU”). Yet as with the Police Service’s HET, the new unit would leave the decision to prosecute or not with the DPP.¹⁷ Of greater concern, earlier this year the Conservative UK Government

13. See *Transitional Justice Genealogy*, *supra* note 12, at 77 n.57; see also Promotion of National Unity and Reconciliation Act 35 of 1995 § 20 (S. Afr.) (on the need for amnesty applicants to make a “full disclosure” of their acts).

14. See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Ir.-U.K., Apr. 10, 1998, 2114 U.N.T.S. 473.

15. DEFENCE SELECT COMMITTEE, INVESTIGATIONS INTO FATALITIES IN NORTHERN IRELAND INVOLVING BRITISH MILITARY PERSONNEL, 2016-17, HC 1064, ¶¶ 8, 20, 22 (UK).

16. *Id.*

17. Stormont House Agreement art. 30-40, Ir.-U.K., Dec. 23, 2014.

introduced legislation that would make the prospect of prosecution even more remote. According to its announcement, “[t]he Government will ensure that the investigations which are necessary are effective and thorough, but quick Only cases in which there is a realistic prospect of a prosecution as a result of new compelling evidence would proceed to a full police investigation and if necessary, prosecution.”¹⁸ Otherwise, a case “would be closed . . . though family reports would still be provided to the victims’ loved ones.”¹⁹ In effect, Northern Ireland’s approach to transitional justice will likely prove to be a mix of long delayed investigations augmented by rare and occasional prosecutions.

Standing apart from this patchwork were the inquiries undertaken by Justice Cory. As noted, the Irish and UK governments in the 2001 Weston Park Agreement agreed to do something about transitional justice legacy issues pending a more comprehensive solution. That something was to single out a handful of high-profile cases drawn from each community to be subject to a serious, independent investigation.²⁰ The ultimate selection comprised the cases of Patrick Finucane, Lord Justice and Lady Gibson, Robert Hamill, Rosemary Nelson, and Billy Wright. Justice Pomerance concisely sets out both the circumstances of each killing and why they resonated.²¹ As only an insider can, Justice Pomerance also recounts the successes and challenges that this entailed.²²

Yet as she also makes clear, of all six inquiries Justice Cory took up, the most ill-starred was and remains the murder of Patrick Finucane.²³ Almost from the first, the press and international human rights groups reported credible evidence of collusion by the security forces—both the RUC and British Army—in facilitating the killing.²⁴ Over time they kept up the pressure and aired new

18. Press Release, U.K. Gov’t Northern Ireland Office, Addressing Northern Ireland Legacy Issues (Mar. 18, 2020).

19. *Id.*

20. *See supra* text accompanying notes 9-10.

21. *See Pomerance, infra.*

22. *See Pomerance, infra.*

23. *See Pomerance, infra.* For an excellent account of the Finucane murder and the failure of subsequent inquiries, see Joaquin P. Terceno III, *Burying the Truth: The Murder of Belfast Lawyer Patrick Finucane and Britain’s “Secret” Public Inquires*, 74 *FORDHAM L. REV.* 3297 (2006).

24. *See, e.g.,* LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 2, at 52-58.

information. Especially dogged in this regard were the then Lawyers Committee for Human Rights, British Irish Rights Watch, and the BBC's *Panorama* program. By contrast, the first relevant official investigations touched upon the Finucane case incidentally. Both were conducted by John (now Sir) Stevens, the Chief Constable of the Northumbria police who would go on to head the Metropolitan (London) police. The first inquiry, ordered in 1989, examined possible official collusion in the sectarian killing of Loughlin Maginn, a Catholic with no paramilitary connections.²⁵ "Stevens I" would uncover a double agent in a loyalist paramilitary group who passed information to and from the British Army. "Stevens II," begun in 1994, turned more generally to collusion between loyalist groups and the security forces. At the time, much speculation arose as to the extent any findings of collusion by Stevens overlapped with evidence that had already come to light concerning Finucane. The reports helped conclude that although collusion existed, nothing beyond an executive summary was released.²⁶

Only with "Stevens III," which began in 1999, did an official inquiry specifically investigate collusion in the Finucane case.²⁷ Eventually a Commissioner of the Metropolitan (London) Police, Stevens' 2003 report confirmed the suspicions raised by the press and human rights groups a decade before.²⁸ Substantial evidence existed that the RUC as well as the British Army could have prevented the killing, had in other ways facilitated it, did not conduct adequate investigations into the murder, and to the contrary had taken various measures to make sure that the truth would never come to light.²⁹

At the end of the day, the Stevens inquiries still involved police investigating police (and Army), did not involve public hearings, and did not result in any convictions. One individual, William

25. *The Stevens Inquiry: Chronology*, BBC (Apr. 17, 2003), http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/2954383.stm [https://perma.cc/HZS9-S5R2].

26. *Id.*

27. Sir John Stevens, *Stevens Inquiry 3: Overview and Recommendations*, RELATIVES FOR JUSTICE (Apr. 17, 2003), <https://relativesforjustice.com/wp-content/uploads/2016/11/Stevens-3-Inquiry-Report.pdf> [https://perma.cc/DW6K-MPME].

28. *See supra* text accompanying note 26.

29. Stevens, *supra* note 27.

Stobie, who allegedly had supplied the guns for the murder, did stand trial for his involvement, but the trial collapsed for the lack of evidence, and Stobie was later shot dead, with a loyalist paramilitary group claiming responsibility.³⁰ Likewise troubling, Stevens reported resistance to his investigations at almost every turn, including a suspicious fire at his team's office during Stevens I.³¹ This resistance in its own way tended to support the picture that had been steadily emerging. In their effort to obtain intelligence, the security forces had compromised themselves and the rule of law by tolerating, and even facilitating, the crimes of informers and agents in paramilitary groups to obtain information.³²

III. CORY'S BREAKTHROUGH

Against this backdrop, Justice Cory's inquiry represented a giant leap forward. First, it provided the most comprehensive account of the evidence that had been uncovered regarding Patrick Finucane's murder. Second, it argued in no uncertain terms for the need of an independent public inquiry.

Even without the official resistance she recounts, Justice Pomerance gives some idea of the challenge in bringing together the many complex leads and threads that the case involves. It must be said that the eventual report, released in 2004, met that challenge masterfully.³³ As it was an independent investigation conducted by a foreign judge, Justice Cory was under no constraint to limit the publication of his team's findings to a brief executive summary.³⁴ Instead the result ran over 100 pages of densely packed detail.³⁵ That rigor, however, did not prevent the report from making a clear and compelling case. Overwhelming evidence indicated that two units of the security forces had played a role in the murder. One was the Force Research Unit of the British Army. The other was the Special Branch of the RUC. Each group had been heavily involved in the use of informers and agents in the loyalist paramilitaries in particular. To keep these agents in place, their

30. *Id.*

31. *Id.*

32. *Id.*

33. CORY COLLUSION INQUIRY REPORT, PATRICK FINUCANE, 2004, HC 470, (UK).

34. Pomerance, *infra*.

35. Pomerance, *infra*.

government handlers and higher-ups were more than ready to look the other way, or even help out, when it came to their paramilitary groups engaged in various operations, including murder. The report also made clear that Finucane's murder was likely just the tip of the proverbial iceberg.³⁶

In part for that reason, Justice Cory fulfilled his mandate with an unambiguous call for an immediate public inquiry. At the time, there was concern that a delayed and desultory prosecution might delay such an inquiry, and the Cory report left no doubt as to which should take precedence. In its own words:

The Finucane case was specifically chosen as one of the six cases to be reviewed to determine if there was sufficient evidence of collusion to warrant the directing of a public inquiry. In light of this provision in the original agreement, the failure to hold a public inquiry as quickly as it is reasonably possible to do so could be seen as a denial of that agreement, which appears to have been an important and integral part of the peace process.³⁷

No less important, the Report left no doubt as to what a genuine public inquiry should entail. Among other things, it would require:

An independent commissioner or panel of commissioners.

[The tribunal having] full power to subpoena witnesses and documents together with all the powers usually exercised by a commissioner in a public inquiry.

[The tribunal selecting] its own counsel who should have all the powers usually associated with counsel appointed to act for a commission or tribunal of public inquiry.

[The tribunal] empowered to engage investigators who might be police officers or retired police officers to carry out such investigative or other tasks as may be deemed essential to the work of the tribunal.

The hearings, to the extent possible, should be held in public.

The findings and recommendations of the Commissioners should be in writing and made public.³⁸

36. CORY COLLUSION INQUIRY REPORT, PATRICK FINUCANE, *supra* note 33, at ¶ 1.41-12.70.

37. *Id.* at ¶ 1.296.

38. *Id.* at ¶ 1.294.

With Justice Cory's efforts, not only was the Weston Park Agreement apparently fulfilled, it looked as though the truth behind the Finucane murder, and the Pandora's box of systemic government collusion, was at last at hand.

IV. UNFINISHED BUSINESS

Things didn't quite work out that way. Prophetically, Cory's report on Finucane noted, "[t]he failure [to undertake an independent public inquiry] could be seen as a cynical breach of faith which could have unfortunate consequences for the peace accord."³⁹ Not incidentally, it went on to note the effects of any significant delay: "The Finucane family will be devastated. A large part of the Northern Ireland community will be frustrated. Myths and misconceptions will proliferate and hopes of peace and understanding will be eroded."⁴⁰

Against Justice Cory's counsel, not only was there delay, but to date a public inquiry has yet to take place. Instead the UK government's response has effectively justified a charge of "cynical breach of faith."⁴¹ To begin, the government forged ahead with just the type of prosecution that would delay an inquiry. That initiative at least led to the guilty plea of Ken Barrett, the triggerman, the one man convicted in the Finucane murder.⁴² Apart from any delay, the conviction was met with suspicions that genuine accountability would proceed no higher than this single loyalist agent and paramilitary.⁴³

Worse, however, is what came next. In 2005 Parliament enacted a new Public Inquiries Act that severely restricted the independence and power of such investigations as they had previously been undertaken.⁴⁴ Then, dramatically in 2007, Prime

39. *Id.* at ¶ 1.296.

40. *Id.* at ¶ 1.299.

41. *Id.* at ¶ 1.296.

42. *Barrett gets 22-year term for the Pat Finucane murder*, IRISH TIMES (Sept. 16, 2004), <https://www.irishtimes.com/news/barrett-gets-22-year-term-for-pat-finucane-murder-1.990214> [<https://perma.cc/D9FZ-5SUN>].

43. *Press release from the Finucane family following the conviction of Ken Barrett*, PAT FINUCANE CTR. (Sept. 17, 2004), <https://www.patfinucanecentre.org/pat-finucane/press-release-finucane-family-following-conviction-ken-barrett> [<https://perma.cc/5U5E-X7DQ>].

44. U.K. Public Inquiries Act 2005, c. 12 (Eng.) <https://www.legislation.gov.uk/ukpga/2005/12/contents> [<https://perma.cc/KP56-Y6YS>] (last visited Oct. 18, 2020).

Minister David Cameron met with the Finucane family and its representatives at 10 Downing Street. There he admitted to and apologized for collusion by the security forces in the killing. At the same meeting, he announced that an official inquiry into the murder would indeed be conducted, only by a lawyer, Sir Desmond de Silva QC, who would not have subpoena power, hold hearings, or engage a team of investigators as Justice Cory had urged.⁴⁵

The Finucane family, as well as human rights groups, rightly condemned the procedure as a “sham.”⁴⁶ Just last year, the UK Supreme Court effectively agreed. In a suit brought by the Finucane family, the Court determined that the de Silva review did not comply with Article 2 of the European Convention of Human Rights, which guarantees the right to life.⁴⁷ Put another way, the government could have avoided this judicial rebuke had it followed Justice Cory’s recommendations.

No less troubling than the official half measures, foot dragging, and palliatives is the government toleration of the obstruction of any and all inquiries. As noted, the Stevens inquires met with often blatant obstruction by the security forces under investigation, efforts that Stevens himself consistently decried.⁴⁸ It should come as no surprise that the Cory Investigation met with similar resistance. Some incidents have come to light but remain

45. John F. Burns, *British Prime Minister Apologizes in Killing of I.R.A. Lawyer*, N.Y. TIMES (Dec. 12, 2012), <https://www.nytimes.com/2012/12/13/world/europe/cameron-apologizes-for-british-role-in-finucane-killing.html> [<https://perma.cc/2TYA-TZB5>]. It should not go without comment that the *Times*’s slapdash headline is misleading to the point of being libelous. As noted, there is no evidence whatsoever that Mr. Finucane was a member of or associated with the IRA. Likewise, certain of Mr. Finucane’s clients were alleged to have been members of the IRA, but that fact hardly justifies of epithet of “I.R.A. Lawyer.” On the lack of Da Silva’s subpoena power, see Ed Neafsy, *Case of murdered Troubles lawyer Patrick Finucane returns to court*, IRISH CENT. (Oct. 17, 2019), <https://www.irishcentral.com/opinion/finucane-inquiry-courtcase> [<https://perma.cc/C4ZA-7UVU>].

46. Owen Bowcott, *Pat Finucane’s family denounce report as “sham”*, GUARDIAN (Dec. 12, 2012), <https://www.theguardian.com/uk/2012/dec/12/pat-finucane-family-report-sham> [<https://perma.cc/FNS2-FSVD>].

47. *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7, [24] (appeal taken from NICA).

48. Stevens, *supra* note 27, at paras. 3.1-3.5.

underreported, foremost the security services wiping out the Cory team's hard drives.⁴⁹

In this light, one signal service that Justice Pomerance's piece performs is to show the scope of the government's efforts to undermine the Cory team's efforts—and Justice Cory's often brilliant parries to keep the investigation going and to exert pressure for its release. In these ways, the account that follows importantly adds to the historical record. It also provides an inspiring model for how transitional justice should be sought, both in Northern Ireland and beyond.

On that note, the UK government has yet to fulfill Justice Cory's recommendation or the decision of its own highest court.

49. *MI5 erased hard drives held by collusion inquiry, BBC investigation reveals*, IRISH LEGAL NEWS (Oct. 8, 2019), <https://www.irishlegal.com/article/mi5-erased-hard-drives-held-by-collusion-inquiry-bbc-investigation-reveals> [<https://perma.cc/YU9A-LSNR>].