

## Lost on the Way Home? The Right to Life in Northern Ireland

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*This article starts from the premise that, through the Belfast Agreement, the Human Rights Act 1998 (HRA) was invested with a 'transitional justice' function in Northern Ireland, unlike the rest of the United Kingdom. The article evaluates how far the HRA has met this challenge by examining a case study of the right to life. The European Court's development of a procedural aspect to the right to life in the form of a right to an effective investigation, has implicated both institutional reform for the future, and also a need to revisit past state killings with their 'transitional justice' implications. There have been some positive developments, but, despite this, domestic institutions and courts have largely failed to deliver on Article 2's procedural aspect. The article concludes by questioning whether the very design of the HRA has limited the possibilities for a 'transformational constitutionalism' capable of incorporating Article 2's procedural right.*

This article examines the impact of the Human Rights Act 1998 (HRA) in Northern Ireland, through a case study on the right to life. Any analysis of the HRA in Northern Ireland, must acknowledge a political context quite distinct from the rest of the United Kingdom. Three main reasons for the HRA were given by the Labour government in 1997: that accessing rights domestically would be speedier and cheaper; that it would enable British judges to make a distinct contribution to human rights jurisprudence; and that it would improve rights protection.<sup>1</sup> Four years in, these justifications can be turned into questions through which to evaluate the HRA. However, consideration of the HRA in the Northern Irish context can add a fourth question: whether the HRA has helped Northern Ireland move from conflict to peace.

This ambitious aim is implicit in the Belfast Agreement, which coincided with enactment of the HRA: the two became inextricably linked. The Labour government's plans for giving domestic effect to the European Convention on Human Rights (ECHR) stood independently of the peace process. However, when the Belfast Agreement came to be signed, 'incorporation' was presented as a central part of what

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<sup>1</sup> Home Office, *Rights Brought Home: The Human Rights Bill* (1997; Cm. 3782).

has become known as the human rights and equality agenda. It was one of a number of human rights measures that together went far beyond the constitutional reform/devolution package as conceived of elsewhere in the United Kingdom. Unlike the rest of the United Kingdom, this package included a Human Rights Commission and a single Equality Commission, and contemplated further development into a possible Bill of Rights for Northern Ireland, and an all Ireland Charter of Rights.<sup>2</sup>

These measures emerged during negotiations as vital to underwriting the 'big constitutional fix' of devolution. Together with power-sharing and cross border bodies, they aimed to take the sting from the Constitutional question of British versus Irish sovereignty - resolution of this question having been left open - by ensuring that in the interim, society would be fair for everyone. The inclusion of a human rights and equality agenda also responded to the analysis that human rights abuses by the state had contributed to the onset, escalation, and sustenance of conflict and required to be addressed if a lasting peace was to be achieved. This agenda reflected a coincidence of principled human rights arguments with the negotiated search for avenues for on-going conflict resolution that would remove vestigial arguments for paramilitary violence.

Human rights measures, while primarily addressing the vertical relationship between citizen and state, also held some potential for mediating the horizontal relationship between Protestant Unionist and Catholic Nationalist communities and cultures, by providing new fora for dealing with public order disputes, equality, and language rights, through which 'parity of esteem' could grow. Thus, the HRA, already on new Labour's devolution table, took on a new dimension and was invested with a deeper political role with respect to Northern Ireland. This different context has given rise to arguments that the new constitutional order in Northern Ireland does not 'fit' within notions of traditional British constitutionalism, even in their modernized, devolution-friendly guise, but are indicative of a more complicated 'transitional justice' terrain.<sup>3</sup>

It follows that in evaluating the HRA in Northern Ireland, we must begin from a different starting point. In the rest of the United Kingdom such evaluation is classically a critique of the Act's capacity to improve rule of law protections against the worst excesses of government. In Northern Ireland, however, it is being expected to assist a transition from a less liberal-democratic, violent past to a more liberal-democratic, peaceful future, by affecting both vertical (state-citizen), and horizontal communal (Catholic-Protestant) relationships. In its vertical ambition, the HRA and the other human rights measures are being expected to reconstruct and 're-legitimate' a degraded rule of law. Crucial to this was the Belfast Agreement's programme of legal institutional transformation focused around delivering a new accountability, particularly in policing and criminal justice. This more radical goal opens up a rather different series of questions through which to evaluate the HRA in Northern Ireland. In particular, how has the HRA influenced the programme of legal institutional transformation? Has it played a part in buttressing institutional reform? To what extent has it assisted more broadly in drawing a line under Northern Ireland's past,

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<sup>2</sup> *Agreement reached in the multi-party negotiations, 10 April 1998*, [hereinafter *Belfast Agreement*], 'Rights, Safeguards and Equality of Opportunity'. See, further, P. Mageean and M. O'Brien, 'From the Margins to the Mainstream: Human Rights and the Good Friday Agreement' (1999) 22 *Fordham International Law J.* 1299.

<sup>3</sup> See, for example, C. Campbell, F. Ní Aoláin, and C. Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *Modern Law Rev.* 317.

and establishing new institutional practices for the future? To what extent has the HRA capacity to undertake this role?

The role of the HRA can also be examined at a deeper level – one which implicates the horizontal inter-communal relationships. The view of transition articulated thus far remains contested communally, and this contestation affects not only understandings of the Agreement itself, but also understandings of the necessity for legal institutional reform or transformation. Inter-communal differences revolve around the extent to which legal institutions have been complicit in the maintenance and management of conflict, and result in diametrically opposed views on whether reform is necessary or even desirable. This has created not only a vertical dynamic, but also an inter-communal one with relation to key legal institutions. As noted elsewhere, if these institutions are viewed as having ‘done a good job in difficult circumstances,’ then demands for reconfiguration are seen as charged political assault on the integrity and neutrality of such institutions and law itself.<sup>4</sup> Change can only be countenanced as necessary when couched in managerial language tied to modernization projects in the rest of the United Kingdom. However, if such institutions are viewed as having fundamentally failed, as evidenced by multiple human rights abuses, then the imperative is for substantial reform articulated in the language of ‘transformation’.

This adds a jurisprudential layer to the evaluation of the HRA in Northern Ireland, by inquiring how government, public bodies, and judicial system have positioned themselves with regard to these two competing views, when dealing with the HRA. Have they endorsed either ‘traditional’ or ‘transitional’ approach, or have they tried to mediate between the two? To what extent have they tried to maintain law’s stability, and to what extent have they tried to acknowledge and address its failings during the conflict? Have they found ways to do both? What has been the significance of their approach in terms of both a jurisprudence of transition, and in terms of the actual transformation of legal institutions? Where has this left inter-communal relationships?

## THE RIGHT TO LIFE

The right to life forms a good case study from which to evaluate the impact of the HRA in Northern Ireland. The right to life found in Article 2 ECHR is acknowledged to be one of the most fundamental rights – the right on which all others depend. The state’s use of lethal force during the conflict, and attempts to hold state actors accountable, formed a central and controversial place in human rights activism throughout the conflict. These efforts were to result in May 2001 in the consolidation of the so-called ‘procedural’ aspect to the right to life by the European Court in the cases of *Jordan, McKerr, Kelly, Shanaghan v. United Kingdom*, emanating from Northern Ireland.<sup>5</sup> Here the Court found that an effective investigation was a necessary component of the right to life, setting out a critique of domestic institutions which suggested a blueprint for reform. The coincidence of Agreement, HRA and the development of the procedural aspect to Article 2, makes the right to life a test case *par excellence* for evaluating the HRA’s impact on institutional reform.

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<sup>4</sup> C. Bell, C. Campbell, and F. Ní Aoláin, ‘Justice Discourses in Transition’ (2004) 13 *Social & Legal Studies* 305.

<sup>5</sup> *Jordan v. United Kingdom* (2003) 37 E.H.R.R. 2; *McKerr v. United Kingdom* (2002) 34 E.H.R.R. 20; *Kelly v. United Kingdom* (ECHR), *Times*, 18 May 2001; *Shanaghan v. United Kingdom* (ECHR) *Times*, 18 May 2001. See, also, *Finucane v. United Kingdom* (2003) 37 E.H.R.R. 29.

However, the right to life also lies at the heart of more paradigmatic ‘transitional justice’ debates over how to deal with the abuses of the past, post-peace agreement, and the relationship of justice to peace.<sup>6</sup> From the 1990s onwards, peace processes have increasingly produced mechanisms to address issues of accountability for human rights abuses, although these have varied in design. Northern Ireland’s peace process stands out as one of the few not to have yet produced such a mechanism, dealing with the issues in a piecemeal way.<sup>7</sup> During the conflict in Northern Ireland over three thousand were killed; studies indicate that 367 were killed by security forces, 1050 by loyalist paramilitaries, 2139 by Republican paramilitaries, and 80 killed by civilians or not known.<sup>8</sup> These figures leave open the ‘dark figure’ of collusion – the number of deaths by paramilitaries in which the state may have colluded in a variety of ways. As the peace process has developed, pressure to ‘deal with the past’ through some form of accountability or acknowledgement of conflict-related deaths has remained. This is true with relation to all deaths. However, the *Jordan et al.* decisions have injected detailed normative standards into this debate as regards those killed by state forces, and those killed after alleged collusion between state and non-state actors. Here the families are entitled to an accounting of the state’s actions, including access to information about planning and decision-making around the use of force. However, underlying the quest for information is a search for a broader acknowledgement of the state’s role in the conflict. As Ní Aoláin writes, these:

Represent a unique class of cases intimately linked with the progress and form of the conflict itself. . . . At this transitional stage of the conflict, these cases represent an enormous accountability gap for the State. The story about these cases is a missing narrative about the role of the State during the conflict itself.<sup>9</sup>

This story is integral not just to future state accountability, but to communal attempts to move to a shared understanding of the conflict that could enable the peace process to move forward. Evaluating the Convention’s ‘transitional justice’ role involves evaluating what the Convention brings to debates about the past, and considering what it should bring.

## BRINGING ARTICLE 2 HOME

The development of Article 2’s procedural aspect itself stands testimony to the difficulties of holding state actors accountable domestically.<sup>10</sup> Over the years, families, lawyers, and NGOs had cooperated in a wide variety of strategies aimed at holding state actors accountable domestically and internationally. Domestically, these strategies were ineffective with domestic processes, such as the inquest, becoming ever more closed. Internationally, however, the very impossibility of evaluating the state’s arguments that its use of force was always legitimate, logically gave rise to the

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<sup>6</sup> The literature is too extensive to be fully referenced here, but see, in particular, P. Hayner, *Unspeakable Truths* (2001); N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995); S. Cohen, ‘State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past’ (1995) 20 *Law & Social Enquiry* 7.

<sup>7</sup> C. Bell, ‘Dealing with the Past in Northern Ireland’ (2003) 26 *Fordham International Law J.* 1095.

<sup>8</sup> D. McKittrick, S. Kelters, B. Feeney, C. Thornton, *Lost Lives: The stories of the men, women and children who died as a result of the Northern Ireland Troubles* (1999).

<sup>9</sup> See F. Ní Aoláin, ‘Truth Telling, Accountability and the Right to Life in Northern Ireland’ [2002] E.H.R.L.R. 572.

<sup>10</sup> See, further, F. Ní Aoláin, *The Politics of Force* (2000).

notion that a ‘procedural’ aspect to Article 2 was vital to ensuring the substantive protection of life. This procedural aspect began to be developed by the European Court in the case of *McCann v. United Kingdom* (1995), where the United Kingdom became the first state found to have violated the right to life, with respect to three IRA operatives shot dead by British security forces in Gibraltar.<sup>11</sup> While not central to the finding in *McCann*, the Court noted that:

a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities.<sup>12</sup>

The procedural aspect to the right to life was developed through a series of Turkish cases,<sup>13</sup> and consolidated and elaborated on in the cases of *Jordan v. United Kingdom*, *McKerr v. United Kingdom*, *Kelly and Others v. United Kingdom*, and *Shanaghan v. United Kingdom*. These cases, analysed elsewhere,<sup>14</sup> involved a finding that the United Kingdom had violated Article 2 because it had not properly investigated the killings of twelve individuals, some of them killed by the police, some by the army, and one killed by loyalist paramilitaries in circumstances suggesting collusion. The United Kingdom had argued that a combination of police investigation, review by the Director of Public Prosecutions, the inquest system, and the possibility of civil proceedings had satisfied the procedural requirement of Article 2. While the Court acknowledged that a combination of remedies indeed could satisfy Article 2, it found that they had not in these cases. The investigation had to be capable of leading to a determination of whether the force used in such circumstances was or was not justified in the circumstances and to the identification and punishment of those responsible. The Court set out the relevant institutional defects, as shown in Table 1.

Bringing the right to life home in Northern Ireland, therefore involves a fascinating ‘completing of the circle’ with respect to international adjudication and domestic institutional reform. An optimist could have expected two things: first, that adequate investigations would now ensue in these particular cases, and others like them; and second, that the institutional failings identified by the Court would form a blueprint for holistic change relating to police, prosecution, and coroner practices, aimed at ensuring an effective investigation. These were, after all, the institutions also targeted for reform by the Agreement (in part for a lack of public confidence generated by cases such as *Jordan et al.*). The declaratory nature of the Court’s decisions, of course, left the need for either response technically open.

The government made a formal response to the Committee of Ministers regarding the findings of the Court as obliged to do by virtue of Article 46(1) of the ECHR. This response has been supplemented by processes emanating from peace process pressures and negotiations; by continuing reform of the inquest system; and by the intervening litigation strategy in Article 2 cases.

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<sup>11</sup> *McCann v. United Kingdom* (1996) 21 E.H.R.R. 97.

<sup>12</sup> *id.*, [161].

<sup>13</sup> See, for example, *Akdeniz and Others v. Turkey* (31 May 2001) App. no. 23954/94; *Avsar v. Turkey* (10 July 2001) App. no. 25657/94 [2003] 37 E.H.R.R. 53; *Irfan Bilgin v. Turkey* (17 July 2001) App. no. 25659/94 [2003] 36 E.H.R.R. 50; *Semse Onen v. Turkey* (14 May 2002) App. no. 22876/93; *Ulku Ekinci v. Turkey* (16 July 2002) App. no. 27602/95; *Aktas v. Turkey* (24 April 2003) App. no. 24351/94 [2004] 38 E.H.R.R. 18.

<sup>14</sup> Ní Aoláin, *op. cit.*, n. 9, p. 588.

**Table 1**

|                      |  |
|----------------------|--|
| Police investigation | Lack of independence of investigating officers from officers implicated  |
| Prosecution process  | Lack of public scrutiny, and information to victim's family from Director of Public Prosecution (DPP) regarding non-prosecution  |
| Inquest              | Lack of compellability of state actors<br>Lack of verdicts or findings capable of leading to prosecution<br>Absence of legal aid for families<br>Non-disclosure of witness statements to families prior to inquest<br>Public Interest Immunity (PII) certificates preventing examination of central issues<br>Delay<br>Limited Scope<br>Lack of prompt or effective investigation into collusion allegations on state's own initiative |

#### THE GOVERNMENT RESPONSE

On 19 March 2002 the government produced a 35-point response to the Committee of Ministers in what has proved to be an on-going negotiation.<sup>15</sup> The package points firmly only to institutional reform for the future - there are to be no new investigations into the cases in question. As regards institutional reform, however, rather than envisioning what would deliver an effective investigation in the *Jordan* sense, the package adopts a piece-meal and minimalist approach to addressing discrete *Jordan* defects. While the HRA forms a central plank of the response,<sup>16</sup> paradoxically, it is used to displace the onus for holistic institutional reform away from government proper onto the relevant institutions themselves through their Article 6(1) duty to act compatibly with the Convention. Thus, the DPP, the Chief Constable, all Coroners, as well as Ministers of the Crown are 'bound to act compatibly with Convention rights'.<sup>17</sup> The DPP's obligation to comply with the HRA in making decisions is stated in a context where very little other change is proffered.<sup>18</sup> The problems with the scope of inquest are largely to be 'cured' by the Coroners ensuring compliance with the Convention.<sup>19</sup> A summary of the rest of the government's response is contained in Table 2. Interestingly, where positive changes are proffered these for the most part had predated the judgements owing their existence to peace process human rights reforms.

<sup>15</sup> Northern Ireland – Article 2 Cases [hereinafter *Government Package*] (Copy on file with Author). The government supplemented its response on 19 May 2003, and 14 June 2004, and (orally) on 20 September 2004. At time of writing a secretariat document became public setting out the full government response, critical comments received from third parties, and a secretariat assessment of the adequacy of the response; 'Cases concerning the action of security forces in Northern Ireland', CM/Inf/DH(2004) 14 Revised (Restricted) 27 September 2004.

<sup>16</sup> *id.*, para. 2.

<sup>17</sup> *id.*, para. 2.

<sup>18</sup> *id.*, paras. 2, 10-15.

<sup>19</sup> *id.*, paras. 2, 16, 18, 20, 21, 22.

**Table 2**

| <b>Problem</b>  | <b>Response</b>  |
|---|--|
| Police investigation <ul style="list-style-type: none"> <li>• Independence</li> </ul>   | <ul style="list-style-type: none"> <li>- Police Ombudsman's office for dealing with complaints against police</li> <li>- Chief constable to remain 'mindful of need to ensure unlawful killings are investigated expeditiously and thoroughly'</li> <li>- Police and Police Ombudsman to have family liaison officers</li> </ul>   |
| DPP <ul style="list-style-type: none"> <li>• Lack of public scrutiny and information to families (failure of DPP to give reasons)</li> </ul>  | <ul style="list-style-type: none"> <li>- Recognition by DPP of need to evolve policy within context of HRA obligations</li> <li>- Current policy restated (policy of refraining from giving reasons except in cases of exceptional nature, where a decision on giving reasons will be reached 'having weighed the applicability of public interest considerations material to . . . each case').<sup>20</sup></li> </ul>   |
| Inquest <ul style="list-style-type: none"> <li>• Lack of jury verdict</li> <li>• Narrow scope of examination</li> <li>• Lack of compellability of state actors</li> <li>• Non-disclosure of witness statements</li> <li>• Absence of legal aid</li> <li>• PII certificate prevented examination</li> <li>• Delay</li> </ul> | <ul style="list-style-type: none"> <li>- Verdicts not considered necessary</li> <li>- Coroner to ensure adequate width given his/her HRA duty</li> <li>- Coroners rules amended to provide for compellability of witnesses</li> <li>- Chief Constable normally will disclose statements sent to the Coroner in cases involving the state</li> <li>- Ex-statutory legal aid scheme established</li> <li>- Recent case law and policy changes providing that the government will focus on 'damage caused' by disclosure rather than automatic claims based on the class and contents of documents</li> <li>- HRA obligation now applies to coroners</li> <li>- Appointment of additional full-time Deputy Coroner for Belfast</li> <li>- Additional administrative support to part-time coroners.</li> <li>- Northern Ireland Court Service (NICS) to provide statistics and information on outstanding inquests</li> <li>- NICS aware of need to minimise delay and are in contact with Coroners</li> </ul> |

Criticisms regarding the adequacy of this response can be made.<sup>21</sup> The failure to renew investigations into the actual cases in question has been criticized as violating

<sup>20</sup> *id.*, para. 10-15, 631 *H.L. Debs.*, col. WA 260 (1 March 2002); *Adams's, In Re* [2001] NICA 2 (19 January 2001).

<sup>21</sup> See Committee on the Administration of Justice, 'Preliminary Response from the Committee on the Administration of Justice (CAJ) to the "package of measures" submitted by the United Kingdom to the Committee of Ministers', 8 October 2002; Northern Ireland Human Rights Commission, *Comments on the United Kingdom Government's Package of Measures Intended to Address the Issues Raised by the European Court of Human Rights in Its Article 2 Judgments of 4 May 2001* (2002).

the judgements. The Police Ombudsman's office while clearly independent of police, does not cover cases where the army was involved – significant given that the ECHR, in *Kelly v. United Kingdom* and later *McShane v. United Kingdom*,<sup>22</sup> found that police investigators were not sufficiently independent of implicated army personnel. The duty on the Chief Constable to remain 'mindful' of the need for investigation stands at odds with the more stringent HRA requirement of compatibility. Whether the DPP's stated policy will produce further reasons in cases of alleged state-wrongdoing remains to be tested, although early evidence is not encouraging.<sup>23</sup> Reasons have not been forthcoming in the cases that were subject to the judgments. The refusal to have verdicts in inquests has been criticized as inadequate to meet the judgments' criticisms, a position now further supported by the House of Lords.<sup>24</sup> While state witnesses are now compellable, protection against self-incrimination still applies, leaving the inquest's scope, in this regard, limited. The provision for disclosure of statements, and the government's PII response, have not always been implemented.<sup>25</sup> Furthermore, the Police Ombudsman's failure to disclose relevant police documents to families has been challenged as violating the Article 2 procedural requirement.<sup>26</sup> Delay is still a practical feature of the system, and indeed has been exacerbated by the wait for litigation to filter through to the House of Lords (as discussed further below).

This package has since been supplemented with regard to Coroners' practices and deaths in custody. In relation to this discussion, in the summer of 2001 the government established the 'Luce review' to review and report on 'Death Certification and Investigation in England, Wales and Northern Ireland'. This was established largely in response to the scandals surrounding the Shipman, Alder Hey, and Marchioness cases, which had highlighted deficiencies in the inquest system in England. In response to both Article 2 pressures and peace process pressures (the Criminal Justice Review Group established as a result of the Belfast Agreement having recommended an independent review into the law and practices of inquests in Northern Ireland), it was agreed, after much NGO lobbying, to include a review of coroners' services in Northern Ireland. The Luce review contemplates an overhaul of the inquest system which if implemented would go far to meet Article 2 concerns left unaddressed by the government's response, such as provision for juries in controversial cases, and the lifting of protection from self-incrimination for compellable witnesses.<sup>27</sup> A special chapter in essence extends the recommendations to Northern Ireland, with both it, and the Northern Ireland Court Service response<sup>28</sup>

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<sup>22</sup> [2002] 35 E.H.R.R. 23.

<sup>23</sup> See *In re John Boyle* (N.I.Q.B.) 29 September 2004 (failure of judicial review of DPP's decision not to prosecute). Reasons have been given in Article 2 cases of Thompson, Brecknell (where families rejected them as inadequate), and McKerr.

<sup>24</sup> *R. (Middleton) v. Her Majesty's Coroner for the Western District of Somerset* [2004] 1 A.C. 182.

<sup>25</sup> Committee on the Administration of Justice, *op. cit.*, n. 21, p. 5; N.I. Human Rights Commission, *op. cit.*, n. 21, para. 23. *McCaughy & Another, Re Application for Judicial Review* [2004] N.I.Q.B. 2 (20 January 2004) later changed the law on PII's with respect to inquests, finding that Police or Ministry of Defence are under a duty to disclose documents to the coroner to decide on relevance, and ultimately on disclosure if any PII is then presented.

<sup>26</sup> *O'Brien v. Police Ombudsman* (judicial review awaiting judgment).

<sup>27</sup> *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review* (2003).

<sup>28</sup> Northern Ireland Court Service, *The Coroners Service of Northern Ireland Proposals for Administrative Redesign, A Consultation Paper* (2004) addresses primarily restructuring and reporting issues, does not address jury verdicts scope, or testimony of implicated witnesses, also proposed by

couched in the language of managerial change, rather than transition from a problematic past.

While the government's response rules out further investigations in the cases in question (and, it would seem to follow, in other 'past' cases), political developments have resulted in a commitment to establish public inquiries in a number of other cases involving state use of force, in what has continued to be a 'piecemeal' approach to the lingering question of 'how to deal with the past'. As a confidence-building measure in January 1998, prior to the Belfast Agreement, the government established a judicial inquiry into 'Bloody Sunday', an incident in which security forces killed thirteen people at a civil rights demonstration in Derry on 30 January 1972 (a fourteenth person dying later). The inquiry, now finished and due to report in 2005, already holds some sobering insights as to the effectiveness of public inquiries in delivering truth or accountability, touched on below.<sup>29</sup> Post-agreement, as a result of negotiations aimed at restoring devolution, Canadian Judge Peter Cory was appointed to make 'a thorough investigation of allegations of collusion' in six cases, many of which had been the subject of years of non-governmental organization and family pressure.<sup>30</sup> Cory recommended public inquiries in five of the cases (one in Republic of Ireland), and the United Kingdom government has now committed to holding inquiries in the four cases in its jurisdiction, although without caveats and controversy in particular relating to how public they will be.<sup>31</sup>

At the time of writing, the Committee of Ministers' response was still awaited.<sup>32</sup>

## LITIGATION STRATEGY

While the government response has focused primarily on institutional reform for the future, the litigation strategy has focused primarily on bringing the judgments home with respect to past cases, in particular the cases of *Jordan* and *McKerr*, which were the subject of the ECHR judgment. Of course, these cases remain important also to sharpening institutional reform. It is worth noting the extent to which their strategies have exhibited continuity with pre-*Jordan*, pre-HRA strategies, now supplemented by the jurisprudence of *Jordan* and the HRA. The difficulties of implementing the HRA are not, in this case, difficulties of lack of knowledge or capacity of clients or lawyers. In fact families have continued to press their claims, with the teams of lawyers who took the cases to Europe remaining involved afterwards in the struggle to 'bring the judgments home'.

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Luce. Compare Home Office, *Reforming the Coroner and Death Certification Service: A Position Paper* (2004; Cm. 6159), adopting similar managerial approach.

<sup>29</sup> A. Hegarty, 'The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland' (2003) 26 *Fordham International Law J.* 1148.

<sup>30</sup> Weston Park Proposals, published by the Northern Ireland Office, and the Republic of Ireland Department of Foreign Affairs, in the form of a letter to the party leaders, 1 August 2001 (available at <[www.cain.ulst.ac.uk/events/peace/docs/bi010801.html](http://www.cain.ulst.ac.uk/events/peace/docs/bi010801.html)>).

<sup>31</sup> P. Cory, *Cory Collusion Inquiry Reports into Chief Superintendent Breen and Superintended Buchanan; Patrick Finucane; Lord Justice Gibson and Lady Gibson; Robert Hamill; Rosemary Nelson; and Billy Wright* (2004). The Irish government have committed to an inquiry in the fifth case but not yet established terms of reference. See NIO Press Statement, 16 November, 11 January 2005 (announcing steps towards Finucane inquiry case).

<sup>32</sup> The secretariat assessment, *op. cit.*, n. 15, cannot be fully reviewed here. While finding 'significant improvements in existing procedures', it requests further information on a number of points, and identifies matters which are outstanding.

There have been three main planks to the litigation strategy. The first plank focused on the inquest procedure. Cases were taken to push the courts to ‘cure’ its defects, so that it was capable of fulfilling the procedural aspect of Article 2. Thus, cases focused on pushing inquests to be prompt,<sup>33</sup> for legal aid for families,<sup>34</sup> for an expanded scope of review and jury verdicts,<sup>35</sup> and for adequate document disclosure.<sup>36</sup> The jurisprudence in this regard was intertwined with that from cases emanating from England, focusing for the most part on the scope of the inquest in cases of deaths in custody, and whether it enabled attribution of responsibility for the state’s role in those deaths.<sup>37</sup> The second plank of the legal strategy focused on cases where the inquest had finished or run aground, where the Secretary of State was asked to initiate a new investigation, and judicially reviewed in terms of Article 2 where he did not.<sup>38</sup> The third plank of the litigation strategy supplemented these two, by focusing on the DPP process, by judicially reviewing decisions not to prosecute, and/or the failure to give reasons for such decisions.<sup>39</sup>

Cases quickly crystallized the matters left open by the European Court’s declaratory judgement. Challenges to the inquest system became vulnerable to the argument that the Court had not specified ‘in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents.’<sup>40</sup> Therefore, it was argued, the institutional failings identified could not be read as discrete and cumulative – a failure to deliver one did not necessarily amount to an Article 2 violation. Secondly, it was argued that not all the criteria were required to be met in any one forum (for example, the inquest), given the possibility of other routes to investigation remaining open.<sup>41</sup> Thus, an attempt to compel documents failed on the argument that disclosure was not invariably necessary for the satisfaction of Article 2.<sup>42</sup> Challenges to the restrictive scope of the inquests failed on the grounds that the Article 2 duties rested on the state and not the coroner, and so it was up to the state to provide the effective investigation rather than for the coroner to extend the scope of the inquest.<sup>43</sup> This type of argument was also

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<sup>33</sup> *Jordan, Re Application for Judicial Review* [2002] N.I.C.A. 27 (28 May 2002); *In Re McIlwaine* N.I.Q.B. (18 May 2004).

<sup>34</sup> *Hemsworth, Re* [2003] N.I.Q.B. 5 (7 January 2003); *Jordan, Re* [2003] N.I.C.A. 30 (12 September 2003); *Hemsworth, Re an Application for Judicial Review* [2004] N.I.Q.B. 26 (26 April 2004).

<sup>35</sup> *Jordan’s Application for Judicial Review, Re* [2002] N.I. 151; *Jordan, Re an Application for Judicial Review*, [2002] N.I.Q.B. 20 (8 March 2002); *Jordan, Re Application for Judicial Review*, op. cit., n. 32; *Jordan, Re an Application for Judicial Review* [2004] N.I.Q.B. 27 (12 January 2004).

<sup>36</sup> *Jordan, Re Application for Judicial Review* [2001] N.I.Q.B. 32 (4 September 2001); *Wright, Re Application for Judicial Review* [2003] N.I.Q.B. 17 (7 March 2003); *McCaughy & Another, Re Application for Judicial Review* [2004] N.I.Q.B. 2 (20 January 2004); *In Re McIlwaine*, op. cit., n. 33.

<sup>37</sup> See, cases culminating in *R.(Amin) v. Secretary of State for the Home Department* [2004] 1 A.C. 653; *Middleton*, op. cit., n. 24; *R (Sacker) v. HM Coroner for the County of West Yorkshire* [2004] 1 W.L.R. 796; and *R (Kahn) v. HM Coroner for West Hertfordshire & Anor* [2002] EWHC 302 (Admin).

<sup>38</sup> *In Re McKerr*, Q.B.D. (26 July 2002); *McKerr, Re* [2003] N.I. 117 (10 January 2003); *Jordan, Re Application for Judicial Review* [2004], op. cit., n. 34; *In Re McKerr (Northern Ireland)* [2004] 1 W.L.R. 807.

<sup>39</sup> *Jordan, Re* [2003] N.I.Q.B. 1 (6 January 2003); *Jordan, Re Application for Judicial Review* [2003] N.I.C.A. 54 (12 December 2003). *McCaughy & Anor*, op. cit., n. 36. *In re Marie Louise Thompson*, N.I.Q.B. (29 September 2004). This third plank tended to apply only to non-collusion cases, as the state’s alleged involvement in such cases generally had not reached the DPP, whose decision to prosecute had revolved around non-state killings.

<sup>40</sup> *Jordan* [143], *Kelly* [137], *McKerr* [159] op. cit. n. 5.

<sup>41</sup> See, for example, *R (Amin)*, op. cit., n. 36 and *R (Middleton)*, op. cit., n. 24.

<sup>42</sup> *Jordan, Re Application for Judicial Review* [2001], op. cit., n. 36; compare *Wright*, op. cit., n. 36.

<sup>43</sup> *Jordan, Re Application for Judicial Review* (8 March 2002), op. cit., n. 35.

raised in the English ‘death in custody’ case of *Middleton*, which focused on whether a jury finding of ‘neglect’ was essential to the inquest being Article 2 compliant. While this case was appealed to the House of Lords, inquests, and challenges to them, ground to a halt in many areas of Northern Ireland as coroners and courts adjourned them for the intervening period (almost two years).<sup>44</sup> Article 2 challenges to the consequent inquest delays on the grounds that these themselves violated *Jordan et al.*, were unsuccessful.<sup>45</sup> If the judgments had provided a step forward, asserting them under the framework of the HRA appeared to result in two backwards.

The domestic courts resolved many of these issues in the House of Lords decisions in *Amin*, *Sacker*, and *Middleton*. *Amin* made it clear that *Jordan et al.* did have a clear minimum content, which the state had to deliver.<sup>46</sup> As an inquest was no longer possible, a public inquiry was ordered. In *Middleton*, the House of Lords further affirmed that normally ‘a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under Article 2.’<sup>47</sup> This position affirmed judicially the position stated by the government in its response package. In *Middleton* the House further found that the implications of *Jordan* were that the central question of the state’s responsibility had to be left to the jury.

However, even as this was clarified, a more devastating derailment of Article 2’s journey home reached its culmination, seemingly making these decisions redundant with regards to dealing with the past in Northern Ireland. This was through the success of the ‘retrospectivity’ challenge to families’ HRA claims. With respect to the DPP’s failure to give reasons for non-prosecution, the courts in Northern Ireland had persistently found that these involved retroactive application of the HRA. The question of retroactivity was finally dealt with in the House of Lords decision in *In Re McKerr*.<sup>48</sup> The European judgments’ declaratory nature had avoided the question of what, if any, investigation should ensue in the cases in question. Litigation sought to require further inquiries, with the McKerr family judicially reviewing the Secretary of State’s decision not to order a new investigation. As *McKerr* progressed through the courts, the very applicability of Article 2’s procedural aspect was challenged as a retroactive application of the Human Rights Act, on the basis that the death in question took place prior to 2 October 2000.

Despite findings of a continuing violation in the lower courts, in the House of Lords five judges unanimously found that the Human Rights Act did not apply to deaths occurring prior to 2 October 2000.<sup>49</sup> They distinguished between rights arising under the Convention and rights created by the HRA with reference to the Convention. Whereas ‘the former existed before the enactment of the HRA and they continue to exist’, the latter only ‘came into existence for the first time on 2 October 2000’.<sup>50</sup> The court found that the obligation to hold an investigation did not exist in the absence of a violent death, and therefore reasoned that if the death itself was not within the reach of section 6 HRA, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death. As the judge stated: ‘This interpretation has the effect, for the *transitional*

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<sup>44</sup> See, *Jordan*, id. (28 May 2002).

<sup>45</sup> *Jordan*, id. (12 January 2004).

<sup>46</sup> *Amin*, op. cit., n. 37.

<sup>47</sup> *R (Middleton)*, op. cit., n. 24, at [47].

<sup>48</sup> *In re McKerr (Northern Ireland)* op. cit., n. 38.

<sup>49</sup> id.

<sup>50</sup> id., at [26].

purpose now under consideration, of treating all the obligations arising under Article 2 as parts of a single whole.’<sup>51</sup> The House of Lords further dismissed an attempt to rely on common law grounds.<sup>52</sup>

The *McKerr* judgement therefore, would appear to carve out an extraordinary state of affairs – namely that the HRA incorporates the Convention as regards all public bodies, except those dealing with deaths occurring prior to 2 October 2000. This exception prevails regardless of the on-going nature of these processes, and regardless of what new information comes to light regarding such deaths. The judgment is categorical, it is unanimous, and it appears final.

Despite this, it leaves the law in a state of some confusion. It was delivered the same day as a different panel of the House of Lords decided the cases of *Middleton* and *Sacker*, which – like *Amin* before them – had involved deaths prior to October 2000. In all three, the House of Lords found a procedural violation of Article 2 noting in *Middleton* that, as no question has been raised on the retrospective application of the HRA and Convention, it had been assumed to be applicable, and noting in *Sacker*, that there had been no decision on this point.<sup>53</sup> It would, of course, have been open to the House of Lords to consider the retroactivity argument in these cases notwithstanding the failure of the state to argue it. That it did not, has prompted some to question what drives the distinction. It is difficult not to question whether the key distinction is the fact that *McKerr* was a case involving the past in Northern Ireland, indicating the capacity of the conflict to affect HRA interpretation. However, another related legal distinction between *McKerr* and *Amin*, *Middleton* and *Sacker* could be found. The latter cases involved inquests which were still on-going thus limiting their future implications to a finite number of pre-HRA cases, while requiring the investigation in *McKerr* to be re-opened would have opened the floodgates to an indefinite number of pre-HRA cases, apparently on a family’s request. However, this distinction is belied by the categorical wording of *McKerr*, and in particular its notion that Article 2’s procedural aspect only arises in domestic law where the death occurred after 2 October 2000.

Ironically, post-*McKerr* the strategic litigation on Article 2 in Northern Ireland lives on by removing section 6 of the Human Rights Act as a ground of challenge in judicial reviews. With regard to questions of policy, cases now fall back on ‘pre-HRA’ style judicial reviews based on reviewing public bodies where their practices depart from stated policy. Thus, cases against the DPP continue by striking out any reference to the Human Rights Act and relying on the public commitments that public bodies and the government have made. As regards inquests, the cases rely on the government’s response package commitment that inquests will be Article 2 compliant. The Convention here plays an indirect role, providing the reason why public bodies have made public commitments as regards their procedures in right-to-life cases, commitments which can then be used to hold them to account.<sup>54</sup> It also has a pre-HRA-style domestic impact in that it can be used to resolve ambiguities in domestic legislation or practice. However, where legislation is involved, for example in inquest cases, there is also a ‘back-door incorporation’ argument that while the

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<sup>51</sup> *id.*, at [23] (emphasis added).

<sup>52</sup> *id.*, at [28]-[33], and see in particular judgement of Steyn J at [36].

<sup>53</sup> *R (Middleton)*, *op. cit.*, n. 24, at [50]; *R (Sacker)*, *op. cit.*, n. 37, [29].

<sup>54</sup> These arguments had some successes in the cases of *Hemsworth, Re*, *op. cit.*, n. 34 and *McCaughey*, *op. cit.*, n. 36; but compare post-*McKerr* case of *R (Challender) and Another v. The Legal Services Commission* [2004] E.W.C.A. 925 (Admin) where court refused to turn a section 6 case into a section 3 one, and followed *McKerr* more strictly.

HRA may not apply to public bodies dealing with pre-HRA deaths under section 6 and 7, it does apply as a *general* tool of statutory construction under section 3 (requiring that legislation be read and given effect in a way which is compatible with the Convention rights), even when public bodies are interpreting the statute with regard to a pre-HRA death.

The recent NICA judgment *In Re Jordan*<sup>55</sup> illustrates how this post-HRA ‘twist’ to the ‘old-style judicial review’ is capable of reinserting HRA and Convention in cases where inquests are on-going, and force on *McKerr* the distinction that the House of Lords did not make. This latest *Jordan* case involved a long-running judicial review of the Lord Chancellor’s and Coroner’s refusal in Pearse Jordan’s case to establish an inquest where the jury would be able to bring in a verdict such as unlawful killing or an open verdict. Girvan J agreed with Counsel for the applicant that Article 3 of the HRA is of *general* application as a tool of statutory construction, and thus applies to on-going inquest proceedings regardless of *McKerr* (which had not involved such on-going proceedings). Any other finding, he reasoned, would have the result of a coroner applying legislation one way for pre-HRA deaths, and another way for post-HRA deaths. The court did not order a legislative change to allow such verdicts, finding that *Middleton*-type jury findings could be accommodated within the existing rules governing verdicts in Northern Ireland. Nevertheless, the capacity of this reasoning to erode the *McKerr* judgment with regards to past cases should not be underestimated. However, as we went to press, the Court of Appeal (NI) overruled itself in *McCaughey & Anor*, finding that due to *McKerr*, ‘section 3 [HRA] is not triggered’ and there was therefore ‘no obligation to hold an article 2 compliant investigation’.<sup>56</sup>

Finally, also of note, Article 2’s procedural right has come under attack from another angle, namely Court of Appeal (England) decisions emanating from challenges to Bloody Sunday Tribunal rulings by the security force personnel whose actions are at the centre of the inquiry. These cases posit the ‘substantive’ aspect of Article 2 against its ‘procedural’ aspect.<sup>57</sup> Security force personnel have successfully challenged decisions regarding identification (screening and anonymity) and venue, on the basis that their lives are at risk. In these cases, the English court of appeal has set up a balancing act wherein Article 2’s ‘substantive’ protection (as beefed up from European Court jurisprudence) almost inevitably trumps its ‘procedural’ aspect (the two appearing as disconnected). Cumulatively the resulting limitations on the Tribunal’s inquiry has impacted on its ability to ‘restore public confidence’, and also the capacity of future inquiries to reach ‘the truth’.<sup>58</sup>

The litigation strategy itself bears testimony to the lack of comprehensive institutional reform. It provides some evidence that HRA litigation can on occasion supplement and clarify reform, as illustrated by *Amin* and *Middleton*. However, it illustrates the difficulties of using the HRA to deal with Northern Ireland’s past, and clear differences between the Northern Irish courts and the House of Lords, which throw light on the transitional justice questions raised in the introduction, and discussed further in the evaluation below.

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<sup>55</sup> *In Re Jordan* [2004] N.I.C.A. 29 (10 September 2004).

<sup>56</sup> *Police Service of Northern Ireland v. McCaughey & Anor*, NICA 14 January 2005 (inquest disclosure case whose possible appeal is likely to lead to further stalling of ongoing inquests).

<sup>57</sup> See, for example, *Lord Saville of Newdigate & Ors v. Widgery Soldiers & Ors* [2001] E.W.C.A. Civ 2048 (19 December 2001).

<sup>58</sup> See Hegarty, *op cit.*, n. 29.

## EVALUATING THE HUMAN RIGHTS ACT

How then, does the HRA fare when evaluated from the perspective of the right to life case study? The questions derived from the government's rationale for the HRA, together with those raised by the Northern Irish context, outlined in the introduction, form a framework.

### 1. *A speedier and cheaper way to enforce rights?*

The right-to-life cases indicate that the HRA does not necessarily provide a speedier and cheaper way to enforce rights. As regards institutional reform for the future, litigation is only clarifying some of the Article 2 implications for investigation procedures, four years post-HRA, and three post-*Jordan et al.* However, even families whose deaths have occurred since 2 October 2000 - and unfortunately conflict related deaths do continue - have encountered many of the same problems of inadequacy of police investigation, and delay and non-disclosure of documents in inquests. Resort to judicial review is still a feature of these cases. For example, in the case of David McIlwaine, involving an ostensible non-state killing apparently in connection with a loyalist feud, the coroner was judicially reviewed for the failure to hold a prompt and effective investigation as required by Article 2 ECHR, due to the failure of the Police Service to furnish written statements relating to the death of David McIlwaine and the failure of the coroner to deal with these statements. The judge made it clear 'that the documents should be released at the earliest possible moment'.<sup>59</sup> Some similar difficulties have continued in death in custody cases in Northern Ireland.

As regards dealing with the past, it now seems that families pushing for remedies in deaths occurring prior to October 2000 are now operating officially in a non-HRA context. As a result, in September 2004, protective letters were sent to the European Court in the cases of *Kelly*, *McKerr*, and *Shanaghan*, given the state's failure to provide new investigations. Whether the families proceed with these cases depends to some extent on the outcome of the Committee of Ministers process. Five other cases have also been lodged in Europe post-*McKerr* on ground of violations of Article 2's procedural right.<sup>60</sup>

### 2. *British contribution to European jurisprudence?*

The clear import of *Jordan et al.* is that an effective, publicly transparent investigation is required - capable of either identifying culpability, or of putting allegations of state wrongdoing to rest. While domestic judgments analyse thoughtfully the Article 2 implications, an audit of the cases as a whole reveals a picture which does little to further the underlying rationale of the European Court's decision - the need for an investigation capable of determining whether there was a substantive violation of Article 2 or not. Rather the cases tend to continue a pattern of litigation, forum bouncing, and denial of investigation. The cynic could observe that the clearest thread that runs through cases emanating from the conflict is that Article 2 violations are seldom found - the state tends to win, substantively or by default. Thus, apart from some legal aid decisions, and the Bloody Sunday cases (where the 'victims' are themselves alleged security force 'perpetrators' of Article 2 violations), it would

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<sup>59</sup> *In re McIlwaine*, op. cit., n. 33, Judge refused to make Article 2 breach declaration given Coroner's commitment to release statement.

<sup>60</sup> Interview, Ritchie McRitchie, Madden and Finucane, Solicitors.

appear that successful cases have resulted in declaratory relief only, and/or have failed to withstand higher challenge.<sup>61</sup>

### 3. *Better protection of rights?*

As the discussion thus far indicates, the HRA has not yet ensured a full delivery of Article 2's procedural right. It has not delivered effective investigations in the cases brought to Europe, or in other similar cases; it has not delivered holistic reform of institutional practice; and the House of Lords have effectively excluded the HRA as regards dealing with Northern Ireland's past. However, some positive developments must be noted. Incremental institutional reform is on-going. Also, the HRA can be seen to be having some impact in what might be termed 'the shadow of the law', where it is affecting the interactions of families with the Police Service and the Director of Public Prosecutions. NGOs report that they increasingly are getting more details from both the police and the DPP regarding murders, even when judicial review is not an option. Police now engage with NGOs as normal practice (although this may have more to do with the style of the new Chief Constable than the HRA), and senior officers appear informed about, and influenced by, Article 2.<sup>62</sup> In some cases where the Ombudsman has exposed inadequate investigations, new approaches to re-invigorating the investigation are emerging. In the case of the loyalist killing of Sean Brown, for example, where the Ombudsman revealed a catastrophic failure in the police investigation, the new investigation has established a novel cooperation between police and a local human rights NGO (The Pat Finucane Centre), with support from the family, overseen by a senior officer from Britain and by an Irish government official.<sup>63</sup> Witnesses are being encouraged to give statements either to police or, where unwilling to go to the police, the NGO. Moreover, while the use of Article 2 by the state in the Bloody Sunday cases raises concerns about protection of rights, it could perhaps be argued to provide somewhat positive evidence of former state law enforcers embracing and engaging with the Convention, albeit out of self-interest.

### 4. *How has the HRA impacted on the Northern Ireland's transition to peace?*

Incorporation has had little effect in buttressing institutional transformation as regards prosecution and inquest processes. In fact, quite the converse – peace process reforms have formed the core of the government response package and it depends on these deeper reforms for any semblance of adequacy. As noted, the HRA is used to deny the need for a more holistic government response, rather than to develop institutional reform. When litigation is included in the picture, it could be argued that the HRA has slowed reform in some cases, witness the inquest delays, and the potential of *McKerr* to undermine government commitments included in the package. When we turn to the issue of dealing with the past, the *McKerr* decision aims to take the HRA out of the picture, and it remains to be seen whether this will hold or be eaten into by decisions such as those in *Jordan*. Domestic Convention jurisprudence in the Bloody Sunday cases has obliterated Article 2's procedural right in its expansion of its substantive component. The right to life, of course only becomes procedural, after a death.

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<sup>61</sup> The most clearly substantive cases of *McCaughey & Anor*, op. cit., n. 25 and *Jordan*, op. cit., n. 55 are now overruled by the NICA in *McCaughey & Anor*, op. cit., n. 56.

<sup>62</sup> Interview, Jane Winter, British Irish Rights Watch, September 2004.

<sup>63</sup> Interview, Paul O'Connor, Pat Finucane Centre, September 2004.

Interestingly, as regards the deeper question of how the Convention has operated as between transitional justice conceptualizations and traditional British conceptualizations of what the HRA can and cannot do, the answer is complicated. The piecemeal approach of the government to institutional reform is consistent with the traditional ‘managerial approach’ but, as noted, only comes close to being adequate in terms of *Jordan et al.* because of peace process reforms which acknowledge the need for more fundamental transformation. Both the House of Lords and the lower courts in Northern Ireland, acknowledge in small ways that ‘something different is going on’ in the Northern Ireland cases. However, this recognition of ‘something different’ is used by the courts as an excuse to ‘back off’ a robust bringing back home of Article 2’s procedural aspect. In the House of Lords it is a complete backing off through the ‘retroactivity’ argument that Article 2 does not require (and is not permitted) to be brought back home in these cases. Interestingly, the House of Lords in *McKerr* refer to the problem of past deaths as a ‘transitional’ one – albeit not with the meaning invested in the term here. However, in the NICA, a pattern observed during the conflict of a more creative engagement with the complexities of the Northern Ireland conflict can still be seen.<sup>64</sup> Most notable in this regard is the September 2004 decision in *Jordan*, limiting the application of *McKerr*. However, while the NICA has been quicker to find violations of Article 2 in Northern Ireland’s past, it tends to ‘back off’ from robust implementation by refusing to order substantive relief in the form of new investigative measures. This stands in contrast to the English courts in English cases who have been prepared to order a public inquiry as a remedy in *Amin*. The failure to order relief in Northern Ireland is often justified by reference to the very political developments that make Northern Ireland distinctive. Thus, in *In Re Wright*, where Kerr J affirms the application of Article 2, he refuses to order the release of a police file to the family, on the grounds that the Cory inquiry is investigating and determination of disclosure must await any resulting inquiry.<sup>65</sup>

It can be argued that the Convention cannot be expected to deal satisfactorily with transitional justice issues, and was not designed for such a purpose. In rebuttal, it could be noted that the decisions in *Jordan et al.* applied Article 2’s procedural aspect to a situation of conflict (although it could be argued that this approach to United Kingdom violations was perhaps emboldened and enabled by the end of the conflict). Yet, to some extent the argument stands. In all these cases litigation only provides a route to an effective investigation being established. Any ensuing information will only be as good as the investigation, which may find itself limited by Article 2 and by the unwillingness of state actors to cooperate, as the Bloody Sunday litigation indicates. Thus, litigation can remain at best a means to an end - that end being an effective and transparent investigation.

However, the HRA and Convention continue to impact on the debate over how to deal with the past. While it has not delivered new investigations, Article 2’s procedural aspect has, in cases where state actors have been involved, given families of these victims some leverage on a victims debate which has often relegated them to a low place in a ‘hierarchy of victims’, and refused to recognize a discrete set of needs as regards information and accountability relating to state involvement. As has been noted elsewhere, Northern Ireland’s transition is not a paradigmatic one, but is shaped

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<sup>64</sup> S. Livingstone, ‘The House of Lords and the Northern Ireland Conflict’ (1994) 57 *Modern Law Rev.* 333, at 351.

<sup>65</sup> *In re Wright* [2003] N.I.Q.B. 17, at [21].

by the fact that the Britain is a Western liberal democracy.<sup>66</sup> In this context, which has not involved regime change or indeed an acknowledgement of the state's role in the conflict, Article 2 remains one of the few pressures on a state whose approach to the conflict has been to present it as inter-communal/horizontal, rather than vertical. This pressure adds to political peace process pressures. That the government want a 'way out' is evidenced by its recently announced consultation on 'how to deal with the past'.<sup>67</sup> However, a paradox remains: Article 2 not only provides the pressure to have a holistic response to the past, but constrains the type of 'trade-offs' which are possible (for example 'truth' in place of 'accountability'), making it more difficult to negotiate a holistic mechanism which would meet the full range of political demands as regards state and non-state actors.

There are also indications of the HRA's capacity to fulfil its horizontal 'intercommunal' ambition, albeit in somewhat negative ways. Although the Article 2 pressures described above has the potential to polarize communities with respect to the HRA in reinforcing the view that human rights are a 'nationalist' tool in the dealing with the past debate, there are countervailing factors. Continued failings of investigations and obstacles during transition have affected the Loyalist community, and this has resulted in the increased use of Article 2 by that community. This has led to an increased human rights skilling of lawyers dealing therein, and novel communal interaction as regards furthering cases, most notably the use of the same barristers to run similar arguments in the joined cases of loyalist Billy Wright and Catholic solicitor Pat Finucane. As well, there is an increasing realization among the Unionist/Protestant community that Article 2's procedural aspect has implications for non-state killings. Police figures indicate that out of 2,788 conflict-related killings between 1969 and 1998, individuals were subsequently charged in only 955 cases.<sup>68</sup> Evidence in relation to some cases has indicated acute investigative failures, calling into question police competence and use of informers, opening up further Article 2 implications.<sup>69</sup> Interestingly, the Police Service has begun a review of 'historical cases' aimed at re-opening investigations or giving further information to the families about the state of the investigation.<sup>70</sup> There has been some commitment to introducing outside police officers into the relevant unit, to inject an element of independence. While couched in managerial language of bringing police practice into line with that in England, it clearly also forms a police response to Article 2 pressures.

## CONCLUSIONS

As this review demonstrates, the right to life case study indicates an approach which often limits Northern Ireland's possibilities for institutional and political transformation by failing to put clear water between past approaches to human rights abuses and present ones. While this Article has questioned whether Article 2 has 'got

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<sup>66</sup> C. Campbell and F. Ní Aoláin, 'The Paradox of Transition in Conflicted Democracies' (2005) *Human Rights Q.* (forthcoming).

<sup>67</sup> In the spring of 2004 the Secretary of State for NI announced a consultation process to examine the means of 'dealing with the past'. To date the consultation has been a private process of consulting experts and opinion formers by invitation only, and has included a trip by the Secretary of State to South Africa. The process may be broadened, see <[www.nio.gov.uk/index/key-issues/victims.htm](http://www.nio.gov.uk/index/key-issues/victims.htm)>.

<sup>68</sup> *Security Situation Statistics for Northern Ireland*, provided by the Police Service, 22 January 2003, on file with authors. The statistics do not apparently include around 367 deaths caused by state actors.

<sup>69</sup> See, for example, Police Ombudsman, *Statement by the Police Ombudsman for Northern Ireland on Her Investigation of Matters Relating to the Omagh Bomb on August 15, 1998* (2001).

<sup>70</sup> <[www.policfed-ni.org/uk/chair\\_conf04.htm](http://www.policfed-ni.org/uk/chair_conf04.htm)>. Interview, Hugh Orde, Sept. 2004.

lost on the way home', a different view exists. It can be argued that the very notion of 'bringing rights back home' and the mechanism chosen was aimed at presenting 'incorporation' as unthreatening - a repatriation of the Convention which was deliberately ambiguous as to whether it was intended to radicalize British constitutionalism, or to enable containment of the Convention's domestic reach. The concept of bringing rights back home could be sold to human rights advocates as increased rights protection which would consolidate and extend human rights jurisprudence which was already seeping into domestic courts. But it could also be sold to enemies of increased rights frameworks as adding little in practice, while making it more difficult to get to Europe, and reasserting the primacy of British judges and judgments as against 'European' ones.

The right-to-life case study may illustrate exactly what bringing Article 2 back home looks like, because from this second limiting notion of incorporation there is little room for the Article's procedural right. Implementation of *Jordan et al.* domestically requires a 'transformative constitutionalism' which the very design of the HRA is evidence of ambivalence to. While glimmers of this transformative constitutionalism exist in the judgments relating to English death-in-custody cases, the Northern Irish case study indicates the capacity of its conflict to skew and limit the HRA's impact in these areas. The need for a transformative constitutionalism capable of recognizing the differing needs in the different jurisdictions – those of transition in Northern Ireland and those of democratic renewal in the rest of the United Kingdom – remains.