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“Spinning Justice” and the Political Assassination of Dr. David Kelly. Human Rights, Inquests and Coroners

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The tenth Anniversary of the death of Dr Kelly is inextricably linked with the UK government’s role in the invasion of Iraq in March 2003 (1). This British scientist and expert on biological warfare, employed by the British Ministry of Defence, and a United Nations weapons inspector in Iraq, came to public attention in July 2003 following an off the record discussion with a journalist about the British government’s dossier on weapons of mass destruction (WMD) (2).

Prior to the invasion over 11 million citizens worldwide took to the streets demonstrating that they knew there was no real threat posed by Saddam Hussein to the West (3). What follows is a critical reflection on some of the moral, political and legal issues raised by the UK government’s response to the death of Dr Kelly.

The escalating importance of human rights

The death of Dr Kelly remains highly relevant as an exemplar of the vital need to keep the Legislature, the Executive, and the Judiciary honest, open and accountable in regards to the human rights of citizens of the state; in particular, our rights concerning the preservation of life and the expectation that where a citizen’s life is lost in suspicious circumstances, that death is properly investigated.

The rationale for Human Rights, particularly within justice systems, has been the subject of extensive debate for centuries. Since the Enlightenment, philosophers have striven to find universal truths (4) and emphasised the role of scientific evidence in assuring social justice. This serves to counteract trends in arbitrary and self-interested decision-making and action within powerful social and economic groups resulting in the oppression and control of the powerless by the powerful. Universal truths and human rights are designed to make social justice ‘accessible’ to every human being regardless of their capacity or social position.

Article 2 of the Human Rights Act (1998) (5) sets out to guard human life as sacrosanct and is one of its principal provisions, making exception only for “lawful execution”. The importance of effective investigation into suspicious deaths, sanctioned by Article 2 has been articulated by the European Court of Human Rights at Strasbourg in *McCann*:

> There may be cases where the facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally, there may be other cases, where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to

> investigate the cause of the deprivation of life could by itself raise an issue under article 2 of the Convention (para 193) (6).

The Minnesota Protocol (7), to which the UK is signatory, also lays out guidelines for the *independent* and thorough investigation of possible political assassinations. No-one would question that Dr Kelly's death was deeply 'political' and yet this modus operandi has never been mentioned by anyone in government.

Human rights, inquests and Coroners

A Coroners Court is a court of law, and the inquiries into the death of Dr Kelly were governed by the Coroners Act (1988) (8). Coroners have been a feature of the British legal administration since before Feudal times (see Jervis, 1854). Coroner's inquests must be held in a number of circumstances and are always held when the death is violent or unnatural. Recent rulings at Strasbourg have acknowledged the importance of effective inquests in relation to Article 2. In a recent ruling related to the killings of two members of the IRA over 23 years ago Judge Mahoney stated that:

> ...the innumerable and excessive delays in the inquest proceedings prevented the investigative process from beginning promptly and from being carried out with reasonable expedition (9).

The primary focus of the British coroner's system is to "investigate cases with the goal of answering who, how, when, where and by what means someone died" (10). According to Lord Bingham, the coroner has a "duty to conduct a full, fair and fearless investigation" (11). The Coroners court is not a criminal court but delivers a verdict at the conclusion of proceedings as to the cause of death. The Coroner is an independent judicial officer, with powers to summon witnesses and jurors and hear evidence under oath. The verdict of the coroner or the jury could be in a short-form such as unlawful killing or suicide or accident, or it can be expressed in a brief, neutral, factual statement, expressing no judgment or opinion, called a narrative verdict. There may be a short-form verdict, a narrative verdict or both. Importantly, "suicide should never be presumed, but must always be based on some evidence that the deceased intended to take his own life" (12). The evidence that the coroner examines to record a suicide verdict must indicate suicidal intent *beyond reasonable doubt*; certainly the Coroner does not set out to 'build a case' for suicide. When this is not evidentially possible, an open (also known as undetermined) or accidental verdict must be returned (13).

"Speaking for the dead to protect the living": The importance of the oath and truth

The importance of human life is such that even in their death, human beings have a role in the protection of the well-being of others. There have been cases in the past where deaths of high public significance have been the subject of an Inquiry. To the credit of our judicial systems, there are a number of examples where the proper and rightful investigation of single or multiple deaths has led to considerable illumination of the nature of those deaths, and lessons learned to inform policy the avoidance of further preventable loss of life. Two noteworthy cases are the Shipman Inquiry and the Climbie Inquiry.

The Shipman Inquiry (2000) (14) held inquiries into deaths under s17A of the Coroners Act 1988 and was given statutory powers under the Tribunal of Inquiries (Evidence) Act 1921. The Inquiry investigated the practices of the notorious General Practitioner, Dr Harold

Shipman, who was found responsible for the deaths of at least 215 patients. The Inquiry culminated in a raft of recommendations from the Chair, Dame Janet Smith, leading to improvements in patient safety for UK citizens.

Eight year old Victoria Climbie died in 2000 from hypothermia, malnutrition and multiple organ failure, a victim of protracted and horrific child abuse. The trial of Victoria's abusers, her aunt and aunt's partner was held in 2001. Both were convicted of murder hence the cause of Victoria's death had been defined as unlawful killing in a criminal court prior to the Inquiry. The Climbie Inquiry (15) established in 2003, was held according to the Tribunals of Inquiries (Evidence) Act 1921 under statutory conditions provided by three separate pieces of legislation. Lord Laming's Inquiry into Victoria's tragic death exposed numerous failures within the contemporary Child Protection system and his subsequent recommendations led to far reaching changes in Child Protection policy and practice in the UK.

Whilst these Inquiries attracted healthy debate and critique, the events of the deaths were investigated under statutory conditions, due process was followed, lessons were learned and the public and justice were served as well as practically possible. This well worn path of transparent public scrutiny was not evident in the approach taken to any UK inquiry associated with Dr Kelly. Whilst the spirit of any Inquiry should be one of openness, transparency and truthfulness, sadly none of the Iraq-related Inquiries (the Foreign Affairs Committee Inquiry, the Intelligence and Security Committee Inquiry, the Butler Inquiry, the Hutton Inquiry and the Chilcot Inquiry) has met those criteria. Not one word of witness evidence has been spoken under oath at any of these inquiries, which is quite a coincidence. Presumably, not a single witness at any of these inquiries had any motivation to lie.

The inquiries into Dr Kelly have been notably opaque. Within 3 hours of the discovery of Dr Kelly's body, Lord Falconer, the then Lord Chancellor and the then Prime Minister, Tony Blair had discussed Dr Kelly's death (16). Lord Falconer subsequently contacted Lord Hutton and asked that he preside over an Inquiry into the circumstances surrounding Dr Kelly's death. The Coroner, Nicholas Gardiner, opened an inquest (17). However, this was adjourned in order to hold the ad hoc inquiry. Whilst the Lord Chancellor acted within his powers he did not give any particular legal rationale or justification for his decision and the Inquiry he called had no statutory powers i.e. powers to place witnesses under oath, issue subpoena and appoint a jury.

This leads to three points for analysis: First, was this action on the part of the Lord Chancellor unjustified interference in due process? All other S17A Inquiries concerned multiple deaths and were heard under oath according to statute. Lord Hutton could have requested statutory powers in his Inquiry. However, he saw no need for these apparent trimmings as he saw "no reason why anyone would lie" and everyone whom he asked to bear witness complied. Given the context, this is extraordinary; many witnesses called to Hutton were members of HM government who had sent British troops into Iraq on the basis of WMDs. In May 2003 an announcement was made that no such weapons had been found or fired . Surely Lord Hutton would therefore have reasonable grounds for suspicion at the time of his Inquiry that perhaps someone, somewhere in the government was not telling the truth about some very important issues?

Second, Hutton neglected to consider that 'the oath' can have a protective and facilitatory function for some witnesses as explained by MP Andrew MacKinlay in the Parliamentary debate concerning the (then proposed) Iraq Inquiry in 2008 (18):

> The inquiry should afford support to witnesses who want to tell the truth but are being leaned on by superiors and people we do not see to be ambiguous or economical with the truth. For an inquiry to have any veracity, it is a prerequisite that people give evidence under oath (25 Mar 2008: Column 40).

Given that Lord Hutton was an "experienced judge" is it not strange that he did not consider this himself?

Third, if one does not have to present reasoning as to why one does not need the oath, then what is the point of the oath in other legal arenas? This question was asked of Lord Falconer who told the Parliamentary Select Committee on Public Administration in 2004:

> [Answering Question 218] In court, it is because if you give evidence under oath and then lie you have committed the crime of perjury. Separately from crime, giving evidence under oath carries with it some degree of marking the solemnity of what you are doing and making it clear that this is a matter of real importance. I would tend to share Lord Hutton's judgment in relation to whether or not an oath would have made any difference on this particular occasion because, remember, I do not think anybody was minded to lie in relation to what happened and also there were huge amounts of documents, e-mails, et cetera, et cetera, et cetera. (19)

The contradictions here are astonishing. An inquest had been adjourned, a £2,000,000 Inquiry convened- is this not a "matter of real importance" worthy of the oath? Does an abundance of documents and emails at an inquiry ensure that every witness will tell the truth? Hutton lacked any real inquisitorial motivation or curiosity in stating that discrepancies in oral evidence are acceptable and do not require investigation:

> In the evidence which I heard from those who saw Dr Kelly's body in the wood there were differences as to points of detail, such as the number of police officers at the scene and whether they were all in uniform, the amount of blood at the scene, and whether the body was lying on the ground or slumped against the tree…These differences do not cause me to doubt that no third party was involved in Dr Kelly's death.

The oath can be said to be a defining feature of a court of law. If Judges, Inquiry Chairs, and Coroners are intent on establishing the facts of a case and then synthesising, drawing conclusions and forming verdicts from those facts, they need to be as sure as possible that they are hearing the truth from witnesses. Perjury in any UK court of law carries a maximum 2 year prison sentence under the Perjury Act 1911(20) and brings untold reputational damage to the offender.

Intent to commit suicide

To prove suicide it is necessary to have evidence of intent and evidence that the deceased knew the consequences of his act. The establishment of intent to commit suicide is critical prior to any coronial verdict of suicide. Many hold that the act of suicide was not proven beyond reasonable doubt at Hutton partly because the evidence on which Lord Hutton based his decision was not given under oath.

In order to deliver a verdict of suicide a coroner must demonstrate that this has been proved beyond reasonable doubt. When this is not the case, an open (also known as undetermined)

or accidental verdict is returned (21). Hutton not only made an assumption that all witnesses were telling the truth but failed to fully explore discrepant indicators of Dr Kelly's mood immediately prior to his death. There was no suicide note and no witness recalled him saying he planned to take his own life, there was every indication that he was planning for a future. Professor Keith Hawton, as expert witness in the field of suicide, thought Dr Kelly could have been suicidal but had never met Dr Kelly and did not cite any research evidence to support the opinions he gave at the Inquiry. Lord Hutton chose to conclude that Dr Kelly took his own life through incised wounds to his left wrist and an overdose of co-proxamol.

The High Court have repeatedly stated that intent must be proved by facts presented in the evidence available to the Coroner and have, accordingly, quashed coronial verdicts where intent has not been properly established (22). This is an important point to note with .regard to the Attorney General's handling of the challenge posed by experienced medical doctors under s13 of the Coroners Act 1988 (23). Following the Memorial of Drs Frost et al in 2010 and a flood of other citizen concerns, Dominic Grieve, the Attorney General, decided to conduct a review. Again, a fundamental problem with Grieve's review is that he was reviewing evidence, which had not been given under oath, as it would have in a coroner's inquest. Again there was no cross-examination of professionals or other personnel (none of whom were qualified in coronial law) involved under oath about their review findings. What ensued was a masterpiece of spin by Mr Grieve on the day of his post-review statement to Parliament. This was not picked up by the press but is recorded in Hansard (24):

> …The review arose from the representations of the memorialist doctors who indicated that they thought that the lack of certainty specifically as to the cause of death was such that I ought to exercise my powers under section 13 of the 1988 Act to make an application to the High Court for the inquest to take place—we may have to face up to the fact that no inquest took place, because it adjourned without being completed (9 June 2011: Column 305).

So above, Grieve has conceded that there had been "no inquest" into the death of Dr Kelly but later states:

> …There is no possibility that, at an inquest, a verdict other than suicide would be returned…. I could see perfectly satisfactory answers to every question that was raised with me, all of which led inexorably to the suicide verdict (9 June 2011: Column 305).

Grieve stated there was no inquest (when one is required by statute), but maintained to Parliament that there is in existence a "suicide verdict" which, paradoxically, can only be delivered by a Coroner. Furthermore, even in the absence of the oath throughout the entire process and no cross-examination of witnesses in his 'review', Grieve arrogantly insisted there is no other verdict "possible" at an actual inquest. This Attorney General's "review" failed to placate many of the public.

Following an unprecedented public fundraising campaign by Margaret Hindle, retired NHS coordinator, Grieve was subject to legal challenge by Mr David Halpin, retired Consultant Orthopaedic and Trauma Surgeon at the High Courts of Justice in December 2011(25). Judge Nicol ruled that the Attorney General's decisions remain lawful, rational and "unreviewable." Above all, Justice Nicol demonstrated that the position of Attorney General carries enormous political powers to deny citizens access to the judicial skills of the High Court. As stated by Lord Denning, [Attorney Generals] "can, one after another, suspend or dispense with the execution of the laws of England" (26).

Conclusion

In summary, Article 2 of the 1998 legislation enshrines the duty to effectively investigate suspicious deaths. The Hutton Inquiry was neither a statutory inquiry nor an inquest and quite likely a violation of human rights under Article 2. Lord Falconer gave no reason for the need of a s17A Inquiry. Hutton closed his Inquiry with three major conclusions: a criticism of the BBC, exoneration of HM government of any 'wrongdoing' (much to the distress of Dr Kelly's family) and that Dr Kelly had committed suicide. No recommendations were made in terms of future policy to ensure greater duty of care in the future. The suicide conclusion was a judicial 'finding' that was going to be very difficult for a Coroner to query or challenge. In 2011, the Attorney General made an admission that Hutton did not conduct an inquest but asserted that Hutton was "tantamount" to an inquest. It is questionable that his 'review' of the evidence was lawful and as Attorney General he was in no legal position to either agree or disagree with Hutton's findings-that was the job of the High Court. Whether there has been a conspiracy or not, the actions of key players have certainly conspired to ensure that no inquest has yet taken place.

Human rights legislation exists precisely to compel governments to respect and defend human life, dignity and equality. The investigation into Dr Kelly's death did not honour these objectives and respect Dr Kelly's right to due process. On the contrary, it bears the stains of interference, shoddy investigation and arbitrary decision making by the politically powerful. Without fidelity towards accepted standards of justice within law-making, the exercise of law and political decision making, we risk an abandonment of its universal moral underpinnings-a state of affairs in keeping with totalitarian government.

Notes

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24. http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100305/debtext/100305-0012.htm

25. http://drdavidkellyinquestrequired.blogspot.com.au/2012/02/transcript-of-mr-justice-nicols-strange.html

26. http://www.uniset.ca/other/css/1978AC435.html

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