

The Right to Life and Self-Defence in English Criminal Law : A Note

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The present author has been interested in the issue of the right to life in comparative law and politics for some time now. In particular, the issue of the right to life in Japan¹ has received attention in some depth. A further area of interest has been the issue of corporate social responsibility,² particularly the company-community relationship, which also has a bearing on the individual's right to life. In this short note we draw attention to one interesting aspect of the right to life in English criminal law : self-defence. How does English law seek to balance the interests of 'assailant' and innocent victim in cases where the latter is killed through an act of self-defence of the former?

We begin with a brief outline of the position under the *European Convention on Human Rights* of 1950, to which the United Kingdom is a signatory. We then look at the position in English law which, arguably, is out of keeping with the Convention in this respect. We end with a plea that more stringent measures to protect the right to life of the innocent victim be taken.

Article 2 of the Convention provides the following protection to an individual's right to life :

- (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary :
 - (a) in defence of any person from unlawful violence ;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained ;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2(1) thus lays down the principle that an individual's right to life is to be protected by law, there being the assumption that some form of sanction in criminal law is to be put in place to punish offenders who intentionally deprive others of their basic, fundamental right to life.

Article 2(2) provides exceptions to this general principle, it allowing acts which deprive the individual of his life when committed in self-defence or when defending others, when effecting a lawful arrest or stopping the escape of a lawfully detained person, or in the context of riots or insur-

rection. In all these exceptions there is the requirement that the force exerted should not exceed that 'absolutely necessary.'

Case law on article 2(2) of the Convention points to the necessity for good reason where life is taken away in the context of acts which come within the ambit of article 2(2) where there has been a mistaken belief of fact. In *McCann et al. v. United Kingdom*³ the European Court of Human Rights was asked to decide whether the shooting of three members of the Irish Republican Army by SAS soldiers in the mistaken belief that they had planted a car bomb and were able to detonate it was lawful. The Court held that :

the use of force by agents of the State in pursuit of one of the aims (in Article 2(2)) may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.⁴

A similar judgement was handed down in the later case of *Andronicou and Constantinou v. Cyprus*,⁵ involving the shooting of two people by officers of a Cypriot government commando unit. As to the question of the infringement of article 2(2), the Court held that the officers were entitled 'to take all measures which they honestly and reasonably believed were necessary'⁶ in the defence of their own lives. In *Gül v. Turkey*⁷ the necessity of having a good reason for a mistaken belief in taking away an individual's life was again stressed. This was further restated in the case of *McKerr v. United Kingdom*.⁸

If the case law on article 2(2) has attempted to uphold the right to life principle in cases of self-defence through the establishment of the principle of good reason for a mistaken belief, English law can be said to be failing miserably in this respect. In a line of cases, the English courts have accepted a degree of protection below that demanded by the European Court of Human Rights. Some of these cases can be noted.

In 1987 the Court of Appeal⁹ laid down the principle that the defence of self-defence to a charge of assault could succeed even where the belief that the defendant was being attacked was unreasonable, given that this belief was honest. This was adhered to in such cases as *Jackson*,¹⁰ *Asbury*,¹¹ *Fisher*,¹² *Owino*,¹³ *DPP v. Armstrong-Braun*,¹⁴ *Shaw*,¹⁵ and *Martin*.¹⁶ Failure to prosecute many who kill others in self-defence stems largely from this test established by the courts, a test which merely requires the presence of an honest belief that the individual was being attacked.

The issue of whether English law in this respect is contrary to article 2 of the Convention has been taken up by legal academics and practitioners alike, although not directly by the European Court of Human Rights itself. Perhaps the most vocal voice arguing the incompatibility of Eng-

lish self-defence law with article 2 is that of Fiona Leverick of the Aberdeen University School of Law.¹⁷ Leverick supports the claim that :

in allowing an honest unreasonable mistake to ground an acquittal on the basis of self-defence, English law is contrary to Article 2 of the ECHR. The reason for this claim is that, in allowing the unreasonably mistaken defendant to escape punishment in this way, English law fails to respect the right to life of the person who, though no fault of their own, is mistaken for an attacker. An examination of relevant case law leads to the conclusion that the substance of English law does indeed contravene Article 2.¹⁸

The main moral criticism that can be made of English self-defence law in this connection, she argues, is this :

The main reason why English self-defence law is open to moral criticism is that it fails to respect the right to life of the innocent person who is unreasonably mistaken for an attacker.¹⁹

Arguing that English law is contrary to article 2 of the Convention, she observes :

the hope is expressed here that English law will be brought into line with Article 2 of the ECHR. . . . the object and purpose of the Convention is the 'protection of individual human beings'. Requiring an honest belief to have some reasonable basis serves to protect the right to life of all of us by sending out the message that killing for no good reason is not tolerated in the United Kingdom. Any victim of a defendant who has killed for no good reason has been denied this protection and the family of the victim should be entitled to expect that the defendant in question be condemned and punished.²⁰

As the main aim of article 2 is the protection in law of an individual's right to life — given the proviso that certain situations can be exceptions to this general principle —, the current position in English law in respect of self-defence is one which treats lightly the generally held perception in international law and views held by many jurists that the right to life is one of the — if not *the* — most essential of the fundamental rights to be protected, an essential building-block of civilized society.

A few of these jurists can be mentioned in passing. Menghistu defines the right to life as 'the most basic, the most fundamental, the most primordial and supreme right,' without which the

protection of all other rights becomes 'meaningless.'²¹ Similar sentiments have been expressed by *inter alios* Halûk Kabaalioglu, who believes that, 'There can be no doubt that "right to life" is the most important of all human rights.'²² For Leo Kuper, 'The right to life must certainly be the most basic and elementary of the human rights.'²³ For Lasok, 'There can be nothing more fundamental than the right to life.'²⁴

This perception of the right to life is also found amongst organizations involved in the field of the international law of human rights. Following the examination of reports submitted by the parties to the *International Covenant on Civil and Political Rights*, the Human Rights Committee of the United Nations, in general comments adopted in 1982, described the right to life provided in article 6 of the Covenant²⁵ as 'the supreme right.'²⁶ In the drafting of an article on the right to life, it was maintained by the Secretary-General of the United Nations at the Tenth Session of the General Assembly that the right to life was 'the most fundamental of all rights.'²⁷ The Commission on Human Rights, in a 1983 resolution, similarly observed that the right was 'a cardinal right of every human being,' and should be safeguarded to ensure the enjoyment of economic, social, cultural, civil and political rights.²⁸

Similar views can be found if we examine the legislative history of the right to life provision in the Inter-American legal system. Thus in the first draft of the *American Declaration on the Rights and Duties of Man* of 1948, we read that, 'The first of the fundamental rights of man, by order of logic and of importance is, without doubt, the right to his own life.'²⁹ The Inter-American Commission on Human Rights of 1987 similarly observed: 'The right to life merits a special consideration because it is, without a doubt, the foundation and sustenance of all the other rights.'³⁰

If such a perception is quite common, it does not, of course, accurately reflect the position of the right to life in the international law of human rights. The right to life is not accorded status commensurate with its perceived primary position in any list of freedoms and rights. Rather, in such international instruments as the *International Covenant on Civil and Political Rights*,³¹ and the *American Convention on Human Rights* of 1978,³² the right to life can legitimately be limited in certain instances. And so it is with article 2 of the *European Convention on Human Rights*, as we have seen. The right to life of an individual is protected in principle, but allows for certain exceptional circumstances. Self-defence is one such exception.

The problem with the present situation in English criminal law is that, arguably, the courts put too much weight on protecting the interest of the 'assailant' to the detriment of the innocent victim, a victim who, through no fault of his or her own, loses his life. For that particular individual, and for the family concerned, the situation is clearly unjust and unreasonable. The danger with the present situation in English law in this context is that the doctrine seemingly being developed by

the courts, in effect, establishes a distinction among the people between those who are ‘special’ and those who are not in respect of the protection of human life, and to punishment — or lack of punishment — for acts which take away life. This inequality in the law’s protection of the individual’s right to life needs to be remedied.

- 1 See further Noel Williams, *The Right to Life in Japan* (Routledge, London and New York, 1997); ‘Death in the Corporate Setting in Japan,’ *Daito Law Forum*, no.1 (2001), pp.5–14; ‘The Right to Life in Japan,’ *Daito Law Forum*, no.1 (2001), pp.20–23; ‘Inequalities in the Japanese Workplace: Gender, Political Creed, and the Right to Life,’ *Daitō Hōgaku* (Journal of Law and Politics, Law Faculty, Daito Bunka University), vol.37 (2001), pp.1–81; ‘The Pursuit of Happiness in the Japanese Family (2),’ *Daito Law Forum*, no.3 (forthcoming 2003).
- 2 A discussion of corporate social responsibility in the context of Anglo-American culture in the early 1980s can be found in Noel Williams, ‘Corporate Social Responsibility and the Community,’ *Kenkyū hōkoku* (Bulletin) (Minami Kyushu University), no.25 (B) (Cultural and Social Science) (1995), pp.121–201.
- 3 (1996) 21 E.H.R.R. 97.
- 4 Paragraph 201.
- 5 (1998) 25 E.H.R.R. 491.
- 6 Paragraph 192.
- 7 (2002) 34 E.H.R.R. 28.
- 8 (2002) 34 E.H.R.R. 20.
- 9 *R. v. Williams (Gladstone)* [1997] 3 All E.R. 425.
- 10 [1985] Crim. L.R. 674.
- 11 [1986] Crim. L.R. 258.
- 12 [1987] Crim. L.R. 334.
- 13 [1996] 2 Cr.App.Rep.128.
- 14 [1999] Crim. L.R. 416.
- 15 [2002] 1 Cr.App.Rep. 10.
- 16 [2002] 2 W.L.R. 1.
- 17 Fiona Leverick, ‘Is English self-defence law incompatible with Article 2 of the ECHR?,’ *The Criminal Law Review* (May 2002), pp.347–62.
- 18 *Ibid.*, p.361.
- 19 *Ibid.*
- 20 *Ibid.*, p.362.
- 21 F. Menghistu, ‘The Satisfaction of Survival Requirements,’ in B.G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht, the Netherlands, 1985), pp.63–83, at p.63.
- 22 Halûk A. Kabaalioglu, ‘The Obligation to “Respect” and to “Ensure” the Right to Life,’ in B.G. Ramcharan (ed.), *ibid.*, pp.160–81, at p.160.
- 23 Leo Kuper, ‘Genocide and Mass Killings : Illusion and Reality,’ in B.G. Ramcharan (ed.), *ibid.*, pp.114–19, at p.114.
- 24 D. Lasok, ‘The Rights of the Unborn,’ in J.W. Bridge et al. (eds.), *Fundamental Rights: A Volume of Essays to Commemorate the 50th Anniversary of the Founding of the Law School in Exeter, 1923–1973* (London, 1973), pp.18–30, at p.28.
- 25 Article 6(1) states that ‘every human being has the inherent right to life,’ one which ‘shall be protected by law.’ It also states that ‘no one shall be arbitrarily deprived of life.’ Non-arbitrary deprivation of life is recognized if it is in compliance with paragraphs (2)–(6) of the article.
- 26 Quoted in B.G. Ramcharan, ‘The Concept and Dimensions of the Right to Life,’ in B.G. Ramcharan

- (ed.), *op. cit.*, pp.1-32, at p.5.
- 27 B.G. Ramcharan, 'The Drafting History of Article 6 of the International Covenant on Civil and Political Rights,' in B.G. Ramcharan (ed.), *ibid.*, pp.42-56, at p.43.
- 28 Resolution 1983/43, adopted on 9 March 1983.
- 29 Quoted in J. Colon-Collazo, 'The Legislative History of the Right to Life in the Inter-American Legal System,' in B.G. Ramcharan (ed.), *op. cit.*, pp.33-41, at p.35.
- 30 *Diez Años de Actividades*, p.339. Quoted in J. Colon-Collazo, *ibid.*, p.41.
- 31 The Covenant accords the right to life a status higher than most of the other rights. Article 4(1) provides that, 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,' the right may be suspended (albeit only 'to the extent strictly required by the exigencies of the situation'). The right to life, along with the freedom from cruel, inhuman or degrading treatment or punishment, and freedom from slavery, are all exempt from this provision.
- 32 Article 4.