

## Hugh M Fitzpatrick Lectures in Legal Bibliography

### WAS MICHAEL COLLINS A TERRORIST – OR A HUMAN RIGHTS WORKER?

Reflections on law and revolution in Ireland, 1966-1922

This series of lectures has as their focal point the idea of the legal document. But what is such a document? What, for that matter, is a 'legal bibliography'? The students are told that it is showing off all that you need to pretend to have read in order to get a good mark in your dissertation. Scholars – the same, but this time for promotion not a first class degree. There is even a bibliography of legal bibliography: Armstrong and Knott's *Where is the law?*; Frank S Bae's *Searching the Law*; William Putnam's *Pocket Guide to Legal Research*; and (my favourite title) Robert Berring's *Legal Research Survival Manual*. But do these books even exist? I once asked a colleague for a book he had cited in a piece. 'Oh it is in Brazil' he said. Then when he promised to bring it over on his next trip, I think he said it had fallen out of the airplane on the way over. In fact despite what the catalogue said it had never been published. It didn't exist. However it was now cited. It would creep into the bibliographies. It didn't need to be really there to be there. I felt the lesser scholar for not having said I'd read a book I knew had never been written.

This offends the legal if not the post-modern mind. For, above all, legal documentation deals in truth. Judgments 'find facts' the way believers 'find God' – as truths outside themselves that they encounter and must then acknowledge. Legislators give administrators powers only where they are 'satisfied' or 'reasonably belief' or are 'of opinion' that certain facts exist - that an individual is truly an 'illegal immigrant' or that a supplicant for welfare has cheated in his or her application; or that a person presenting as ill is 'in fact' able to work. While juries are not told to strive for the impossibility of absolute knowledge, they are asked to find facts 'beyond reasonable doubt' before they consign those brought before them to a life of even greater misery than they have already endured.

The lynch-pin of truth-finding in law is rightly thought to be cross-examination in court and the written depositions that can precede such an adversarial grilling. But lying further back in the legal system, less dramatic for sure, but with a much wider reach, is the legal document essential to the whole ecosystem of truth-assertion upon which law depends, the affidavit or witness statement. As one of the law dictionaries puts it, 'an affidavit is based upon either the personal knowledge of the affiant or his or her information and belief. Personal knowledge is the *recognition* of particular facts by either direct observation or experience.' These are of course used in legal proceedings but are not so restricted. Witnessed by a local functionary - a public notary; a commissioner for oaths; perhaps a duly authorised solicitor – and backed by an oath or an affirmation, they are as close to declarations of 'this is how it really is' as any person can get, state-organised ejaculations of honest assertion of truth.

My lecture today takes as its starting point two such witness statements. The first was signed and witnessed on 4 June 1949, the second on 12 December 1957. Each is to be found in the archives of the Bureau of Military History 1913-1921, that excellent initiative of the Military and National Archives. This collection of 1,773 witness statements, 334 sets of contemporary documents,

42 sets of photographs and 13 voice recordings were collected by the State between 1947 and 1957, in order to gather primary source material for the revolutionary period in Ireland from 1913 to 1921. As its excellent web site makes clear, the Bureau's official brief was 'to assemble and co-ordinate material to form the basis for the compilation of the history of the movement for Independence from the formation of the Irish Volunteers on 25th November 1913, to the 11th July 1921' (report of the Director, 1957).<sup>1</sup> Locked away for over forty years, these documents are now accessible to all. And one of its very first witness statements was the first of the two I have mentioned, that taken in June 1949: from Dr Bridget Lyons Thornton, 'Niece of Joseph McGuinness, Sinn Fein TD for Longford, May 1917,' as she is described, with an address of 41 Fitzwilliam Place, Dublin.

I remember that address very well. We used often to visit Aunty Thornton (as we called her) there when we were children. Then later when she spent the last years of her life with my Uncle Gerard and Aunty Teresa, in Donnybrook. An old woman, slightly crotchety, difficult politely to escape from, a memory from noisy Christmas's with other aged relations in Church Street Longford: my Grandmother Rose; deaf Hubert Wilson with his loud voice and his habit of speaking in Irish; Aunty Bee with her transparent rather dishevelled Santy Claus before Maureen Potter and then Morecambe and Wise. Had Aunty Thornton really ever been a doctor, a woman in Ireland in the 1920s? To us her fame lay in her having had Norman Scott (the man who brought down Jeremy Thorpe) as a neighbour in the early 1970s. These were all just old people, unchanging and never-changed realities of our youthful lives, our casualness about who they were making casualties of what they had once been.

This witness statement tells another story. When the Easter Rising was known to have broken out, Aunty Thornton told of her, together with Tom Bannon (a distant relation, I should say, of my sister-in-law Carmel, and her brother James Bannon, now a TD) and her uncle, Frank McGuinness (brother of the soon-to-be-renowned Joseph) having 'motored up to Dublin ... to take part in the Rising'. Having negotiated road blocks, 'hiding in doorways to escape the snipers' bullets' and then through knowing the right password, they managed to get right into one of the main areas of insurrection, the Four Courts, earlier seized by Commandant Ned Daly. Astonishingly the woman who was to go on to be my grandmother Aunty Thornton's cousin Rose - who can have been hardly more than a child - was already there with another uncle Joe McGuinness, though Aunty Thornton records she 'fell and cut her hands with a lemonade bottle she was carrying, so she was going round all the week with bandaged hands. She was then detailed for dispatch work'. Wandering around for a while, some of the girls 'lay down in ermine for a few hours' rest. Then came her 'most vivid recollection', this young girl only a year out of the Ursuline Convent in Sligo: A messenger came to where they were. 'Two girls were needed for a task. Someone said "call that fat girl that came up from the country".' The Witness Statement goes on: 'I resented the slight but my patriotism asserted itself.'

Aunty Thornton went on to play a substantial part in revolutionary activities, and it was she who later claimed to have introduced Michael Collins to the Kiernan family in Granard when Mick was in the county campaigning for her uncle Joe, interned in Lewes but standing for Sinn Fein in the now famous by-election of 1917. I have by my desk as I write this a silver flask, with an inscription on it 'To Larry from Sean'. This was given to my grandfather (this time on my mother's side) Larry

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<sup>1</sup> <http://www.bureauofmilitaryhistory.ie/about.html> (last visited 14 May 2013)

Kiernan as a wedding gift by the famed 'blacksmith of Ballinalee' General Sean MacEoin IRA director of operations in North Longford during what we all know of now as the 'War of Independence.' There were good reasons for such a gift as his witness statement (the second one I have mentioned, signed in 1957) makes clear - for his men had very nearly ruined my grandfather's life and livelihood. At the height of the insurgency an unpopular local district inspector Kelleher had been 'condemned to death' by the IRA Brigade Council, with the sentence to be executed on the evening of the funeral of Terence MacSwiney, Mayor of Cork. D I Kelleher spent time in my grandfather's hotel in Granard and was there on the night he was to be shot. MacEoin recalled that 'The owners of this hotel ... were friendly and we did not want to execute Kelleher in their house'. But my Grandfather had some days before turned down an IRA request to refuse to let Kelleher drink in the place and now the District Inspector was not leaving at the expected time. Impatient, the IRA men entered, saw Kelleher coming down stairs, saw him enter the bar and begin to socialise with prominent Sinn Feiners, and promptly shot him dead. Inevitably the men drinking with Kelleher, my grandfather among them, knew they were bound to be implicated in the killings and sure enough he was later arrested and held for a time on suspicion of murder and conspiracy to murder.

But worse was to follow. My Grandfather was released. But five days after the shooting, on 4 November 1920, the Black and Tans entered Granard. This is how what happened next was described, by a reporter (Hugh Martin) from the *Daily News* who visited shortly afterwards:

I found the town desolate, half deserted, and largely in ruins. Some of the ruins were still smoking. Eight of the largest places of business, together with the Town Hall, had vanished, leaving no trace but piles of rubbish. Six other buildings were badly damaged ... Granard had been coolly, scientifically, methodically gutted by men who from first to last remained under some sort of discipline.<sup>2</sup>

The British Chief Secretary Sir Hamar Greenwood afterwards explained to the Commons that the British forces had left the town just before all these fires mysteriously started, a coincidence which was 'only one of the many marvellous things that occur in Ireland' as he was to say a few days later when defending another governmental action.<sup>3</sup>

Sean MacEoin recounts that Michael Collins called him up to Dublin and gave him a 'very severe cross-examination and interrogation as to the reasons for the shooting in the Granard hotel, and the necessity for it'. Hardly surprising given that it was the home of his girlfriend Kitty. My Grandfather Larry was the one boy in a family in which he had seven sisters, and both parents were dead - it was probably through their guardian Andrew Cusack that they became sympathetic to Sinn Fein, with three of the girls (including Kitty) having gone to Pearse's St Ita's school. (A Dr Brian Cusack is another ancient face from my youth, a seemingly giant-bearded man whom we used as children to visit in Rush - he had been a member of the first Dail, and lived on until 1973 (dying aged 90).) So here were two sides of my family, successful traders in two decently prosperous towns - Longford and Granard - whose lives took this radical turn in the second decade of the 1900s but following which they and their descendents reverted quickly back to the expected norm, the solicitors, doctors, farmers, hoteliers, shop keepers that we more or else are, on both sides. The revolutionary frenzy came and went in our family. In these we were not alone, experiencing this

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<sup>2</sup> Quoted by T P O'Connor in the House of Commons: see H C Debs, 8 November 1920, col 830.

<sup>3</sup> H C Debs 11 November 1920, col 1343.

mystery of radicalisation, the shift from extremism to violent extremism as it would be called today if we were Moslem and lived in England. The great historian of Ireland, Professor Roy Foster has devoted his recent James Ford lectures to 'Making a Revolution in Ireland' – so perhaps from his authoritative general remarks I will be able to unlock this minor mystery of my family's past, 'why it came about?' even if not 'why it went away?'.

But were we terrorists? Was Michael Collins? Two points of interest emerge from MacEoin's witness statement. First the decision to condemn Kelleher to death was certainly taken locally but it had then to be ratified by what he called GHQ (General Head Quarters) before it could be acted on: this was where the instruction to wait until MacSwiney's death (and funeral) had come from. (The Mayor of Cork had still been on hunger-strike when the application had gone up to Dublin.) And second, there was this almost throwaway remark from the General about his routine at the time he was orchestrating IRA activities in Longford. Describing where he was when news came from Granard of Kelleher's killing:

On this day, I was holding a court in Finea, where the Volunteer police had a number of publicans summoned for breaches of the Licensing Act. The, cases were all called, and instead of bearing any evidence on the various cases, I warned the publicans against any breach of the law, that even if the R.I.C. were not available to enforce it, that we would do so, and that I was letting them off with a caution. This was hailed with cheers...

Clearly this was not an organisation devoted to violence of the sort that we now think of as terrorist - that preoccupation with the intentional or reckless killing of civilians or non-combatants in order to communicate some kind of political message that we think of today as quintessential terrorism: the attacks on the Pentagon and the World Trade Centre in September 2001; the assault on the Munich Olympics before that; the seizure of industrialists by organisations like Baader-Meinhof gang in Germany in the 1970s or the Tupamaros in Uruguay the decade before. A far cry, too, from Omagh in 1998, Enniskillen in 1987, Birmingham in 1974. Targets were identified by a process of deliberation, and then sanctioned by head office. Shadow systems of justice and administration were in place, rivalling those of the central power and offering constructive alternatives to collusion.

Maybe I am coming upon an answer to at least a part of this lecture's question, 'Collins: terrorist or human rights worker?' On the strict criteria of the scholars John Keegan and Bartle Bull,

The basic formula to define civil war is simple: the violence must be "civil", it must be "war" and its aim must be the exercise or acquisition of national authority. The "civil" part means the struggle must take place within a national territory, largely between the people of that territory, and must involve popular participation. A civil war also must be a war – what the dictionary calls a "hostile contention by means of armed forces". Does this require formal battles and campaigns, or does factional or regional struggle suffice? For us the baseline is a minimum degree of organisation, formality and identifiability of combatants. A civil war also requires leaders who say what they are fighting for and a public that understands what it is all about – the divisions, the people and the goals. The third principal condition, authority, is equally important. The point of the violence must be sovereign rule: combatants must be

trying to seize national power or to maintain it. Revenge, rights, mass criminality and economic gain are not sufficient motives, individually or severally.<sup>4</sup>

These authors thought that 'to pass the test of posterity and achieve historical status as a civil war is rare.' They came up with only five clear-cut cases: the English (1642-49), the American (1861-65), the Russian (1918-21), the Spanish (1936-39) and the Lebanese (1975-90).' They might not have been sure about the Irish war of 1919-1921 (or for that matter what we routinely call the civil war that followed), but I would suggest that it clearly fits the bill, especially if we recall that it was a battle for power over one large part of a then unified constitutional entity, the United Kingdom of Great Britain and Ireland. 'Identifiability' would perhaps be the single issue - but did Collin's men need to offer themselves as human sacrifices to superior fighting power in order to prove that their struggle was a recognisably superior one?

The Irish war of independence was I would say a civil war. Collins led the Irish side. Does it therefore follow that he cannot have been a terrorist? The first answer is a confident 'yes' – Collins was a civil warrior, a freedom fighter, more a George Washington than an Osama Bin Laden. But it is not this simple. Consider the Black and Tans and their sacking of Granard: surely a classic example of terrorism - here was violence as a communicative act, a reprisal as old as warfare - a message to the locals - 'You will suffer grievous harm if you are ever even thought to be harbouring our enemy'. The Germans did it in the Second World War, and the British forces did it long after they had engaged with Collins, as they fought a largely losing battle to keep their Empire in the decades after 1945. But if we cannot call Collins a terrorist simply because he was engaged in a civil war, then it must equally follow that the British forces cannot have been terrorist whatever they did, simply because they were British forces. The sacking of Granard and burning of my Grandfather's hotel for one example. Take another atrocity fifty-two years later. On 28 December 1972 a car bomb killed two innocent teenagers in Belturbet Co Cavan, and by cruel irony wrecked the hotel owned and run by my uncle Kevin, son of Larry Kiernan. At the end of last year, on the fortieth anniversary of this terrible event, there was a mass of commemoration for the victims, and renewed calls for an enquiry into who was responsible.<sup>5</sup> We don't know of course – but could it be any the less an atrocity if it had been perpetrated by the forces of the British state rather than an independent subversive group?

We now reach the nub of the difficulty so far as terrorism is concerned, and it is a simple matter of language which has two very large consequences. Terrorism is not something certain people are; it is something that any group can do. It is a method of violence, not a category of person. In war just as in civil war the combatants deploy a variety of violent methods to achieve their goals - these might include aerial bombardment of enemy positions for example, or full-scale invasion - the range of techniques of violence that are capable of being used is largely contingent on the resources available to each warring faction. Now the first effect that seeing terrorism in this way has is the following. Terrorism – ie the use of violence as communication; the killing of persons or damage to property not for its direct military value but for the effect it has on the other side, an effect that assists in securing the goal of its deployer – terrorism in this sense can be used by the

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<sup>4</sup> *Financial Times* 19 November 2006 <http://www.ft.com/cms/s/2/d52ab816-77eb-11db-be09-0000779e2340.html#axzz2TQtxQzZB> [last visited 16 May 2013].

<sup>5</sup> See 'Renewed calls for Inquiry into Belturbet Bombings' <http://www.rte.ie/news/2012/1230/360768-belturbet-bombing/> [last visited 16 May 2013].

powerful as well as by the weak, by a state as well as by a sub state actor, by – as I say – any faction in a violent struggle. Sure this includes Birmingham, Munich and Omagh – but it also inevitably embraces the sacking of Granard and – to take a couple of provocative examples – the carpet bombing of German cities towards the end of world war two; the dropping of not one but two atomic bombs on Japan in 1945.

Mentioning these last two takes me to the second large consequence, and it is a difficult one quickly to grasp. When we view terrorism in this way, as a method of political violence available to all rather than a description of just one group (as opposed to any other) in any given politico-military struggle, we need to try and avoid assuming that because it is *rightly* called terrorism it must *therefore* be wrong. To engage in ‘terrorism’ as a method of violence is not necessarily to act wrongly. The modern assumption that all terrorism is wrong and that it can only be done by subversives rather than by states is a trick of the mind, achieved (as I have written at length and often elsewhere<sup>6</sup>) by the interest various states have had (and Israel have been the drivers and most brilliant diplomatic exponents of this) in successfully linking their political opponents not to any issues linked to justice and dispossession but to some large-scale virus or contagion of violence marked ‘international terrorism’ which has to be resisted – and which it is *right* to resist – at all costs. ‘Terrorism always bad’ equals ‘counter-terrorism always good’ – that is the prize these states are after, whether it be a covert assassination here, an invasion there, a mortar attack from the air, a naval bombardment - not at all terrorist because they are counter-terrorist.

Now it happens that I think acts of communicative violence when done by subversives that do nothing else, in other words that conduct themselves in isolation from other forms of military and political engagement are invariably wrong because provably ineffective. And also I have to say I find it hard to think through an example of such isolated violence as this which would be morally defensible given the damage wrought on innocent lives, or at least those who can never be regarded as plausibly guilty.<sup>7</sup> But it follows from my approach that to call the bombing of Hiroshima and Nagasaki acts of terrorism is not to say they are wrong. It sets up rather than forecloses that debate. The same for those acts of terrorism committed by allied forces acting covertly in occupied Europe during the war. Or even the bombings of German cities, terrible though they were. And going back to Michael Collins, the killing of D I Kelleher was not an act of terrorism in the way in which the sacking of Granard was - he was a serving police officer aggressively discharging his duty at a time of extreme civil strife. But if and when Collins went further than the murder of agents of the Crown, persons clearly implicated on one side in the British civil war, or secessionary war, in which he was such an active protagonist, if and when this happened (either then or – later – in what after 1922 had become Northern Ireland) and for that reason we are right to call him someone who committed or authorised acts of terrorism, the question of justification necessarily remains.

So we can leave the issue of whether Collins was or was not a terrorist with a shrug of the shoulders and the reply that it is not a very interesting question, that what matters is not this absurd label but whether the violence to which he resorted (which may indeed have extended to ‘acts of terrorism’ among other mayhem) was right or wrong. Was he then ‘a human rights worker’? Of course the question is deliberately obtuse: there was no NGO, membership of which can settle the

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<sup>6</sup> See in particular my *Terror* (Faber and Faber, London, 1991).

<sup>7</sup> The useful idea of Igor Primoratz: see his ‘What is terrorism?’ (1990) 7 *Journal of Applied Philosophy* 129

issue, nor any Strasbourg court to which we can check whether or not he took his case. The category was not a familiar one in Granard or west Cork: the Kiernan girls had no Amnesty to join or Human Rights Watch lads to flirt with. The question is a useful one, though, for its bearing on the issue we have just left hanging: the legitimacy of politically-motivated violence. For human rights is no pacifist creed. Its legal shape is formed by an acknowledgement that violence may in some situations be permitted. The Universal Declaration of Human Rights, agreed in 1948, and generally accepted as the foundational document so far as human rights is concerned, sets out in its Preamble various reasons why the protection of human rights is so important. And one of these is as follows:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

The International Bill of Rights agreed in 1966 is composed of two documents, but one article they share and attach such importance to that the drafters put it right at the start:

Article 1.1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Famously Nelson Mandela was a terrorist and one who because of his acceptance of the necessity of violence was rejected by Amnesty International as a 'prisoner of conscience'. It is hard to see how this fits with the broader set of values that underpin the human rights movement and which are reflected in the international documents to which I have referred. These are the documents that should ultimately underpin the question which I have posed for tonight: Was Michael Collins 'compelled' to have recourse as a 'last resort' to violence as a 'rebellion against tyranny and oppression' and in pursuit of his people's 'right of self-determination'? If we believe that there is more to truth than the simple question of who wins, then I think this is not a bad entry point into what discussion of what really matters, and better by far that the two slogans 'terrorist or human rights worker' with which I have lured you here tonight, on – as you can now see – something of a false prospectus.

Conor Gearty

20 May 2013