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LEARNING THE LESSONS FROM THE CUTTING EDGE: THE MAU MAU CASE

INTRODUCTION

THE KENYA EMERGENCY

1952 State of Emergency on the Kenya Colony Declared.

1953 British Army deployed.

General Erskine given full operational control of the Army and all Kenyan security forces, including police, special branch and the Home Guard.

June 1954 Villagisation. 1 million people displaced and put into quasi-internment in guarded villages.

1955 Pipeline detention system and "screening" fully operational. At least 150,000 people interned.

1957 Authorisation of the dilution technique.

June 1957, Eric Griffith-Jones, Kenyan, wrote to the Governor, Sir Evelyn Baring, the mistreatment of the detainees is "*distressingly reminiscent of conditions in Nazi Germany or Communist Russia*". In order for abuse to remain legal, Mau Mau suspects must be beaten mainly on their upper body, "*vulnerable parts of the body should not be struck, particularly the spleen, liver or kidneys*", and it was important that "*those who administer violence ... should remain collected, balanced and dispassionate*". In a separate memo to the Governor he also reminded the Governor that "*If we are going to sin, we must sin quietly*."

3 March 1959 Hola Incident.

November 1959 State of Emergency Ends.

1963 Kenyan Independence.

REVISIONIST HISTORIES

Prof Caroline Elkins (Harvard)
Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya Henry Holt/Jonathan Cape (2005)
http://history.fas.harvard.edu/people/faculty/elkins.php

Prof David Anderson (Oxford/Warwick)
Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire, Weidenfeld & Nicolson, London. (2005)
http://www2.warwick.ac.uk/fac/arts/history/people/staff_index/anderson/

Dr Huw Bennett (Kings/Joint Services Command and Staff College)

Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency (Cambridge: Cambridge University Press, 2012).
http://www.aber.ac.uk/en/interpol/staff/academic/bennetthuw/

Central allegations: London i) knew of widespread and systematic abuses, ii) sought to cover up the excesses of the colonial regime and was complicit in the interference in investigations and prosecutions and iii) ultimately authorized the use of systematic violence in the detention camps post 1957.

THE TEST CASE AND THE HANSLOPE ARCHIVE

2003 Mau Mau organisations unbanned in Kenya.

2003 Leigh Day approached by John Nottingham.

2005 New Histories Published.

2009 Five test cases issues with support on Kenya Human Rights Commission.

2010 Hanslope Archive discovered – the FCO's "guilty secret". Rolling disclosure of 17,000 documents (January – April 2012) prior to strike out hearing.

http://www.theguardian.com/uk/2012/apr/18/sins-colonialists-concealed-secret-archive

http://www.bbc.co.uk/news/uk-13336343

David Anderson wrote: *"Most incriminating of all, the documents showed that responsibility for tortures in the detention camps went right to the top – not only sanctioned by Kenya's Governor, Evelyn Baring, but authorized at Cabinet level in London by Alan Lennox-Boyd, then Secretary of State for the Colonies in Macmillan's government." http://www2.warwick.ac.uk/knowledge/culture/maumau/*

The ongoing issue of the "Special Collections".
http://www.theguardian.com/politics/2014/jan/22/british-academy-members-concern-secret-archive-william-hague

2011 Summary judgment/Strike out hearing re. Liability

2012 Strike out hearing: Limitation

June 2013: Settlement announced

LIABILITY : IS BRITAIN LIABLE FOR COLONIAL ATROCITIES?

Judgment of McCombe J. 21 July 2011:

"The FCO's case (in very broad outline) is that any claim that the claimants might have had could only have been brought against the direct perpetrators of the alleged assaults and/or their employer at the time, the Colonial Government in Kenya, and not against the British government."

R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs **[2006] 1 AC 529**

5 formulations re liability:

1) Public International Law: Transfer of liabilities of the Colonial Government on independence?

Para 97…."the claimants have not been able to establish with any clarity a sufficiently "extensive and virtually uniform" rule of customary international law to constitute it as the basis of a claim under the common law of England."

2) & 3) Liability of the UK government for "having encouraged, procured acquiesced in or otherwise having been complicit in "a tortious system": (a) through the British Army; (b) through the Colonial Office.

Para 128: "The materials evidencing the continuing abuses in the detention camps in subsequent years are substantial, as is the evidence of the knowledge of both governments that they were happening and of the failure to take effective action to stop them."

Paras 132 & 133: "The existence of a Colonial Government does not preclude, in my view, a separate and individual role for the paramount Government of the country whose colony a particular territory is. … Each is a distinct legal entity capable of forming such a common design. In the present case, the evidence so far available suggests that this colonial power played a distinctly "hands on" role in the management of the Emergency. It was not standing aloof, merely offering advice and assistance when the local government asked for it…. What I am trying to say is that I can see no place for some form of *Salomon v Salomon* rule precluding the viability of the claimants' causes of action here in respect of the role played by the UK Government on its own behalf in its separate and distinct interest as colonial power.

4) Direct liability for the "Dilution Technique" - The July 1957 "Instruction".

Para 111. "However, (while making no final decision on the point) short of an act under the constitution, it seems to me that the Secretary of State acted as one of Her Majesty's Ministers in the United Kingdom."

5) Negligence: failure of Govt to take steps to put a stop to systemic torture.

Para 154: "In my judgment, it may well be thought strange, or perhaps even "dishonourable", that a legal system which will not in any circumstances admit into its proceedings evidence obtained by torture should yet refuse to entertain a claim against the Government in its own jurisdiction for that government's allegedly negligent failure to prevent torture which it had the means to prevent, on the basis of a supposed absence of a duty of care. Furthermore, resort to technicality, here the rules of constitutional theory (viz. *Quark* and the notional divisibility of the Crown)[1], to rule such a claim out of court appears particularly misplaced at such an early stage of the action."

LIMITATION: IS A FAIR TRIAL POSSIBLE?

s.33(3) Limitation Act 1980

> 33. Discretionary exclusion of time limit for actions in respect of personal injuries or death.
>
> (3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to-
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 [by section 11A] or (as the case may be) by section 12;
>
> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

Judgment of McCombe J. 5 October 2012:

1. FCO conceded primary allegations of torture.

2. FCO conceded reasons for delay were excusable given political factors in Kenya (and new historical scholarship.)

3. Central issue: was a fair trial possible given that witnesses from the highest echelons of government and the military are no longer alive, in particular, in determining the liability of GUK v. GoK?

Documents:

Available papers included 2000 pages of War Council and Security Council official minutes;
5,400 pages of War Council memoranda;
4,000 pages of Intelligence Committee reports;
2,000 pages of Emergency Committee reports.

Only 40% of the Hanslope material has been inspected at the date of the hearing.

Witnesses:

FCO – witnesses no long available include three Secretaries of State for the Colonies (Lyttleton, Lennox-Boyd and Macleod), the three Commanders in Chief (Erskine, Lathbury and Tapp), the Governor for the bulk of the emergency period (Baring), the principal Ministers and Civil Servants of the Colonial Administration and the principal Civil Servants in the Colonial Office.

Vicarious liability

JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust **[2012] EWCA Civ 938**

Para 80: "The combination of these two developments of the law show that the idea that we learnt as students, that (subject to very limited exceptions) vicarious liability for a tort only arises where the primary tort is committed by an employee within the scope of his employment, is now far too narrow. The law has progressed well beyond liability solely for employees doing precisely what they were employed to do and beyond the acts and defaults of employees under a contract of service."

Para 86. "Turning to the factual issues arising, it seems to me that these can be fairly and cogently resolved largely by reference to the documents. The relationship between the perpetrators and the UK government does not depend upon oral evidence and liability would not be dependent upon knowledge of the defendant or an intention on its part to commit torture…. The answers to those questions, to my mind, turn principally on documents not the evidence of witnesses."

Joint liability for creation of a system of torture and ill-treatment

Para 95: "I have reached the conclusion, however, that a fair trial of this part of the case does remain possible and that the evidence on both sides remains significantly cogent for the Court to complete its task satisfactorily. The documentation is voluminous, as I have said already, and the governments and military commanders seem to have been meticulous record keepers. The Hanslope material has filled gaps in the parties' knowledge and understanding and that process is still continuing. I am not satisfied that the defendant has adequately taken into account the number of potential witnesses, presently identified or otherwise, at levels of government and the army lower than the politicians, senior civil servants and generals, who might be able to supplement its case on the documents."

Negligence

Para 108: "These documents that I have summarised above convince me that there is an amply sufficient documentary base to test what was known in London about excessive use of force in the camps throughout the period of the emergency and what London's reaction to that knowledge was for the purpose of resolving this aspect of the pleaded case. On the basis of that material, if necessary supplemented by the witness evidence that is likely still to be available (either in statements or orally in court), I am satisfied that a fair trial of any question of breach of duty in respect of each of the surviving claimants is possible.

SETTLEMENT – June 2013

Three elements:

1. Statement of regret by Foreign Secretary and High Commissioner.
2. Memorial in Nairobi to the victims of torture.
3. Compensation for 5,288 victims.