

Killing with No Punishment: Police Violence and Judicial (In)justice

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Abstract

This article offers a critical reading of the Limbu Case that took place in 2009 in Hong Kong. The Limbu Case was about an ethnic Nepalese named Dil Bahadur Limbu who was shot dead by a police constable on a hillside, which resulted in controversies around issues such as excessive police use of force and discretionary policing in Hong Kong. In the coroner's inquest (court case no.: CCDI298/2009) regarding Limbu's death, a verdict of lawful killing was reached by a jury of five. In other words, the killing was defined as a permissible killing. Drawing attention to the process of questioning "reasonableness" of the killing, I attempt to shed light on the ambiguities of the coronial system in Hong Kong which results in a missed opportunity to prevent future deaths. In other words, this article uncovers how the state is unable to live up to its promise to protect people's right to life.

Keywords: Coroner's court, lawful killing; police use of force, policing, right to life

“It’s my first time to realize that our society condones violence as long as the victims are not considered to be valuable people. If you are a homeless person, a person who is marginalized, in fact, our society allows violence to happen to you. No matter how violent it is to take a life, we remain silent,”¹ said Fermi Wong². (translated by the author)

(Lai, 2017, p. 361)

Introduction: The Limbu Shooting (林寶案)

It was the afternoon of 17th March 2009 when the police received a complaint from a woman that a man was urinating at a hillside in Ho Man Tin, opposite to Lok Man Sun Chuen. According to newspaper coverage, a police constable arrived shortly after he had been assigned to handle the nuisance complaint on his own (Lee, 2009a; Lo & Tsang, 2009). The police constable met the man the complainant had described, Limbu Dil Bahadur (林寶), at the hillside, a Nepalese. Only later would the newspapers reveal that he had actually been born and raised in Hong Kong (Lee, 2009b; Lo, 2009). Ka-ki Hui, the police constable, stopped Limbu and requested him to present identification, but Limbu answered “No” to Hui and started leaving (“Gun cop tells of failed attempts to subdue attacker,” 2009). The police constable claimed that he put his hand on Limbu’s shoulder, but Limbu hit the police constable in the face and knocked his sunglasses off his face (Chiu, 2009; “Gun cop tells of failed attempts to subdue attacker,” 2009). The police constable tried to subdue the deceased by withdrawing his baton to guard against Limbu, and the fighting continued (Chiu, 2009). Yet, the police constable argued that using the baton had no effect on subduing Limbu and pulled his pepper spray to subdue the deceased. After allegedly using almost the whole of the spray can (the inquest revealed that there was half of a bottle of pepper spray left), only a small amount got into the deceased eyes, and the deceased used some water to wash the pepper spray off his eyes (“Gun cop tells of failed attempts to subdue attacker,” 2009). Meanwhile, Limbu picked up a wooden chair and started attacking Hui again. “Let go of the weapon,” Hui shouted several times, but Limbu smashed the wooden chair against a tree, and the chair broke into pieces (“Gun cop tells of failed attempts to subdue attacker,” 2009; Man, 2009). The police constable then forwent his baton and pulled his gun out of the holster because he feared that he would be killed (Lau, 2009; Tsang, 2009). “Police, do not move, or else I will shoot,” Hui warned Limbu in Cantonese (Lau, 2009; Lee, 2009c). The police constable tried to keep a distance from Limbu, but then the police constable fell into a “U shape drainage ditch” which caused him pain and a numb feeling (Tsang, 2009). However, Limbu did not stop attacking Hui with the broken chair even after he had fallen down. At the same time, Hui felt his life “was threatened,” and he fired a shot into Limbu’s direction (Lau, 2009; Tsang, 2009). They were both frozen for around two seconds. However, after that, the attacker started attacking the police constable again, according to the police constable when he testified in court (Lau, 2009; Tsang, 2009). The police constable felt that he could not avoid the attack, so he fired a second shot (Lau, 2009). While the police constable’s arm and back were injured, the bullet entered Limbu’s head, and he was consequently sent to hospital. Six hours after the shooting, in the evening on the same day, Limbu passed away at Queen Elizabeth Hospital (Lee, 2009a; Lo & Tsang, 2009).

¹ Original text in Chinese: 「我首次意識到，原來我們的社會縱容暴力，只要受害者不被認為是有價值的人。如果你是露宿者，一些被視為邊緣人士的人，其實我們的社會允許暴力在你的身上發生，哪管奪走一個生命是非常暴力的事，我們依然保持緘默。」

² Fermi Wong is the founder of Hong Kong Unison, a non-government organization serving ethnic minorities in Hong Kong. She offered assistance to the family of the deceased in the aftermath of the shooting.

The Limbu Shooting is a controversial incident in Hong Kong. One of the reasons is because it is a police shoot-to-kill incident. In Hong Kong, it is not every day that police need to pull their guns to assist them in discharging their duties. In the four years before the Limbu Shooting, five cases of police opening fire were recorded, and two out of the five resulted in casualties of the suspects (“Being Attacked with a Chair”, *Ming Pao*, 2009). On top of that, the shooting provoked the hitherto most intensive street protest in Hong Kong, composed of its ethnic minority community, demanding an apology and an impartial investigation into the shooting (Lai, 2017; Lam, 2009; A. Wong, 2009). This reflects the worry about whether the Hong Kong Police Force can uphold the principle of impartiality since a person they identified as a part of the community was killed by a policeman’s gun.

All in all, the Limbu Shooting is a controversial case in the context of Hong Kong, in particular, concerning the politics of inter-ethnic relations in Hong Kong, human rights (the right to life in this case), and policing in Hong Kong. To my knowledge, there has not been any in-depth academic analysis of the shooting. I genuinely believe that this academically undiscussed case is worth looking into in regard to different concepts and forces were intertwined in tension in it. Moreover, by interrogating this police killing incident, I hope it can raise questions which people in Hong Kong feel relevant. Especially since June 2019, the city has been experiencing a challenging time triggered by the Hong Kong SAR Government’s attempt to introduce the Extradition Bill, since then having been passed. The elements of human rights and policing, especially police use of force, in the Limbu Shooting case can shed light on what we might be facing in today’s Hong Kong.

Legal doctrine has always occupied a hegemonic position in the discursive process in our society (R. Coombe, 2001; R. J. Coombe, 2010; Erni, 2010, 2019). While we pay attention to the verdict of a court case, we seldom look into what happens in the courtroom. However, it appears that sometimes we defer to the legal doctrine without thinking. In the Limbu inquest, the verdict of lawful killing was reached, justifying the police officer’s use of lethal force. People who have been following the incident might feel uncomfortable about a life taken lawfully, without any consequence. The Limbu Shooting offers an opportunity to review our right to life and how it is protected as promised by the state. By therefore taking a closer look at the dynamics in the courtrooms, I believe this will give us more insight into how the right to life is protected in reality.

I am here discussing an ambiguity in the coronial system. The ambiguity rests on the purpose of the inquest and the coronial system’s understanding of the state’s obligation to the people’s right to life. The ambiguity, I argue, leads to a missed opportunity for the state to review what can be done to prevent future deaths. Last but not least, I suggest that the accountability construction through ambiguity helps us to comprehend the maintenance of legitimacy.

The Limbu Shooting in Courtrooms

There were three court cases regarding the *Limbu Shooting* in the coroner’s court (CCDI 298/2009), high court (HCAL 85/2010) and district court (DCPI 570/2012) respectively. In this article, the coroner’s court case and the high court case will be discussed. The reason for having the district court case excluded from this article for analysis is that it did not go through trial. The case is a personal injuries action (DCPI) case, in which the widow of the deceased, Sony Rai, sought compensation for the deceased’s death from the police commissioner and the police officer who had killed the deceased. However, according to the lawyer who represented the widow’s party, the parties reached an out-of-court settlement, which explains why the case

was not heard in the courtroom. For this reason, only the coroner's inquest summing-up and the judicial review judgment are analysed regarding the juridical response to the Limbu shooting.

With the direction given by the coroner, upon applying the necessity and proportionality tests, the jury of five reached a verdict of lawful killing after 76 days of inquest. It dismissed the other two verdict options of manslaughter and open verdict. Yet, the widow was unsatisfied with the outcome of the inquest. Thus, she applied for a judicial review (HCAL85/2010), aiming to quash the verdict of the coroner's court. The judicial review application, however, was dismissed by the judge in the high court. After the failure in the high court, the widow's party went for a personal injury action case in district court (DCPI570/2012).

I was able to obtain a) the summing-up of the coroner's inquest delivered by the coroner to direct the jury to come up with a verdict and b) the judgment made by the judge in high court and the reasoning behind why the application filed by the widow's party failed. The coroner's inquest looked into the details causing the death of Limbu. The judicial review application in the High Court was an attempt to quash the verdict of lawful killing made by the jury at the end of the coroner's inquest. Her counsel challenged the coroner's inquest based on three points, that the Coroner was wrongly

1. "refusing to order the Commissioner to disclose documents or parts of documents in respect of which the Commissioner had claimed public interest immunity;"
 2. "refusing to require the jury to make a narrative (as opposed to short form) verdict; and,"
 3. "refusing to exclude evidence of Limbu's previous convictions for violent offences from the jury"
- (Rai v. William Ng, Esq., The Coroner of Hong Kong and Others, 2010, para. 12)

Narratives of the two documents will now be further examined in order to enter the intertwined discussion of human rights, law and policing.

The European Convention of Human Rights Article 2

The occurrence of the coroner's inquest in the aftermath of state killing cases like the Limbu Shooting is a realization of the state's obligation to the European Convention of Human Rights Article 2 (hereafter "ECHR Article 2"). The state is obliged to use an independent inquiry body to investigate deaths that state agents took part in. It is an effort made by the state to uphold its promise to safeguard its citizen's right to life. ECHR Article 2 states:

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.

ECHR Article 2 is known as the “right to life article”, which is specially dedicated to the protection of people’s right to life – a foundational right granted to make the enjoyment of other rights possible in the first place. Section 2 of the article identifies situations in which action resulting in loss of life, whether or not death is intended, can be justified and considered to be lawful (Crawshaw, 1991; Jachec-Neale, 2010). In other words, although it is the spirit that our right to life has to be safeguarded, there are exceptions to the right to life, meaning that the right to life is not absolute (Wicks, 2010). As a result, the state has an obligation to protect our right to life, to make sure that our lives will not be taken away arbitrarily. In Hong Kong, the elements of ECHR Article 2 are included in Basic Law Article 28³ and the Hong Kong Bill of Rights Article 2(1)⁴. Therefore, the state has the obligation to protect our people’s right to life in Hong Kong.

The state’s obligation to protect the right to life can be divided into negative obligations and positive obligations (Mavronicola, 2017; A. R. Mowbray, 2004; Van Der Wilt & Lyngdorf, 2009; Wicks, 2010). For the negative obligation of the state, state actions are not allowed to use lethal force except in circumstances narrowly defined by ECHR Article 2(2), in which, the “absolute necessity” is the key in determining whether a life is taken arbitrarily or not. For positive obligation, it is the state’s promise to offer a redress after learning a lesson by reviewing a case of state killing and to make an effort in preventing future deaths (Baker, 2016a, 2016b; Mavronicola, 2017). Thus, the coroner’s court is an arena which an in-depth investigation can take place to look into the facts causing such deaths, which is also known as the “procedural obligation” of the state in accordance with ECHR Article 2:

“...to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the [substantive] obligations has been, or may have been, violated and it appears that agents of states are, or may be, in some way implicated”

(R (Middleton) v. West Somerset Coroner, 2004, para. 2)

In other words, the coroner’s inquest acts as an independent body to look into whether the loss of the right to life (in which the state has a role to play) is justified or not. More precisely, the Coroners Ordinance (cap. 504) section 27 lists the purpose of a coroner’s inquest:

27. Purpose of inquest

The purpose of an inquest into the death of a person shall be to inquire into the cause of and the circumstances connected with the death and, for that purpose, the proceedings and evidence at the inquest shall be directed to ascertaining the following matters in so far as they may be ascertained—

- (a) the identity of the person;
- (b) how, when and where the person came by his death;

³ The Basic Law Art. 28 states that the right to life is granted: “The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.”

⁴ The Hong Kong Bill of Rights Ordinance Art. 2(1) states that the right to life is granted: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of this life.”

- (c) the particulars for the time being required by the Births and Deaths Registration Ordinance (Cap. 174) to be registered concerning the death; and
- (d) the conclusion of—
 - (i) where the inquest was held without a jury, the coroner who held the inquest;
 - (ii) in any other case, the jury concerned, as to the death.

Section 27 informs us of the procedures of a coroner's inquest, which is an inquest searching for factual information on a death. The purpose of going through these procedures is finding the cause and circumstances of death. Hence, as stated clearly, the responsibility of a coroner's inquest is to tease out the factual puzzles pieces to gain a fuller picture of how a death occurred. Not all deaths have to go through a hearing in the coroner's court. The coroner may call an inquest when a person dies under these circumstances: "suddenly; by accident or violence; under suspicious circumstances; or, when the dead body of a person is found in or brought into Hong Kong," and an inquest must be held when "a person dies whilst in official custody, for example, in a prison or a police cell; or upon the request of the Secretary for Justice" (Hong Kong Judiciary, 2018). Hence, by revealing how ECHR Article 2 is localized in the Hong Kong judiciary, this explains why the Limbu Shooting was heard in the coroner's court and how it is related to the greater discourse of the right to life, as defined by ECHR Article 2.

Coroner's *Inquest*, Not Coroner's Trial

The distinction between a coroner's inquest and a trial has to be emphasized, due to the fact that this influences the goal of a proceeding, as well as our expectation from said proceeding. Namely, a coroner's inquest is not an adversarial proceeding, but an inquisitorial proceeding.

Although the coroner's court is within the body of the judiciary, it is different from other courts in terms of how the proceedings take place. One of the most prominent characteristics of a coroner's inquest is the fact that it is an *inquest*, but not a trial. A coroner's inquest is an inquiry into the cause of and the circumstances connected with a death. The purpose of the inquest is to find out the identity of the person, how, when and where the person died, and also to find out the particulars regarding the Births and Death Registration Ordinance (Cap. 174) which needs to register the person's death. In other words, a coroner's inquest is a fact-finding process, instead of a fault-finding process (Dowd, 1991; McKeough, 1983; Moskoff & Young, 1988; Scott Bray, 2010; Thurston, 1962). By putting it as fact-finding instead of fault-finding, it appears that the compromise to the fact-finding principle sets limitations to coronial proceedings. For a fact-finding proceeding, one can imagine that the proceeding looks into the facts supported by medical evidence, witnesses' testimonies and other relevant evidence which guides us to the "how" in the coroner's court. Yet, for a fault-finding proceeding, it does not stop at the fact level but goes beyond it to look for responsibility, namely the goal of criminal trials and civil trials. To compare the nature of an inquisitorial proceeding and that of an adversarial proceeding, I would like to borrow the table drawn up by the Warwick Inquest Group (1985, p. 46).

Inquisitorial Proceeding	Adversarial Proceeding
Official and thorough inquiry <ul style="list-style-type: none"> • Own motion initiates proceedings • No parties • Inquisitor summonses witnesses • Emphasis upon fresh evidence • Participants have dossier before trial • Accused may be interrogated in court • Confession inconclusive, inquiry continues 	Contest <ul style="list-style-type: none"> • Trial instigated by prosecuting party • Two (usually) parties • Parties select witnesses • Emphasis upon oral evidence, witnesses coached • Ambush and surprise acceptable • Accused may choose not to give evidence • Confession and guilty plea conclusive
Adjudicator as director <ul style="list-style-type: none"> • Adjudicator is active • Evidence predominantly adduced by adjudicator • Accused's circumstances and evidence known before trial • Merger of fact finding and prosecution responsibilities • Lay element integrated with legal adjudicators 	Adjudicator as umpire <ul style="list-style-type: none"> • Adjudicator is passive • Evidence predominantly adduced by parties • No prior knowledge of the case or character of the accused • Division of fact finding and prosecution responsibilities • Fact finding responsibility devolved to jury
Discretion oriented hearing <ul style="list-style-type: none"> • Logical relevance principle of evidence • Documentary evidence acceptable • Tendency to underlawyering • Free flowing, uninterrupted questioning 	Rule restricted procedure <ul style="list-style-type: none"> • Admissibility basis of evidence • Documentary evidence restricted • Tendency to overlawyering • Interruption and objections from parties

Table 1 *Essential Features of Inquisitorial Proceeding and Adversarial Proceeding*. Reprinted from “The Inquest as a Theatre for Police Tragedy: The Davey Case”, by Warwick Inquest Group, 1985, *Journal of Law and Society*, 12(1), p. 46.

One should be able to differentiate the characteristics of an adversarial proceeding from those of an inquisitorial proceeding. The dynamics of, and the roles played by adjudicators, goals, and outcomes between an inquest and a trial are different, as shown in Table 1. However, the distinctions are not there merely because of some undocumented ritual. Instead, the features of an inquisitorial proceeding bring about a verdict composed of facts and a more substantial impact on the public's understanding of death and the right to life, as the former Attorney General for New South Wales, John Dowd put in a piece which reflects upon the role of coroners:

I think the basic function of coronial inquiries is to reassure the public that murders and arsons are not going undetected. It is also to reassure the public that people in positions of control over others, such as doctors in hospitals or police holding people in custody, are not abusing their positions by neglecting people in their care or actively causing them harm.

(Dowd, 1991, p. 54)

Dowd here makes a statement on the purpose of the coroner's court and the importance of the coroner in reassuring the public that their right to life is safeguarded, despite unequal power held between people in the society. Yet, he goes on to remind readers how coroners should behave, as framed by the inquisitorial nature of coronial proceedings:

Coroners do not conduct criminal trials. If the coroner forms the opinion that the evidence establishes a *prima facie* case, it is not up to the coroner to deal with that person for that offence. Many people expect the coronial system to punish people who might be thought, reasonably or unreasonably, to be responsible for the death of someone they knew. This expectation is often based on a combination of emotion and a misunderstanding of the coroner's role. Coroners cannot convict people or commit them for trial.

(Dowd, 1991, p. 54)

It is clear that the existence of the coroner's court has an ideological effect – that is, to reinforce people's belief in the guarantee of the right to life, that people's lives would not be taken arbitrarily. Nevertheless, Dowd (1991) also points out that coroners are expected to be emotionless (compared to trials), as he asserts "...expectation is often based on a combination of emotion and a misunderstanding of the coroner's role"; coroners are expected to be emotion-free and have a full understanding of their role. Literature has pointed out how the medical evidence occupies a high position among the other kinds of evidence in the hierarchy in a coroner's courtroom (Green, 1992; Hanzlick & Combs, 1998). In addition to science being put at a higher priority in the proceeding, the requirements of coroners reflects the enormous demand for the notion of "rationality" in a coroner's inquest. In other words, only facts (more accurately, scientific, thus more reliable facts) are admissible in the inquest, and human factors, such as emotions, are excluded, which differentiates it from adversarial trials. Hence, this defines coronial jurisdiction as facts speak for themselves and the deceased.

Ignoring State Liability: Is It Still An Inquest?

Although the coroner's inquest of Limbu's death is an inquisitorial proceeding, which is supposed to be limited to the exploration of facts in relation to the death of the deceased, the commitment to the spirit of "fact only" appears to have wavered in the inquest. If we follow through, the foundational reason for the existence of the coroner's court in today's world is ECHR Article 2, which suggests the state's responsibility in protecting people's right to life. That is to say: if there is a violation of the right to life, it is on the state. The aim of a coroner's inquest investigating the facts leading to someone's death, therefore, is to examine the state's liability in the death and to work out what the state can do to prevent a similar incident from happening again (Affleck, 1965; Baker, 2016a; Mavronicola, 2017; A. Mowbray, 2002).

Unfortunately, rather than restraining itself to the limitation the inquisitorial principle sets for the coronial proceeding, the coroner's inquest of Limbu's death crossed the line to looking into the police officer's liability. As uncovered above, the inquest ended with a verdict of lawful killing. Yet, when we look at the process of how the coroner directed the jury before reaching a verdict, it is more likely that the coroner stimulated the jury to decide upon whether the police officer has a responsibility in it. Moreover, if the coroner's inquest is expected to carry out its function as making sure that the state is under the negative obligation of ECHR Article 2, the stringent regulation should be treated as the focus of interrogation in the inquest, as suggested in *McCann and Others v. United Kingdom*:

In this respect the use of the term "absolutely necessary" in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2 (art. 2-2-a-b-c).

(McCann and Others v. United Kingdom, 1995, para. 149)

McCann was the first case heard by the court involving ECHR Article 2, which requested the court to clarify that the state has a positive duty to protect its people's right to life, and that law enforcement has to provide sufficient training in and strict guidelines for deploying lethal force (A. R. Mowbray, 2004). The quoted paragraph upholds the "absolutely necessary" threshold set for the exceptional circumstances which taking people's lives would be lawful and justified. Also, the requirement stated in ECHR Article 2 demands a "stricter and more compelling" test than articles concerning other rights. Therefore, the deployment of lethal force should be under stringent regulation of absolute necessity and be considered as a last resort. On top of that, the absolute necessity only counts when there is a "palpable threat to life or bodily integrity" (Mavronicola, 2017, p. 1030) to justify the use of deadly force to repel such a threat. If a lethal force is deployed in other circumstances, the deployment of force would be considered as excessive use of force, and the victim's right to life would be seen as having been taken away arbitrarily.

Returning to the Limbu case, the direction given by the coroner was, to some extent, directing the jury to beyond what ECHR Article 2 suggests. The coroner instructed the jury that the key consideration was to determine whether the police officer *honestly believed* that there was an imminent life threat before he opened fire. The following is a quote from the summing-up of the coroner's inquest to show how the coroner narrated the main consideration the jury had to take before reaching a verdict in the inquest:

Therefore, you must bear in mind that you have to judge police constable Hui's action *based on what he believed the danger was*. You also have to remember that *you cannot expect a person to measure precisely the level of force to be applied when he is situated in the heat of the moment* when he needs to protect himself. If the attack faced by him is severe, his position would be more *hard-pressed*. If you determine that the person being attacked *believes or might truly believe* that he has to protect himself, and his act does not exceed what he *truly and instinctively believes*, then these would be very strong evidence—in showing that his use of force is reasonable in terms of proportionality.⁵

(Limbu Dilbahadur, 2009, emphases added) (translated by the author)

⁵ Original text in Chinese: 所以你哋要謹記，你哋必須憑許警員真心相信佢有乜嘢危險，你判斷佢嘅行動。你哋亦要謹記唔可以期望一個人喺保護自己嘅激動時刻當中，仲可以精確咁樣衡量需要幾多武力才足以自衛，如果佢受到嘅襲擊係愈嚴重嘅，佢嘅處境就會變得係愈窘迫，如果你哋判斷受襲嘅人相信或者可能真心相信佢係必須保護自己嘅，而佢所做嘅亦唔超出佢真心和本能被認為係佢須要做嘅嘢，咁樣呢啲就係一個非常有力嘅證據，嚟顯示佢所用嘅武力喺程度上係合理嘅。

The emphasis I want to put here is on the “true belief” that the coroner guided the jury to test in judging whether the deceased was killed arbitrarily or not (i.e. the main concern of ECHR Article 2). However, one should not forget that the basis of the coroner’s inquest is this ECHR Article 2, which has a stringent regulation on the deprivation of the right to life. The only circumstance for the deployment of lethal force is when it is “absolutely necessary”. Moreover, the European Court of Human Rights noted that the intentional test “would hardly be consistent with the object and purpose of the Convention or with a strict interpretation of the general obligation to protect the right to life” (Stewart v. United Kingdom, 1984, para. 15) and the “absolute necessity” as stated in ECHR Article 2 is the only exception to the right to life (Hessbruegge, 2017). In other words, the “honest belief” test is rather irrelevant in the arena of coroner’s court, if one is strictly following the criteria set out by ECHR Article 2.

Hence, the “honest belief” test points to the argument of *mens rea* (i.e., intention), imposing a criminal law style onto the supposedly inquisitorial proceeding. The “honest belief” test applies not only to the determination of the threat at issue by the state agent but also to their option of response (Mavronicola, 2017). Therefore, it plays a determining role not only in evaluating the need to use force to repel an attack on one of the grounds specified in Article 2(2), but also in the absolute necessity of using lethal force – which allows force to be both appropriate and strictly proportionate to the danger at issue. To give an example, the “honest belief” contended by the state agent is understood as a “good reason” if the jury chooses to trust the agent. Even if the threat is “mistakenly believed” by the person, such a belief will still be considered a legitimate belief and thus the actions to follow will be perceived as justified (Jackson, 2003). The measurement of necessity to repel via assessing the truthfulness of the perception of threat has gone nowhere close to the objective measurement as required by ECHR Article 2.

As a consequence, rather than guiding the jury to guess what the police constable was thinking in that altercation, an objective examination of the “absolute necessity” requirement is needed so as to be loyal to ECHR Article 2. The court should approach the case differently – by differentiating state liability from individual liability in order to avoid the inquisitorial proceeding from becoming an adversarial one (Mavronicola, 2017; Scott Bray & Martin, 2016). The approach is entirely out of the scope set out by ECHR Article 2, but the coroner’s inquest took place in the name of Article 2. In other words, the goal of Article 2 was never fulfilled – not looking into state liability, and hence no redress could be produced. All in all, because of the incompatible approach utilized in the Limbu case, accountability was not claimed. A man died, and no lesson was learned. The dead soul left us nothing but a missed opportunity to consolidate our right to life.

An Ambiguous System

The main idea of holding a coroner’s inquest is to fulfill the state’s obligation to ECHR Article 2. A coroner’s inquest provides space to allow a public, independent and somewhat transparent investigation to take place to look into the cause of death, including deaths after police contact. In other words, members of the public expect state agents and other parties involved to be held accountable for their actions by going through this judicial process (Baker, 2016a, 2016b; Scott Bray & Martin, 2016; Urpeth, 2010). Although the coroner’s court is different from other courts where adversarial trials take place, it provides a venue to disclose documents related to the death and make witnesses available for the inquest, as required by the ECHR (Matthews,

2007). Thus, the coroner's court was the only officially established independent body to adjudicate the death after police contact in the aftermath of the Limbu Shooting.⁶

However, by taking a closer look at the Limbu inquest, one might start feeling confused by the role of the coroner's court. David Baker (2016a) studies death after police contact in England and Wales. Baker puts forward that the coronial system is "ambiguous, discretionary and arbitrary" (Baker, 2016a, Chapter 3). The coroner directed the jury to reach a verdict by emphasizing the *mens rea* of the police who shot the person involved to death. This violates the negative obligation to the Article 2, which "absolute necessity" should be treated as the only acceptable criterion in determining whether a life is taken lawfully or not (Mavronicola, 2017; A. R. Mowbray, 2004). On top of that, one of the controversial issues surrounding the coroner's inquest is the ambiguous definition of the purpose of inquest. In the Limbu case, the primary concern of the case is "how" the deceased came to his death. As in "how", it is one of the reasons why the widow attempted to quash the verdict of lawful killing reached in the coroner's inquest.

The extent of "how" in the case determines other components of the inquest. If the court is sticking to ECHR Article 2, the primary goal of it should be examining the state liability in causing the death. And for the positive obligation of the state, in particular, redress has to be made to prevent future deaths from happening. Yet, before arriving at such a suggestion, the inquest has to determine how the person came to his death. The "how", however, can be interpreted in a narrow or a broad sense (Dorries, 2004). For instance, a death caused by anatomical failures can be explained narrowly by specific organs failed or what medical procedures went wrong. Therefore, in inquests examining state killing, the "how" question occasionally becomes the "why" question, in which it deals with the cause of death at an organization level, different from the acts and negligence of state agents (Baker, 2016a; Dorries, 2004). This, in other words, determines whether the inquest stays in line with the spirit of ECHR Article 2—to explore the state liability. In the Limbu case, unfortunately, the individual liability was emphasized, and the state liability was not prioritized. The inquest, therefore, did not perform the function expected by ECHR Article 2, the article which gives life to the coroner's court in today's world.

The coroner's court, however, does not have a consistent interpretation of the purpose of the inquest. Namely, the House of Lords in *Middleton* unanimously holds that such a limited understanding of the role of the Coroner could not in all situations satisfy ECHR criteria:

Only one change is in our opinion needed: to interpret "how" in section 11(5)(b)(ii) of the Act and rule 36 (1)(b) of the Rules in the broader sense previously rejected, namely as meaning not simply "by what means" but "by what means and in what circumstances".

(R (Middleton) v. West Somerset Coroner, 2004, para. 35)

Therefore, the interpretation of "how" is much more than austere looking into by what means, but the circumstances have to be taken into account as well in order to fulfil the obligation to

⁶ The Independent Police Complaints Council is another independent body that investigates complaints made against the police in Hong Kong. However, it was not a statutory body until 1st June 2009. Therefore, the coroner's court was the only official independent body to investigate the death of Limbu at that time (see Chan, 2014; Independent Police Complaints Council, 2020; Wong, 2010)

ECHR Article 2. At the same time, in the Judicial Review regarding Limbu’s coroner’s inquest, the Hon judge J Reyes also cited the standard adopted by J Hartmann in *Dr. Gilbert Tien v. William Lam Esq.*, Coroner [2004] HKLRD 719, that a narrow “how” should be the purpose of the coroner’s inquest in examining the cause of death:

I am satisfied that this obligation has brought no change to either the earlier legislative regime or the established practice in terms of which *the question to be decided is a limited factual question of the means by which the person came by his death and not in what broad circumstances he did so.*

(Para. 13, emphases added)

Here, the narrow understanding of “how” is adopted. This deflects that there exists such a space of interpretation in terms of the purpose of inquest. Different understanding of the purpose of the inquest brings consequences to the kinds of evidence to be admitted to the court. As we can see from the Limbu case, the coroner had a high degree of discretion in determining what evidence to admit and what not. In the coroner’s court, the deceased’s prior conviction was admitted to the court and it created an effect of characterization of the deceased in the proceeding which requested the jury to reach a verdict based on the jury’s belief in the police officer’s *mens rea*. Meanwhile, in the process of searching for “means” and “circumstances” of Limbu’s death, the coroner used his discretion to dismiss the request for admitting the teaching materials of the police force, as cited in the Judicial Review:

With respect, it is also very difficult for me to see why from one particular incident we can see whether there is a problem or not in the police’s system in teaching the students...In my view, we cannot say that these documents are not relevant to this case, but as a matter of degree, they are only of peripheral relevance...

(Rai v. William Ng, Esq., The Coroner of Hong Kong and Others, 2010, para. 46)

The coroner’s discretion determines what evidence is considered relevant and what is not. Therefore, the pieces of the puzzle made available to the jury largely influenced the process of reconstructing the story, which, as a result influenced their verdict in considering the cause of Limbu’s death. The scope of the inquest was based upon the discretion of the coroner. However, other than the coroner, no one has an idea of the broadness of the investigation, i.e., what area of examination is regarded as relevant in this case. While the deceased’s prior conviction is seen as relevant, details of police training are treated as “peripheral[ly] relevant”. The lack of transparency combined with the ambiguity of the purpose of inquest thus does not guarantee a consistent expectation of the function of the coroner’s court following the principle of ECHR Article 2.

On the whole, there is a lack of clarity in the coroner’s court. The state does not provide the coroner’s court with clear instructions to carry out investigations with consistent criteria to protect its people’s right to life. Thus, it is inevitable to have audiences dissatisfied by the performance of the regulatory body.

Discussion and Conclusion

The law holds a hegemonic position in discursive processes (R. J. Coombe, 2010; Erni, 2010). On the one hand, we are shocked by the fact that a man was shot dead by a police officer, and we might have an inkling that there is something wrong with it. On the other, I believe we should become acquainted with how the incident is scrutinized in courtrooms, where abundant resources are granted to carry out in-depth investigations and debates about the shooting.

I have devoted a part of the article to introduce the features of the coroner's court. By highlighting the inquisitorial characteristic of the court, it reminds us of the fact that the coroner's court is not a place where justice can be served by finding an individual to blame. Instead, taking ECHR Article 2 as principle, the primary goal of the inquest is to act as a balancing body to regulate deaths that the state might have had a role in.

Nonetheless, the arbitrariness and ambiguity of the inquest create obstacles for us to use death as an opportunity to enhance the protection of the right to life. In the Limbu inquest, individual liability became the focus instead of the state liability which is stated in ECHR Article 2. Moreover, there is always an ambiguous purpose in an inquest since the scrutiny concerns the possibility of blame and liability, coupled with the high degree of coroner discretion in the court, which as a result, creates a high degree of uncertainty if one has high expectations from the state to put the effort into enhancing the protection of one's right to life. Thus, I argue that the coroner's inquest on Limbu's death is a missed opportunity, which echoes Scott Bray's contention that:

...law is wholly lived and experienced in the expectation of 'justice', and we cannot regard coronial findings and their constituent statements of fact as if they have no consequence.

(Bray, 2010, p. 587)

Sharing Scott Bray's viewpoint in this article, by uncovering the details of what happened in the court, the cause of such a disappointment of "no consequence" or no change is revealed. This, I argue, is the tragedy of the arbitrary and ambiguous coronial system – a system that we rely on to claim justice for our right to life.

As a whole, the judicial interrogation process of Limbu's death is discussed in this article. It examined the procedural aspect of the judiciary on how the state commits itself to protect its people's right to life in reality. Ironically, the coroner's court, as representative of ECHR Article 2, here did not function loyally in relation to the stringent requirements set out by the article. Instead, it is full of ambiguity in interpreting the purpose of an inquest and in the guidance to the jury by the coroner.

On the one hand, we perceive the coroner's court as an area in which the state (including state agents) is to be held accountable for actions alleged to be violating its people's right to life. On the other, in reality, it is shown that the construction of accountability is based on an ambiguous procedural operation in the judiciary – an arena that enjoys a hegemonic position in our society. More ironically, it is the mechanism (i.e., the obligation to ECHR Article 2) that is supposed to protect our right to life that activates this ambiguous and unconvincing process of accountability construction. This process of construction of accountability in the ambiguous legal process sheds light on the broader issue of the maintenance of legitimacy of the state. Here, in particular, the legitimacy of police use of (lethal) force.

References

- Affleck, W. B. (1965). Coroner's inquests. *Criminal Law Quarterly*, 7(4), 459–463.
- Baker, D. (2016a). *Deaths after police contact: Constructing accountability in the 21st century*. London: Palgrave Macmillan.
<https://doi.org/https://doi-org.ezproxy1.library.usyd.edu.au/10.1057/978-1-137-58967-5>
- Baker, D. (2016b). Deaths after police contact in England and Wales: The effects of Article 2 of the European Convention on Human Rights on coronial practice. *International Journal of Law in Context*, 12(2), 162–177.
<https://doi.org/10.1017/S1744552316000033>
- Chan, R. (2014). Police powers and accountability in China and Hong Kong: A comparative perspective. *Asian Education and Development Studies*, 3(3), 243–252.
<https://doi.org/10.1108/AEDS-08-2014-0036>
- Chiu, A. (2009, September 15). Officer in shooting tells court of attack baton and spray failed to subdue Nepali man. *South China Morning Post*.
- Coombe, R. (2001). Is there a cultural studies of law? In T. Miller (Ed.), *A Companion to cultural studies* (pp. 36–62). Malden, Massachusetts: Blackwell.
- Coombe, R. J. (2010). Honing a critical cultural study of human rights. *Communication and Critical/Cultural Studies*, 7(3), 230–246.
<https://doi.org/10.1080/14791420.2010.504594>
- Crawshaw, R. (1991). The right to life and the use of lethal force. *The Police Journal: Theory, Practice and Principles*, 64(4), 299–308.
- Dorries, C. (2004). *Coroner's Court: A guide to law and practice*. Oxford: Oxford University Press.
- Dowd, J. A. R. (1991). The role of the coroner. *Current Issues in Criminal Justice*, 2(3), 53–56. <https://doi.org/10.1080/10345329.1991.12036496>
- Erni, J. N. (2010). Reframing cultural studies: Human rights as a site of legal-cultural struggles. *Communication and Critical/Cultural Studies*, 7(3), 221–229.
<https://doi.org/10.1080/14791420.2010.504593>
- Erni, J. N. (2019). *Law and Cultural Studies: A Critical Rearticulation of Human Rights*. London and New York: Routledge. <https://doi.org/10.4324/9781315575377>
- Green, J. (1992). The medico-legal production of fatal accidents. *Sociology of Health & Illness*, 14(3), 373–389. <https://doi.org/10.1111/1467-9566.ep11357503>
- Gun cop tells of failed attempts to subdue attacker. (2009, September 15). *The Standard*, p. P08.
- Hanzlick, R., & Combs, D. (1998). Medical examiner and coroner systems: History and trends. *Journal of the American Medical Association*, 279(11), 870–874.
<https://doi.org/10.1001/jama.279.11.870>
- Hessbruegge, J. A. (2017). *Human rights and personal self- defense in international law*. Oxford: Oxford University Press.
- Hong Kong Judiciary. (2018). Coroner's Court. Retrieved April 3, 2019, from https://www.judiciary.hk/en/court_services_facilities/cor.html

- Independent Police Complaints Council. (2020). Independent Police Complaints Council.
- Jachec-Neale, A. (2010). The right to take life: Killing and death in armed Conflict. In J. Yorke (Ed.), *The Right to life and the value of life* (pp. 119–142). Farnham: Ashgate.
- Jackson, M. (2003). *Criminal law in Hong Kong*. Hong Kong: Hong Kong University Press.
- Lai, R. Y. (2017). *Colours of justice*. Hong Kong: Joint Publishing.
- Lam, A. (2009, March 30). 2,000 march overfatal police shooting coalition of groups demands impartial investigation into death of Nepali man. *South China Morning Post*, p. 1.
- Lau, N. (2009, September 17). Chair leg fear “forced cop to shoot.” *2The Standard*, p. P11.
- Lee, D. (2009a, March 18). Why shoot him? *The Standard*, p. P01.
- Lee, D. (2009b, March 19). Cop-shooting victim was “born and raised in HK.” *The Standard*, p. P08.
- Lee, D. (2009c, September 18). Video grief of shooting widow. *The Standard*, p. P09.
- Lo, C. (2009, March 22). Police chief promises fair inquiry into shooting of Nepali man. *South China Morning Post*, p. 4.
- Lo, C., & Tsang, P. (2009, March 18). Suspect dies after officer’s shot to head Policeman, under attack with chair, fires twice. *South China Morning Post*, p. 1.
- Man, J. (2009, September 11). “Put down the weapon”: inquest hears policetape of hillside killing. *South China Morning Post*, p. 3.
- Matthews, P. (2007). Show Me the money: the new death investigation system. *Medico-Legal Journal*, 75(4), 123–138. <https://doi.org/10.1258/spmlj.75.4.123>
- Mavronicola, N. (2017). Taking life and liberty seriously: Reconsidering criminal liability under article 2 of the ECHR. *Modern Law Review*, 80(6), 1026–1051. <https://doi.org/10.1111/1468-2230.12301>
- McKeough, J. (1983). Origins of the coronial Jurisdiction. *University of New South Wales Law Journal*, 6(2), 191–210.
- Moskoff, F., & Young, J. (1988). The roles of coroner and counsel in Coroner’s Court. *Criminal Law Quarterly*, 30(2), 190–209.
- Mowbray, A. (2002). Duties of investigation under the European Convention on Human Rights. *The International and Comparative Law Quarterly*, 51(2), 437–448.
- Mowbray, A. R. (2004). *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. Oxford: Hart Publishing. <https://doi.org/10.1093/iclq/51.2.437>
- Scott Bray, R. (2010). Death scene jurisprudence: The social life of coronial facts. *Griffith Law Review*, 19(3), 567–592. <https://doi.org/10.1080/10383441.2010.10854688>
- Scott Bray, R., & Martin, G. (2016). Introduction: Frontiers in coronial justice – Ushering in a new era of coronial research. *International Journal of Law in Context*, 12(2), 103–114. <https://doi.org/10.1017/S1744552316000094>
- Thurston, G. (1962). The Coroner’s Limitations. *Medico-Legal Journal*, 30(3), 110–121. <https://doi.org/10.1177/002581726203000303>

- Tsang, P. (2009, September 17). I felt my life was being threatened when I fired shots at Nepali, constable tells inquest. *South China Morning Post*, p. 1.
- Urpeth, D. (2010). Taking a closer look at the role of the coroner. *British Journal of Neuroscience Nursing*, 6(3), 131–133.
<https://doi.org/10.12968/bjnn.2010.6.3.47127>
- Van Der Wilt, H., & Lyngdorf, S. (2009). Procedural obligations under the European convention on human rights: Useful guidelines for the assessment of “unwillingness” and “inability” in the context of the complementarity principle. *International Criminal Law Review*, 9(1), 39–75. <https://doi.org/10.1163/157181209X398817>
- Warwick Inquest Group. (1985). The inquest as a theatre for police tragedy: The Davey Case. *Journal of Law and Society*, 12(1), 35–61. <https://doi.org/10.2307/1410246>
- Wicks, E. (2010). *The Right to Life and Conflicting Interests*. Oxford: Oxford University Press.
- Wong, A. (2009, March 30). Ethnic unrest. *The Standard*, p. P02.
- Wong, K. C. (2010). Police powers and control in Hong Kong. *International Journal of Comparative and Applied Criminal Justice*, 34(1), 1–24.
<https://doi.org/10.1080/01924036.2010.9678815>

Legal Cases

- Limbu Dilbahadur (2009) CCDI 289
- McCann and Others v. United Kingdom [1995] ECHR 18984/91
- R (Middleton) v. West Somerset Coroner [2004] 1 AC 182
- Sony Rai v. Mr. William Ng, Esq., The Coroner of Hong Kong and Others (21/01/2011, HCAL85/2010) [2011] 2 HKLRD 245
- Stewart v. United Kingdom [1984] ECHR 10044/82
- Tien v. Lam Esq [2004] HKLRD 719

Laws

- Births and Death Registration Ordinance, Cap 174 (2019).
- Coroners Ordinance, Cap 504 (2019).

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查滋擾案被人木橈施襲 警轟兩槍殺野漢（2009年3月18日）。明報。

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