

Case-Study: Northern Ireland

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Transitional justice – A Working definition

“‘Transitional justice’ describes the interim legal arrangements which come to the fore as states enter into transition from violent conflict to peace and democracy, or undertake profound internal re-arrangement to facilitate new political and constitutional imperatives. Such arrangements can acutely re-order existing legal structures, and act as tools that spurs political accommodation and compromise”¹

Central to any political transformation are the values, institutions and practices of justice. They provide the legal means of guaranteeing the rights and equality promised in peace agreements and are, in an ideal form, the independent bulwarks against repression and the abuse of power which drive so many conflicts. Because institutions of justice have failed this important test and if the transition from conflict is to be successful, those institutions must themselves be transformed. Societies in transition from conflict to peace require changed political, legal and economic imperatives and norms. One of the ways in which one that may be done is through changes in justice, all of which make a significant contribution to the establishment of the rule of law. These are the tools of transitional justice.

In Northern Ireland, as elsewhere, the use of law by the government was a central aspect of the conflict, as the appropriation of law in defence of the political status quo contributed to repression and the undermining of the rule of law. Yet, criminal trials have overwhelmingly focussed on the actions of the non-state actors, or the ‘paramilitaries’.² Around 3,500 people have been killed in the conflict, out of a population of around a million and a half. Of these, around 900 were members of state security forces and the remainder either civilians or members of paramilitary organisations.³ There have been very few prosecutions of state actors that is, police officers and members of the British Army,⁴ although they have been responsible for 10% of the deaths in the conflict.⁵

¹ *Justice in Transition - Northern Ireland & Beyond*, ESRC Seminar Series, 2001-2002, Transitional Justice Institute, University of Ulster.

² Between 1980 and 1970 alone, more than 8,270 people were convicted of indictable ‘scheduled’ (i.e. terrorist-type) offences. (HANSARD, Commons Written Answers, 6 March 1998, Col: 30032)

³ Police Service of Northern Ireland (PSNI). (2003) DEATHS DUE TO THE SECURITY SITUATION IN NORTHERN IRELAND 1969-2003 (By Calendar Year);

⁴ There have been 24 prosecutions and 8 convictions of police officers and soldiers for the use of force whilst on duty. Fionnuala ni Aolain, *THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND* (2000) Blackstaff, Belfast, at p73.

Consequently, there have been numerous calls in the past thirty years for an independent investigation of the many controversial events involving the state and the practices that gave rise to them. At the heart of those demands has been the existence of human rights abuses and a partial breakdown in the rule of law. Calls for independent inquiries have multiplied as the failure of the existing legal processes to hold the state to account for its role in the conflict has become apparent. However, the response of the state to such events has compounded a pervasive sense of state impunity. There are also more than 1700 unsolved killings by paramilitary organisations and the Chief Constable of Northern Ireland has recently said that few of these will ever be resolved through the criminal courts.⁶ There has also been a growing local awareness of the 'truth commission' model, largely through publicity of the South African Truth and Reconciliation Commission. This has led to calls for a local truth commission, encompassing the activities of state and non-state actors. More recently, judgements in the European Court of Human Rights have provided further legal imperatives for independent inquiries into state killings.⁷

The task, therefore, for the new political and legal dispensation in Northern Ireland is to restore those values undermined by conflict and to become the guarantor against such repression that the preceding arrangements were not. This is a difficult task, made all the more difficult by the fact that it is not universally accepted that the state was an actor in and a contributor to the conflict. The study of any transition teaches us that transitional justice is a process, not an event. Few transitional justice processes are smooth and none are the same. The case of Northern Ireland demonstrates that and exposes some of these problems.

Northern Ireland's Conflict: A Very Brief background.

There is no agreement about the length, causes or definition of the conflict. It began either 1170, 1609, in 1921 or in 1968. It is often described as a religious conflict, although it is not. It is better described as an ethnic conflict, with colonial elements.⁸ The most recent phase of the conflict has been more than thirty years of bloody civil unrest

⁵ This figure is a minimum, which would rise substantially if the allegations of collusion between the state and loyalist paramilitaries are correct. See British Irish Rights Watch, DEADLY INTELLIGENCE: STATE COLLUSION WITH LOYALIST VIOLENCE IN NORTHERN IRELAND (February 1999) BIRW, London. The allegations of collusion are so serious that in May 2002, the UK and Irish governments appointed retired Canadian judge Peter Corry to carry out an investigation into 7 key cases, including those of Pat Finucane and Rosemary Nelson, human rights lawyers who were murdered, it is alleged, by loyalist paramilitaries in collusion with the state. See Department of Foreign Affairs, Government of Ireland, Press Release *Appointment Of Judge To Investigate Allegations Of Collusion*, 29 May 2002. (Available from <<http://www.irlgov.ie/iveagh/information/display.asp?ID=966>>, visited 18 Jan 2003. See also State Department, Department of State Human Rights Reports for 2000, United Kingdom, U.S. Department of State, February 2001 at para 1a.

⁶ *Killings will 'go unsolved'* BBC News, Interview With Hugh Orde, 10 June, 2003, (available at http://news.bbc.co.uk/1/hi/northern_ireland/2975976.stm)

⁷ JORDAN v UK, Application no 24746/94, KELLY v UK Application no 300054/96, MCKERR v UK Application no 28883/94 and SHANAGHAN v UK Application no 37715/97; judgment of the European Court of Human Rights May 4 20001.

⁸ See Brendan O'Leary and John McGarry, (1993) THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND, Athlone Press

and violence. Despite this, there is no agreed account of the victims of the conflict – for example, three different projects give three different totals - 3636⁹; 3593¹⁰, 3293¹¹. Even allowing for variations in the period surveyed, these are significant variations.¹²

John Darby sets the parameters of the conflict as follows:

- There is a central constitutional problem: what should be the political context for the people of Northern Ireland? Integration with Britain? A united Ireland; independence?
- there is a continuing problem of social and economic inequalities, especially in the field of employment;
- there is a problem of cultural identity, relating to education, to the Irish language and to a wide range of cultural differences;
- there is clearly a problem of security;
- there is a problem of religious difference;
- there is certainly a problem of the day-to-day relationships between the people who live in Northern Ireland.¹³

'The Peace Process' and the Good Friday Agreement

After a long period of protracted negotiations, the Irish Republican Army (IRA) declared a ceasefire on 31 August 1994. There was a breakdown in this ceasefire between 9 February 1996 and 20 July 1997. Further political negotiations, chaired by US Senator George Mitchell resulted in *The Good Friday Agreement*, which was signed in 1998, which led to the setting up of new political institutions and the devolution of legislative and executive power to Northern Ireland, something which has been suspended on a number of occasions since then. Currently, these arrangements are suspended and have been since 14th October 2002. New elections were held to the devolved legislature (the Northern Ireland Assembly) in November last year, but this Assembly is not currently undertaking any business. A review of the Agreement began on 4th Feb 2004.

Technically, the agreement is comprised of two agreements – the one agreed between the political parties and the international agreement between the two sovereign governments. However, in order for it to be implemented it had to be transformed into law, primarily in the form of the Northern Ireland Act 1998. This was supplemented by legislation in the

⁹ David McKittrick, Seamus Kelters, Brian Feeney and Chris Thornton (1999) *LOST LIVES*, Mainstream Publishing

¹⁰ MT, Morrissey, M., Smyth, M. and T. Wong (1999) *THE COST OF THE TROUBLES STUDY*. Pluto Press

¹¹ Police Service of Northern Ireland (PSNI). (2003) *DEATHS DUE TO THE SECURITY SITUATION IN NORTHERN IRELAND 1969-1999 (BY CALENDAR YEAR)*;

¹² Much more information on the conflict and its effects can be found on the University of Ulster's CAIN website (<http://cain.ulster.ac.uk/index.html>).

¹³ in *Conflict in Northern Ireland: A Background Essay*, in Dunn, S., (1995) *FACETS OF THE CONFLICT IN NORTHERN IRELAND*, Macmillan, London

Oireachtas (the Irish Parliament), further legislation in the Westminster Parliament and by bilateral international treaties between the two governments.

In Northern Ireland, there was an inevitable friction between the output of the constitutional negotiations (i.e. the *Good Friday Agreement*) and the pre-existing British constitutional model, which places a premium on parliamentary sovereignty. This was further complicated by the manner chosen to embed the agreement politically, which was by referendum throughout the whole of Ireland. Referenda have constitutional legal status in the Irish Republic but not in the UK and thus not in Northern Ireland.

This meant that transformation of the agreement into law took place through the UK parliament drafting and enacting the Northern Ireland Act 1998, in a process which was fractious and contentious and over which many arguments persist.¹⁴ It is important to remember the constitutional context in which the peace process operates. Legislative and executive power is devolved in areas such as health, education, social services to Northern Ireland, but in key areas, such as policing and criminal justice, legislative and executive power retained or 'reserved' to London (Westminster and the UK government). This means that in most of the significant transitional justice areas, decision-making powers reside not with anyone elected in Northern Ireland, but with British civil servants and ministers. This is a point of primary importance, not often understood outside of Northern Ireland.

The UK's refusal to allow a variation in its constitutional model has created continuing problems in the implementation of the agreement, not just in the areas of policing and security, but was also demonstrated in the unilateral decision in May 2003 by the UK government to suspend elections in Northern Ireland. Legal sovereignty remains in the hands of the UK, which means that it can suspend the democratic institutions by passing legislation through the UK parliament, even when, as in this case, the other government involved and most of the political parties in Northern Ireland disagreed with its decision.

Transitional Justice Tools

Tools of transitional justice – such as trials, truth commissions, reparations, lustration, amnesties, and apologies have tended to focus on dealing with the past. Few of these have been tried successfully in Northern Ireland and almost none on a holistic basis – initiatives and policies have evolved or have been negotiated over a period of time. Of those actually contained in or referred to in the Good Friday Agreement are

- *Prisoner releases and limited amnesties:*
 - Northern Ireland (Sentences) Act 1998
 - *Sentence Review Commission*

- *Policing Changes:*

¹⁴ See Mageean, P. & O' Brien, M. (1999) *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INTERNATIONAL LAW JOURNAL 1499-1538, at pp1524-1537

- Independent Commission on Policing (The Patten Commission), reported 1999;
 - The Police (Northern Ireland) Act 2000
 - The Police Ombudsman (pre-dates Agreement but essential to it and role changed by it)
 - No lustration:
 - Definition: “a mode of accountability that bypasses the criminal law by removing or disqualifying whole categories of people from government jobs”¹⁵
 - Former paramilitary combatants were specifically barred from the police, whilst many of those associated with the former police service and judiciary remain in office
 - Implementation an ongoing and highly politicised battle
 - Non acceptance of new policing arrangements by largest nationalist party (Sinn Fein)
 - Re-negotiation by the state
 - Ongoing low-level violence by paramilitaries
 - Increasing involvement in criminal activity (drugs, vice, protection rackets) by some paramilitaries;
 - Failure to address past human rights violations
 - Non-return of deceased remains by paramilitaries
 - Continuing existence of emergency law:
 - Despite references in the Good Friday agreement to the need to ‘normalise’ criminal justice, long-standing ‘emergency’ legislation has been replaced with permanent anti-terrorist legislation applicable to the whole of the UK, with special sections retained for Northern Ireland.¹⁶
- *Criminal Justice Review*
 - Limited terms of reference
 - Control given to UK government
 - Emergency Law apparatus excluded from its remit
 - Culminated in Justice (Northern Ireland) Act 2002
 - No reform of the courts structure, although certain aspects of the ethos and procedure of courts are to be modified.¹⁷
 - *Decommissioning of Arms*
 - Independent International Commission on Decommissioning (IICD), set up prior to the Agreement, on 26 August 1997
 - Northern Ireland Arms Decommissioning Act 1998

¹⁵ Cohen, S, (2001). STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING. London: Polity Press, at p 231

¹⁶ Terrorism Act 2000

¹⁷ Criminal Justice System Review Group, (2000). REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND: THE REPORT OF THE CRIMINAL JUSTICE SYSTEM REVIEW. HMSO: Belfast, at paras 8.41-8.65

- *Human Rights Commission and Bill of Rights*
 - ss68-70 Northern Ireland Act 1998;

Those which either pre or post date the Agreement are

- *The Bloody Sunday Inquiry*
 - Controversial
 - Opposed by sections of the state
 - Huge cost and long duration
 - Possible outcomes
- *Victims Commission*
 - Led by former head of UK civil service in Northern Ireland
 - Accusations of partiality and omissions from report
 - Hierarchies of victims generally

Victims:

The Good Friday Agreement refers in quite general terms to measures to address victims concerns and needs.

- Funding by Irish and UK governments and through EU funded programmes (PEACE I & II) for victims groups
- Victims Unit part of devolved executive government
- Attempts to secure investigations into atrocities;

Post-Agreement:

- Ongoing difficulties led to re-negotiations and 'reviews'
- *Weston Park Declaration* (Aug 1 2001)
- Includes commitments to appoint a judge to investigate claims that several high-profile killings by the state be investigated. Commitment given by Mr. Blair to publish and implement recommendations
 - CORY REPORT
 - Non-publication by UK
- Commitment to deal with 'on the runs' (OTRs)

Conclusions:

- Ongoing political difficulties are out-workings of gaps and fudges in the Agreement; these become re-negotiations of the original agreement;
- Tend to focus around criminal justice and policing on the one hand and decommissioning and paramilitary activity on the other;
- Real, powerful opposition to change;
- No real changes in political control – political pressure brought to bear but control ultimately remains in the hands of the UK government;

- Changes in political climate – different political parties now represent nationalists and unionists;
- Continuing sectarian violence + rise in racist attacks;¹⁸
- Refusal by some parties to conflict to acknowledge their roles;
- Failure to address the past – claims that parties wish to address it, whilst actively working against disclosure;
- This increases the levels of mistrust by all sides of each other, which in turn makes implementation of the commitments in the agreement difficult;
- Real attempts to address and acknowledge the past and to make that acknowledgement real in the foundation of new legal and criminal justice structures which seek to prevent the abuses of the past recurring would be a significant contribution to creating peace.

Technically, rights cannot be conceded: they are universal and inherent. Perhaps one of the errors of political negotiations, however tempting, has been to treat rights as if they *could* be conceded, as if they were bargaining counters in the gift of one side, to be handed over to the other parties at a price. This has an ultimately detrimental effect on peace negotiations, as the illusion of concession may be created where one does not exist. In Northern Ireland rights are still being contested, demonstrated by the continual re-negotiation of changes to policing and criminal justice.¹⁹ If these rights were capable of being conceded and had in fact been conceded, then no contestation would be taking place.

This illustrates the paradox of the rule of law. In conflicts, the law is often an instrument of abuse, repression and conflict, yet the law is also, sometimes, a means of accountability and political transition. It is only a visibly transformed legal system that can resolve that paradox, through a justice system that in its values, ethos and practices guarantees and delivers the rule of law. A deal which does not secure the rule of law and which makes elements of it negotiable may work in the interim but is unlikely to survive. The principles and ideals that underpin and guarantee legal transformation cannot be subject to negotiation. It is only through the rehabilitation of the rule of law that the peace sought in political agreements can take hold. This is the lesson we must learn from Northern Ireland.

Useful reading

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¹⁸ See The Pat Finucane Centre, SECTARIAN ATTACKS, available from <http://www.serve.com/pfc/sattacks/sectarian.html>

¹⁹ JOINT DECLARATION BY THE BRITISH AND IRISH GOVERNMENTS, April 2003, paras 20-24

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