Web Journal of Current Legal Issues

Campbell, 'The Spectre Returns: Conflicted Democracies, Truth Commissions and the Law', [2010] 1 *Web JCLI*
http://webjcli.ncl.ac.uk/2010/issue1/campbell1.html

# The Spectre Returns: Conflicted Democracies, Truth Commissions and the Law

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*Thanks to Ita Connolly (University of Ulster) for research assistance, and to Patricia Lundy (University of Ulster), Louise Mallinder (University of Ulster) and Fionnuala Ní Aoláin (University Minnesota) for helpful comments.*

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## Summary

Part of the self-identity of the liberal democratic state is a commitment to the 'rule of law'. A paradox exists when a liberal-democratic state finds itself dealing with a legacy of serious systematic rights-violations. There is a further paradox when 'transitional justice' analyses are employed to deal with the conflicted 'past', since this discourse developed out of the need to deal with the legacy of authoritarian regimes in transition to democracy.

The UK's attempts to deal with Northern Ireland's 'past' can be understood as the outworking of these paradoxes, and as driven by the need to comply with adverse rulings in relation to Art. 2 ECHR. This is the context for the 'Report of the Consultative Group on the Past,' which recommends a 'Legacy Commission' - in effect, a truth commission.

The example suggests that transitional justice mechanisms can never fully be 'outside' the conflict, the legacy of which they examine. Assertions that particular international law framing is required contribute implicitly to a broader meta-conflict. While transitions involving authoritarian states can project straightforward narratives

of change, those in the liberal state are unlikely to fit together so coherently, even if the level of violations is lower.

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## Introduction

Part of the self-identity of the liberal democratic state is a commitment to the 'rule of law' - to be a 'rechtsstaat' (including a commitment to international human rights law). This is an ideological device, not an actual description - no state could perpetually act fully in accordance with the law. But the commitment does mean something: empirical evidence suggests democracies tend to have lower levels of rights-violations within their borders than authoritarian states – specifically that they tend not to have the kind of serious systematic violations that characterize authoritarian regimes. The presumed explanation is that when a serious violation occurs in a democratic state its legal and political mechanisms can prevent reoccurrence.

A paradox exists when a liberal-democratic state finds itself compelled to deal with a legacy of serious systematic rights-violations. This is so, even if the site of the violations is limited to one conflicted region of the state. There is a further paradox when 'transitional justice' analyses force themselves onto the legal and political stages as modes of dealing with the conflicted 'past'. Much transitional justice discourse developed out of the need to deal with the legacy of authoritarian regimes in transition to democracy (Teitel, 2000), yet the liberal state is by definition democratic, before and after the conflict.

This article uses the example of the quandries faced by the UK in dealing with Northern Ireland's past as a vehicle for exploring some of these issues. These quandries have a particular currency in view of on-going attempts by the UK to address the problems, and of the increasing international interest in the question of transitional justice in Northern Ireland. Just as policing change in the region has been presented as an international model, it is probable that any major attempt to deal with the past will attract similar international interest.

As suggested above, the 'transition' in Northern Ireland cannot be conceived simply in terms of a move from an absence to a presence of democracy. Rather, it can best be modelled as movement along two axes: (1) peace-making, and (2) enhanced democratisation (Ní Aoláin & Campbell, 2005). Peace-making entailed a shift from the use of violence by non-state entities (NSEs) towards support for peaceful political contestation. Eventually movement along this axis produced weapons decommissioning by the main NSE (Rolston, 2007), and reduction of British Army

strength to that of a garrison force. Associated with the conflict came a legacy of serious (though not catastrophic) rights-violations by state and NSEs.

As regards the democratisation axis, Northern Ireland had historically failed to attain the consent of nationalists and republicans within its borders (currently circa 42% of the electorate). The creation of new democratic consociational structures under the 1998 'Good Friday [peace] Agreement' (the 'Agreement'),[1] coupled with an agreed formulation on the question of self-determination, and the building of institutional links with the Republic of Ireland, largely remedied this situation. Parallel guarantees ensured unionist consent. All of this represented the deepening of a democracy that had previously appeared merely formal or procedural, and ultimately exclusionary.

The specificity of the Northern Ireland experience created some unique features when it came to dealing with the legacy of conflict: The first was that the nature and scale of violations were respectively less severe and smaller than typically found in many contemporary conflicts. Secondly, the liberal democratic nature of the overall state meant that it was difficult for it to 'see' that there was a legacy of *any* serious *systematic* violations to be addressed, since the commission of such systematic violations should have been rendered impossible by the overall nature of the state. The third was that in Northern Ireland, there was no easy line to be drawn between the undemocratic 'past' and the new democratic 'present'. Much of the pre-transition state machinery remained in place, with a capacity to exert significant intertial force.

The fourth was that a meta-conflict (a conflict about the conflict) continued: was it about self-determination, civil rights or religious sectarianism? Should the violence be considered criminality, terrorism or 'armed conflict'? Such meta-conflicts are common (McGarry & O'Leary, 1995:1), but in a liberal democratic state they have a distinctive edge. The various possible categorisations had important implications for judging the conflict's legacy in international law: If mere criminality, all that appeared relevant was international human rights law (which bound only the state); if terrorism, permissible derogations from international human rights law became an issue. But if it were an 'armed conflict', international humanitarian law in relation to non-international armed conflicts also became applicable, providing a 'laws of war' yardstick for judging the actions both of NSEs and the state. The difficulty here was that the liberal state found it particularly difficult to accept that what had taken place upon its territory was an 'armed conflict,' and that *it was a party to it*.

These considerations, and the fact that many parties to the peace process had potentially something to lose from truth-recovery meant that the Agreement said little about the past, and contained no institutional blueprint for dealing with it. Rather the pattern has been that Northern Ireland's past has been dealt with in 'piecemeal' fashion (Bell, 2003), with initiatives to deal with specific concerns. Typically the sites of inquiry have also been points at which maximum political pressure has been brought to bear: investigation of army killings at a protest march ('The Bloody Sunday Inquiry'); inquiries into particular allegations of security force collusion in paramilitary killings; initiatives to address the needs of victims; and efforts to locate the graves of those abducted and killed by NSEs.

For many reasons however, pressure for something more than the piecemeal approach grew: Paradoxically, the partial success of the piecemeal model created a dynamic

[1] Agreement Reached in the Multi-Party Negotiation, 37 ILM 751 (1998).

whereby the uncovering of particular facts tended to generate demands for follow-on investigations in new areas, creating a cycle of positive reinforcement. Northern Ireland has a vibrant NGO sector, skilled in maximizing opportunities for human rights advocacy. The piecemeal approach has also proved itself a heavy consumer of resources and time: the Bloody Sunday Inquiry had still to produce a report after 11 years work and expenditure of £180 million+.[2] The various inquiries also proved a significant drain on current police resources. Furthermore, the problem of 'the past' proved an abrasive element when plans were afoot to make policing and justice powers exercisable by the new Northern Ireland administration. An additional complaint from some political quarters was that the piecemeal process focused on state abuses to the exclusion of paramilitary violations (although a discrete commission was tasked with identification of the burial places of victims of such violations).

But perhaps the key imperative driving the need for an examination of the past was the effect of litigation under the European Convention on Human Rights (ECHR), particularly with respect to the right to life (Art. 2 ECHR). In this the state has been found to have breached the procedural requirements of Art. 2 ECHR in investigations of security force killings, and of killings in which the security forces are alleged to have colluded with loyalist paramilitaries.[3] This resulted in monitoring of the state's handling of the consequences of the rulings, with pressure around 'right to life' issues being so intense that the newly constituted Police Service of Northern Ireland established an Historical Enquiries Team to review all conflict-related deaths (Lundy, 2009). There was further policing of the past by the new Police Ombudsman's office, which placed additional focus on the 'collusion' issue (Police Ombudsman's Report, 2007).

Reflecting these imperatives, in 2007 the UK Secretary of State for Northern Ireland announced the formation of the 'Consultative Group on the Past' with a mandate to 'consult across the community on how Northern Ireland society can best approach the legacy of the events of the past 40 years; [and to] make recommendations… on any steps that might be taken to support Northern Ireland society in building a shared future that is not overshadowed by the events of the past' (Report of the Consultative Group, 2009: 22). The Group was jointly chaired by Robin Eames (who had served as a Protestant Archbishop) and Dennis Bradley (a former Catholic priest who had been heavily involved in policing changes). Following a series of public meetings, an overall report was published in Jan. 2009.

The 'memory boom' identifiable from the last decades of the 20th century onwards, and the associated focus on transitional justice mechanisms, provide the international backdrop to the Group's work (Teitel, 2000). One institutional design has emerged as specific to this trend: the 'truth commission' (Freeman, 2006). For its champions the commission offers the prospect of uncovering truths about a conflicted past in a way that may promote reconciliation, without necessarily requiring divisive prosecutions (Hayner, 2002). For its critics, the efficacy of truth commissions has not been empirically demonstrated (Mendelhoff, 2004); claims for their contribution are

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[2] Hansard HC Col. 625W, 1 May 2008.

[3] See cases discussed in Campbell, 2005, and *Brecknell* v. *UK* (2008) 46 E.H.R.R. 42; *McCartney* v *UK* (App. 34575/04, 3 June 2007); *McGrath* v *UK*, (App. 34651/04, 3 June 2007); *O'Dowd* v *UK* (App. 34622/04, 3 June 2007); *Reavey* v *UK*, (App.34640/04, 3 June 2007).

overblown; and they risk subordinating truth to reconciliation in a teleology of state-building.

In many respects the recommendations of the 'Report of the Consultative Group on the Past' ('the Report'), fit this international truth commission template. There are however, key divergences - some apparently antithetical to the truth commission formula. The Report's institutional architecture is sketched in Fig. 1. At its core is a 'Legacy Commission' presided over by an 'International Commissioner' and two other commissioners. The Commission's mandate, to be discharged within 5 years, is described in terms of four strands, of which (2) – (4) appear focused on deaths arising from the conflict:

(1) Commission to address such issues as tackling sectarianism to 'help society towards a shared future', and with the Commission for Victims and Survivors for Northern Ireland to establish a **Reconciliation Forum**

(2) **Review and Investigation Unit** to be established to conduct individual police investigation of 'historical cases'. If sufficient evidence obtained, case to go to Director of Public Prosecutions. If evidence insufficient, case to be referred either to (3) or (4)

(3) **Information Recovery Unit** to be established to provide individual victims' families with details of circumstances that resulted in victims' deaths

(4) **Thematic Examination Unit** to examine 'linked or thematic cases emerging from the conflict' rather than focus on individual cases as under (2) and (3)

Juan Mendéz has suggested that before acknowledgment [of wrong] comes recognition [of a problem] (Mendéz, 2000). The Report does not amount to acknowledgment, but it is a form of recognition that goes well beyond previous officially sponsored initiatives. This recognition is due at least in part to the extent to which the Report represents an attempt to reach for international models to address an important segment of a conflicted past.

Northern Ireland NGOs generally tended to welcome the proposal as a significant move towards a truth commission along international lines. While their relative enthusiasm is understandable, it is also evident that the Report manifests some of the shortcomings of truth commissions in general. For instance, as has been the case with many such bodies (Ní Aoláin & Turner, 2007), the Report largely ignores the gendered and the socio-economic dimensions of transition. This article takes as its starting point the premise that the Report's institutional blueprint provides a worthwhile template for development, a process that can be advanced by critique in a number of areas, with analysis here focusing on two of them: law, legalism and amnesty; and victims, law and meta-conflict.

## Law, Legalism and Amnesty

Among the most important existing initiatives on dealing with the past have been discrete Public Inquiries, established under statutory powers.[4] These Inquiries have been heavily legalistic. Presided over by a judge or former judge, they have entailed the examination and cross-examination of witness; drawn-out litigation in the superior

[4] The Hamill and Wright Inquiries were held under the Inquiries Act 2005 (c.12); the Nelson Inquiry operates under the Police (Northern Ireland) Act 1998; and The Bloody Sunday Inquiry under the Tribunals of Inquiry (Evidence) Act 1921.

courts on the question of anonymity of witnesses; and many of the other trappings of court procedure. This has given impetus to a critique of 'legalism' (McEvoy, 2007; Campbell & Turner, 2008). Heavily legalised procedure risks turning exploration of the past into a lawyers' game. Witnesses subject to hostile cross-examination may feel traumatised and doubly victimized. Processes may become interminable, and blind-spots of the law become blind-spots on the past.

While the Report's avoidance of some legalistic pitfalls is to be welcomed, a distinction should nevertheless be drawn between excessively legalised *procedure*, and the use of substantive legal *standards*. The latter can be employed without excessive procedure, and should be deployed if outcomes are to be in accordance with international standards. UN Special Rapporteurs for instance frequently draw upon a variety of hard and soft law international standards, in the discharge of their mandate.

For reasons that are unclear, the Report focuses mainly on the European Convention on Human Rights (ECHR). Much of the discussion in this area appears telescoped into a discussion of the UK's responsibility under Art. 2 ECHR for conflict-related deaths. In relation to deaths such as these, a host of international legal standards, both hard and soft are applicable (some legally bind the state), and sole focus on Art. 2 ECHR risks skewing the discussion. Hard law standards include the UN International Covenant on Civil and Political Rights, and international humanitarian law (discussed below). Highly specific soft law standards in this area have been developed within the UN system, while jurisprudence under the American Convention on Human Rights is the world's most developed in the area. The focus on deaths could be taken as a prioritisation of non-derogable rights violations. If so, there should as a minimum also be coverage of violations of the right to be free from torture and inhuman and degrading treatment. In this area too, a host of international legal standards are available beyond the ECHR.

The Report places a heavy emphasis on investigation with a view to criminal prosecution in the work of the Review and Investigation Unit. Presumably this is aimed at meeting the procedural requirements of Art. 2 ECHR, but is problematic in a number of respects: Firstly the emphasis on the need to gather evidence to a criminal standard of proof (beyond reasonable doubt and a good likelihood of successful prosecution) is out of line with practice internationally with truth commissions and truth recovery processes (which typically employ social science, 'probable,' or 'likely' tests). Secondly, the number of prosecutions is likely to be very small, and the number of convictions even smaller. The system may therefore be set up to fail, with a large prosecution-oriented input, and a minimal output of trials. Thirdly, the emphasis on prosecution may work against truth-recovery, in that individuals implicated in unlawful activities during the conflict are unlikely to engage with the Legacy Commission if prosecutions from decades-old cases were being actively considered. There are precedents elsewhere for pursuing prosecution-oriented investigation in parallel with truth-finding (for instance in Sierra Leone) (Schabas, 2003), *but not within the same vehicle*. It is in this area therefore that the Legacy Commission departs most obviously from international practice.

The prosecution issue leads to the question of what values are to be prioritised in the process? International experience is that no truth processes have successfully attained complete truth-discovery, accountability and reconciliation. Where accountability has been achieved by truth commissions, this has largely been institutional rather than individual. Institutional accountability involves a decision on whether a particular

element in the state's security forces or a particular paramilitary group is responsible for a breach of international standards, particularly a systematic breach. Even if the epitome of personal accountability, the retributive trial, were not invoked in the Northern Ireland transition, some institutional accountability might yet be achievable.

This brings the question of whether it is possible or desirable to incentivise truth-telling by some form of mechanism that could 'trade' truth telling for amnesty (as done with the South African Truth and Reconciliation Commission (SATRC)) (Van Zyl, 1999). The Report shows a degree of ambivalence on amnesty: it rules one out now, but hints that one might be appropriate after five years.

There has been considerable flux over recent decades in attitudes towards amnesty among international lawyers. The only Convention directly referring to the issue is 1977 Geneva Protocol II, Art. 6 of which provides that after relatively high intensity non-international armed conflicts, the parties in power shall 'endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict…'. In South Africa the Constitutional Court interpreted the Protocol as supportive of the

the SATRC mechanism whereby any crime sufficiently connected to the conflict could be amnestied in return for truth. By contrast, the International Committee of the Red Cross insists that the only crimes covered by Art. 6 are those for which amnesty is *possible*, thereby excluding serious international crimes. In the 1990s many lawyers and NGOs concerned with the evident impunity of rights abusers became increasingly insistent on states' obligation to punish (Orentlicher, 1991), with a corresponding hostility to amnesties. Where involved in supporting peace negotiations, UN organs also became more insistent on delimiting amnesty (Bell, 2008). This movement can be considered to have reached its apex with the adoption of the Rome Statute of the International Criminal Court.

State practice however, continued to manifest a variety of amnesties (Mallinder, 2007), and the Rome Statute allowed some wiggle room on prosecution. Furthermore, in recent years, there has been an insistence that international legal norms are more flexible than some had claimed, and that a relatively broad amnesty may be permissible in certain circumstances (Hadden, 2004). There is some ECHR jurisprudence supporting post-conflict amnesty.[5] And while recent years have seen an increasing focus on the procedural requirements of such rights as Art. 2 ECHR (life), it might be possible to meet the goals underlying these requirements by means other than prosecution.

While a definitive overall statement of the international law on amnesty cannot be found, the following propositions can be set out with some degree of confidence with respect to Northern Ireland:

1. A blanket amnesty would be unlawful
2. Northern Ireland was not classifiable as an international armed conflict so the issue of amnesty for 'grave breaches' does not arise
3. The conflict probably amounted, for at least part of its duration, to an 'armed conflict not of an international character' under article 3 common to all four 1949 Geneva Conventions ('common article 3' - see discussion in subsequent section)

[5] *Dujardin v. France* (1992) 72 DR 236.

a. An act that was not a violation of common article 3, or that was a non-serious violation of it, may lawfully be amnestied without breaching international humanitarian law

b. While the trajectory of international law is towards the international criminalisation of *serious breaches* committed in non-international armed conflicts, there is some doubt as to whether the prohibition on amnesty for such breaches is as binding as for *grave breaches* in international conflicts. Questions of whether an amnesty was conditional or blanket; whether a truth process existed, and the extent to which victims' needs were met may be relevant in deciding if amnesty is permissible (Mallinder, 2007).

4. The prohibition on torture has the status of a peremptory norm of international law. The dominant view amongst lawyers is that it cannot be amnestied, but there is much flux in the law in this general area, and there is some doubt whether the customary law prohibition on torture's *use* equates to a prohibition on amnesty for the crime *in all circumstance*. The points at (3b) with respect to conditionality may also apply here

5. An amnesty for Genocide and Crimes Against Humanity would be unlawful, but Northern Ireland saw no Genocide. The category of activities penalised under the 'Crimes Against Humanity' rubric has expanded since Nuremberg, pointing to norm-shift. But it would be difficult to make a compelling case that when Northern Ireland's most egregious violence took place (1970s) such acts were at that time categorisable as Crimes Against Humanity.

6. The Rome Statute has no applicability to the offences committed in Northern Ireland prior to its coming into force. Most of the egregious prisoner abuse by the state occurred before it ratified the UN Convention against Torture 1984, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987.

It is therefore possible to argue that a conditional amnesty for many of the offences committed during the Northern Ireland conflict could be lawful if it met certain tests. The amnesty would need to be contextualised in terms of conflict-resolution and perhaps 'reconciliation'; the crime would need to show a direct link to the conflict; and the amnesty would require democratic ratification. The amnesty would also need to be awarded on an individual basis, and if it were to require full disclosure, and if victims' needs were to be addressed, it might meet the needs of society for truths about the conflict, and achieve some measure of institutional accountability. Potentially, findings by a truth commission setting out the panoply of violations during conflict might have at least as great a deterrent effect on the emergence of future conflict as individual trials. Though whether 'deterrence' has any real traction in transitional societies is debatable.

The brief exploration above of the international law applicable in Northern Ireland points to a division in crimes between (a) those involving torture and involving a serious breach of common article 3; the latter includes arbitrary killings of civilians and hostage-taking; and (b) all other offences. There are good grounds for suggesting that category (b) could lawfully be amnestied in a conditional process. As regards category (a) the position is less clear, but it is by no means certain that the kind of conditional amnesty discussed above would be unlawful if extended to category (a).

If it were decided not to include category (a), there remains the question of how to deal with crimes for which amnesty were thought impermissible. The early release provisions in the Agreement stipulate that in the case of paramilitaries/insurgents convicted for offences committed prior to 10th April 1998 (date of the Agreement) and whose organisations are on ceasefire, the maximum period of imprisonment is to be two years. It might be possible to adapt these arrangements to include all conflict-related offences other than those for which amnesty is applicable, whether committed by paramilitaries or security force members. The UN Convention Against Torture requires states to make torture offences 'punishable by appropriate penalties which take into account their grave nature', but this could be interpreted in the context of truth telling and transition.

## Victims, Law and Meta-conflict

As noted above, the Eames-Bradley output is entitled the 'Report of the Consultative Group on the Past'. The omission of details of the geographic or communal location of this 'past' is significant. Unionists refer to the region as 'Northern Ireland', and to the conflict as internal; nationalists by contrast tend to refer to the 'North of Ireland', and see the conflict as about removing obstacles to 'the North's' relationship to the rest of Ireland. The very claim that there is a past that requires re-examination, has very different communal resonances (Rolston, 2009; Simpson, 2009).

The report's title therefore reflects the persistence of the meta-conflict adverted to earlier, indeed the Report, beyond its title, has become a site for such contestation. Inevitably any Legacy Commission will become a site where that meta-conflict plays out, in social, political, but crucially also in legal terms. As regards the latter, the conflict is evident in the Report's framing of the international law applicable in a backward view of the conflict. Under Strand four the Report proposes a thematic exploration of 'certain paramilitary activities', but does not suggest any legal basis for this examination. This leaves open a variety of conflict narratives: crime, terrorism or armed conflict.

Where extensive violence by NSEs is in question, the applicable international standards are those found in international humanitarian law, and specifically, as stated above, in 'common article 3'. In the words of the International Court of Justice (ICJ), the article provides a 'minimum yardstick'[6] against which the behaviour of NSEs can be measured. Understandably, states display marked sensitivity on the question of the applicability of humanitarian law during conflict on their territory. While common article 3 provides that its application '…shall not affect the legal status of the Parties to the conflict', there is typically a concern that a 'recognition of belligerency' will give political if not legal status to insurgents, legitimating their activities, and that it will stimulate prisoner of war claims. These considerations were also evident in Northern Ireland: the UK never accepted that an 'armed conflict' existed, and it refused, until the conflict was over, to ratify two additional Protocols to the Geneva Conventions that might have applied to varieties of guerrilla wars (Campbell, 2005).

While these sensitivities are typical during conflict, they lose much of their force at conflict's end. Recognition of the existence of an armed conflict provides a context in which a more meaningful examination of insurgent and state behaviour can take place. Such recognition takes the justification typically advanced by NSEs for their

[6]Judgement of ICJ in *Nicaragua* v. *US*, 27 June 1986

actions ('we were fighting a war'), and turns this into a route to accountability of sorts (albeit largely institutional).

As noted above, there are good grounds for suggesting that, at least during its most intense period (the 1970s), the conflict in Northern Ireland amounted to a non-international armed conflict. At other times the conflict may have periodically fallen below the threshold, but by virtue of the ICJ ruling quoted above it is still legitimate to apply the 'yardstick' provided by common article 3. Doing so would allow examination of patterns of activities such as 'punishment beatings' and arbitrary killings by paramilitaries. This would allow the proposed Legacy Commission to form a view on the key questions as to whether there had been *systematic* violations of international humanitarian standards during the conflict. To exclude IHL from the ambit of a Legacy Commission is to deny the commission access to the legal tools it needs for such an examination. A Legacy Commission cannot exclude itself from the meta-conflict in areas such as international law, since by action or inaction it is compelled to make an explicit or implicit contribution.

That conflict is also evident in the definition of 'victim' used in the Report, which is taken from the *Victims and Survivors (Northern Ireland) Order 2006*. That Order provided what can be considered a pragmatic, service-oriented definition, which included those injured in the conflict; those providing care for such people; and those left bereaved by the conflict. It did not however include the most important category of the conflict's victims: the dead.

The reason for this exclusion appears to have been that to have included the deceased would have put dead soldiers, insurgents, and uninvolved civilians on the same plane. This was repugnant to those who asserted that there should be a hierarchy of victims with insurgents at the base, reflecting a narrative of 'terrorist criminality'. The definitional issue was therefore a site where the meta-conflict played out, and the Report's attempt to side-step the issue by invoking the statutory definition is unsatisfactory. The issue is certain to return to haunt a Legacy Commission if established.

## Conclusion

This analysis suggests that application of transitional justice discourses to Northern Ireland cannot be a mechanistic process of corralling local 'facts' into pre-determined boxes. Rather, if the discourse changes the way Northern Ireland is viewed, the region also alters the contours of transitional justice beyond that applicable to the paradigmatic authoritarian state. Most obviously it forces a re-examination of procedural, substantive and consociational aspects and forms of democracy.

As regards law, there is little doubt that the main driver in the UK's interest is dealing with the past is the on-going Art. 2 ECHR issue. This reflects both the UK's self-identity as a 'rule of law' state, and the related question of the refusal of Council of Europe mechanisms to permit such cases to be conveniently closed. This tends to suggest a maturation of ECHR norms and processes, and a degree of autonomy that might not have been evident in past decades. This autonomy may therefore owe something to a context provided by the transition in Northern Ireland (Campbell, 2005) with the result that it is an international mechanism that is forcing an exploration of the past, and to that extent compelling an engagement with transitional justice. In this context the question of amnesty sits uneasily, appearing as perhaps the

only way to meet some of the goals of Art. 2 ECHR (truths and institutional accountability), yet itself raising questions of compatibility with international law.

Where international *mechanisms* are not forcing an examination of the past even though it is claimed substantive norms were infringed, the state seems much less concerned. The UK is as legally bound by the International Covenant on Civil and Political Rights as by the ECHR, yet the Covenant is ignored in the Report, and scarcely figures in official discourse on Northern Ireland.

This analysis also suggests that transitional justice mechanisms in general (whether in the pre-existing 'rule of law' state or not), and truth commissions in particular, can never fully be 'outside' the conflict, the legacy of which they examine. Assertions that there is a 'past' that requires attention, and that particular international law framing is required, both contribute implicitly or explicitly to a broader meta-conflict. This is also true of decisions on what elements constitute the 'past' and whether amnesty should be granted. While post-conflict transitions involving authoritarian states can easily project a narrative of change with a high degree of logical consistency, those in the liberal state are unlikely to fit together quite so coherently, even if the violations at stake will almost certainly be of a lower order.

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