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Social & Legal Studies 2004 13: 305
DOI: 10.1177/0964663904044997

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Justice Discourses in Transition

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Abstract

This article asserts that 'transitional justice' analyses provide important tools in understanding how societies emerge from violent politics. It argues for a conception of transitional justice that goes beyond the question of dealing with the legacy of past human rights violations; rather, its focus is on a range of inter-related dilemmas relating to the role of law in transitional societies. Specifically, the article explores the pivotal and paradoxical role played by law and legal process in times of transition. It examines the tensions inherent in simultaneously reforming the law while utilizing legal form to bring about institutional transformation. These broad theoretical issues are addressed using Northern Ireland as a case study. The role of law is examined (and a reassessment of transition offered), through an exploration of five inter-linked areas: The relationship between law and conflict; the transformation of legal institutions; dealing with the past; political accommodation and minority rights; and the gap which occurs around gender and political transition. The article concludes by suggesting that only through a broader understanding of transitional justice, coupled with a nuanced reassertion of law's domestic and international legitimacy, can the role of law in transitional societies be adequately understood.

Introduction

'Transitional justice' analyses provide important tools in understanding how societies emerge from violent conflict. As generally understood, 'transitional justice' encompasses the legal, moral and political dilemmas that arise in holding human rights abusers accountable at the end of conflict. This article locates its exploration of the term in the considerable legal flux of the contemporary world. Viewed in these terms, we argue that 'transitional justice' can be used to examine a much broader range of dilemmas relating to the role of law in societies attempting to emerge from violent politics. We suggest that debates about how to deal with the past are only one part of a bigger question of how law and legal institutions assist

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London, Thousand Oaks, CA and New Delhi, www.sagepublications.com
0964 6639, Vol. 13(3), 305–328
DOI: 10.1177/0964663904044997

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(or not) in the move from violent conflict to 'peace' (conceived as non-violent political conflict) (Bell, 2000; Teitel, 2000). Indeed, we suggest that it is only within this broader context that debates about dealing with the past can be fully understood. In short, we argue that that transitional justice discourses are themselves in transition. In doing so, we further seek to define and explore the expansion of the transitional justice field, and to offer some views on its contours.

While the broader conception of transitional justice argued for in this article has implications for a range of conflicted and post-conflict societies, it uses the case study of Northern Ireland by way of specific illustration. Doing so not only emphasizes the point that transitional justice analyses may offer key insights into the region's peace process (Bell, 2000; Rolston, 2002; Campbell, Ní Aoláin and Harvey, 2003), it also illustrates how such processes may in turn be reshaping the boundaries of what is meant by 'transitional justice' (Teitel, 2003). The article, though, does not purport to resolve the dilemmas of the transitional justice landscape in Northern Ireland or beyond. Rather it seeks to reframe and take forward discussions about the potential and the limits of law in effecting transition, by mapping the shifting transitional justice terrain, both theoretically, and with relation to specific debates.

The analysis presented later of the complex relationship between law and contemporary transitions is tied to four important global realities (Campbell, 2000; Bell, 2003; Bell, 2004a). Firstly, there is the rise of negotiated settlements as the preferred way of dealing with internal conflict (Bell, 2000). In the last three decades of the twentieth century, internal conflict replaced inter-state conflict as the main type of conflict experienced globally. While the historical origins of transitional justice lie in the legacy of inter-state conflicts,[1] its reinvigoration can be located in the rise of the negotiated 'peace agreement' in internal conflict. Such settlements necessarily involve some compromise between violently conflicting parties, and this compromise is translated into the design of legal and political institutions. This gives rise to on-going dilemmas focused around law's possible role in achieving the transition from violence.

Secondly, there is the increased status of human rights law within and between states. This is demonstrated by more expansive understandings of what human rights entail, including civil and political rights (first generation), social economic and cultural rights (second generation), and people's or solidarity rights (third generation). The scope of human rights law, and its externality to the actors in a conflict, means that it offers increasing possibilities for mitigating the worst excesses of conflict. It also offers an increasing variety of tools, such as institutional blueprints, capable of assisting the negotiation of conflict endings. This points to a clear role for law in assisting a move away from violence to political accommodation.

Thirdly, there is an increased interface between human rights and humanitarian law as a way of dealing with the actions of both state and non-state actors in internal conflict. This has led to more emphasis on accountability

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and individual responsibility particularly in dealing with past human rights abusers (Campbell, 2000). Again, this raises the difficulty of how to reconcile normative legal standards with the pragmatics of making peace (Anonymous, 1996; Baker, 1996; 2001).

The final reality sits uneasily with the other three. In the wake of the atrocities of 11 September 2001 and of the invasions of Afghanistan and Iraq, and with the global 'war on terrorism' reaching into ever-increasing spheres, the world is a different place. Current US unilateralism, founded on unprecedented military and economic pre-eminence, has important implications for international law, most obviously for the capacity of such law to bind the US in any real sense (a point explored further later). The position is further complicated given the US appropriation of the language of 'transition' and 'democratization' in furtherance of an apparently global project, with few effective international legal constraints.

In the longer term, it is not clear how these dynamics will play out. It may be that US unilateralism will produce a seismic shift in international law, or it may be that countervailing pressures will emerge with time, producing a new international legal consensus. This article does not attempt to guess what the outcome will be; rather it explores the tensions around law and legal institutions generated in contemporary transitions by these sometimes dissonant realities.

The interplay between these realities suggests a distinctive relationship between law and politics in contemporary transition. Identifying such distinctiveness does not of itself assume a homogeneous view of law and legal process, either in a transitional or ordinary context. Rather we defend the view that in transitions particular legal institutions and norms are designed with a specific political task in mind: That of effecting and assisting transition. Typically, the starting point in transition is one in which the rule of law is either absent or degraded, while the end goal is one in which law plays its full role in a functioning liberal-democratic state. This begs the question explored in section A as to what is specific about the role of law in transition. What are the appropriate reference points for understanding it, and how different is law's role during the transition from that at its end-point? These theoretical debates are taken forward in section B of this article, where it is suggested that critical insights into the solution of the problem may lie in revisiting an under-explored relationship: That between law and pre-transition conflict.

The analysis then moves to explore how these debates play out in three areas typically addressed in peace agreements, but with a resonance across the broad spectrum of transitional situations: The challenge of institutional transformation (section C); measures aimed at dealing with the past (section D); and measures aimed at political compromise and accommodation (section E). Finally, section F makes the case for integrating gender studies squarely into the transitional justice landscape, as vital to understanding processes of conflict, processes of law, and transitional justice itself. The discussion in its entirety serves to illustrate the dilemmas for law in transitional situations, and the extent to which these are inter-related concerns, rather than discrete problems.

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(A) MAPPING TRANSITIONAL JUSTICE THEORY: THE ROLE OF LAW

The interaction of law and politics in times of transition suggests a role for domestic law in situations of transition that is different from that occupied by law in more settled times. This is without prejudice to an understanding of law's role in a non-transitionary context as contested in many ways. Nonetheless we assert that rather than being related to well-established notions of order, stability and community, law in transitional societies has to engage with the imperatives of moving between radically different political contexts. The need to compensate for domestic rule of law 'gaps', coupled with internationally imposed imperatives, means that international law typically forms a heightened and important legal reference point during transition by virtue of its externality to the parties to the conflict (Hamber, 2003; Teitel, 2003). These reference points, together with the rhetoric in peace agreements and of the international community, suggest a paradigm of transition from a less liberal (more violent) context, to a more liberal (and less violent) one. The projected end-goal is thus some form of liberal-democratic state.

In practice, however, domestic parties almost invariably contest the processes and goals of transition. This contestation can take the form of a head-on attack either on democracy in its entirety, or on its 'liberal' dimension. Or it may be evident in more subtle disagreements over what democratic liberalization actually means or requires. One way in which this can manifest itself is in conflict as to the 'demos' in the democratic: What is the unit for the articulation of the democratic voice? At this point the argument shades into that on self-determination, as section D explores. Moreover, it is now more generally appreciated that positive movement towards democratic liberalization can be substantially offset by external geo-political factors, the limits of externally imposed 'off-the-peg' liberalism, or even the conflicting goals of the international community (Bell, 2004c).

The question mark over the international community's commitment to a democratic liberal direction for transitions looms ever-larger post-9/11. Even as democratic liberalism is promoted as the 'cure' for varied international problems (including despotic regimes, terrorism, ethnic conflict, and failed states), its central tenets are being concurrently challenged by the 'war against terrorism'.[2] This debate is writ large in the associated challenge to the primacy of international law, and in particular its human rights strand (Campbell and Ní Aoláin, 2003). Any 'externality' of international law turns on law having a degree of autonomy. Without this autonomy, international law would be unable to fulfil the kind of mediating role prescribed by Cassesse (1986), since mediation would be lost where a state was free to ascribe to international law whatever meaning suited it at a particular time. Time will tell how this mediating capacity of international law is affected by US unilateralism.

Any theory of 'transitional justice' therefore has difficult questions to

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grapple with, both domestically and internationally. The degrading of the rule of law in conflict situations means that in sociological and socio-legal terms there is likely to be a loss or absence of legal legitimacy (including the legitimacy of legal institutions) within communities at the sharp end of the conflict. The resulting crisis of legitimacy suggests that in transitional societies, law must be both the subject and object of change: It must simultaneously both produce change and be changed itself.

An initial question arises as to what the reference point for understanding the role of law in transition is. Can law and legal institutions created to facilitate a move from conflict be evaluated in terms of their capacity to buttress traditional concepts of order, community and stability? If not, what should the basis for their evaluation be? One possible answer is that they should be evaluated in terms of their capacity to assist in the kind of paradigmatic transition described above. Teitel (2000), for example, has justified the very *partiality* of transitional criminal justice mechanisms as serving the needs of transition viewed in such terms. She argues that debate over their compatibility with rule of law requirements can be assessed in terms of whether they enable or not liberal-democratic transition, in what amounts to a transition-specific conception of justice (p. 4). However, how to use this new notion of the rule of law so as to evaluate compromises made is not simple, either empirically or conceptually. Moreover, conceptualizing the contours of transition-specific justice is a formidable task, and as this article outlines, it may be a much more ambitious project than has previously been understood by academic and policy commentators.

There are, moreover, difficulties with evaluating legal mechanisms in terms of an accepted normative direction of transition towards a liberal-democratic future. Firstly, there is the problem adverted to earlier that in many post-conflict societies there is little consensus over what that liberal-democratic future should look like. A second practical difficulty in this context is the question of whether future evaluation requires a notion of when transition ends. Are legal institutions, such as bills of rights, to be designed with explicitly transitional goals in mind? If so, do they require to be replaced by more permanent documents at some point, and what would that point be? There would seem to be a danger that ongoing evaluation of legal reform in terms of instrumental transitional goals could, at some point, undermine the normative tenets of liberal democracy which these goals are aimed at.

This leads us to another question: How different, really, is law's role in times of transition, to its role in more liberal-democratic settings? Tully (1995), for example, in noting the modern challenges to liberal-democratic constitutionalism made by women, indigenous peoples, and minorities, argues for less static 'dialogic constitutionalism' which would enable social challenge to be better mediated in an on-going way. If transitional justice is merely a dramatic instance of social change, what are the implications of transitional justice responses for law more generally? It is possible that these discourses, in challenging traditional notions of the role of the rule of law,

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proffer creative possibilities for a much broader range of situations of social change.

Northern Ireland provides a valuable case study through which to probe the limits of contemporary transitional justice discourses both in its specificity from, and in its commonality with, other transitional situations. Part of its specificity lies in the liberal-democratic character of the UK (Campbell, Ní Aoláin and Harvey, 2003), with the implication that political and legal reform in Northern Ireland can be analysed from a 'democratic renewal' perspective. However, Northern Ireland's dysfunctional and conflicted democratic legacy (the region saw a half-century of one-party rule) also locates it at the transitional justice interface. In this it evidences greater similarity with other transitional situations, and borrows in its peace agreement from South Africa in particular (Harvey, 2001). The unique straddling of the categories of 'conflicted/transitional society' and 'western democracy' makes Northern Ireland a key case study in examining the extent to which the dilemmas and solutions of 'transitional justice' have a currency, both as regards other transitional situations, and processes of democratic renewal more generally.

(B) CONFLICT AND LAW

Paradigmatic transition is the transition from violent conflict to peace and democracy. Increasingly, both conflict and processes of resolution are being understood as fluid, with dynamics that change over time. Consequently, processes of conflict-prevention, peace-making and peace-building are now recognized as closely related (Boutros-Ghali, 1992; 1995; Brahimi et al., 2000). This relationship is built on two converse assertions. First, that greater understanding and acknowledgement of the relationship between law and the causes of conflict are necessary when designing legal mechanisms and institutions aimed at facilitating transition from conflict. And conversely, that 'transitional mechanisms' exhibited in societies emerging from violent conflict could have a constructive role elsewhere if promoted when conflict is at a nascent stage (Macedonian Framework Document, 2001). It is in the assumptions buried in these converse assertions, and indeed in challenges posed to them in conflict situations, that we would assert the claim for a distinctive notion of *'transitional'* justice lies.

Northern Ireland provides a prime example of a situation in which security responses, particularly in the early years of the conflict, frequently undercut the (often concurrent) legal responses seeking to eliminate the political causes of conflict. Yet, this phenomenon was denied by official discourses on emergency and anti-terrorist powers, which throughout the conflict were presented as 'the response of the liberal-democratic state to politically-motivated violence and terrorism' (*Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, 1972; *Report of a Committee to Consider, in the Context of Civil Liberties and*

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Human Rights, Measures to Deal with Terrorism in Northern Ireland, 1975; McEvoy and Gormally, 1997). Thus incremental changes were at each stage justified in terms of a balancing calculation of the degree to which the ordinary liberties guaranteed by the liberal-democratic state should be limited in order to eliminate the violence, or at least to contain it within 'acceptable levels'. The problem and the response were separately compartmentalized and calibrated (with obvious post-9/11 resonance).

While challenges to the nature of specific balancing calculations are possible,[3] a more fundamental difficulty with the structure of argumentation was that it denied any link between state action and the causes of conflict. In situations such as Northern Ireland, emergency powers and the security policies operationalizing them could be argued not to be simply a response to the conflict, but in fact *partly constitutive of it.* While official discourses might project emergency legislation being introduced as a response to violent upheaval, in fact, 50-year old 'special' legislation pre-dated the most recent round of violence (National Council for Civil Liberties, 1936; Campbell, 1994). Repeal of this legislation was one of the core demands of the civil rights movement, generating street protests, the policing of which is generally seen as having contributed to the violent disintegration of the late 1960s (Boyle, Hadden and Hillyard, 1975). Particularly in the early 1970s it is empirically possible to demonstrate a correspondence between the escalation of violence and particularly harsh, military-based, security measures (Campbell and Connolly, 2003).

Official discourses obscured evaluation of the extent to which the state in Northern Ireland was not simply a bystander or referee in the conflict but a *participant* in it. This had obvious implications for perceptions of the law's neutrality and legitimacy, which any solution to the conflict would have to address, for the simple reason that in the liberal-democratic state, law matters. The mediating role of law, encapsulated in conceptions of the 'rule of law', is a key source of democratic legitimacy.

As already suggested, in such a situation there are possibilities for international law both to address the de-legitimation of law during conflict, and to provide a way around some of the legal dilemmas which arise at its end. However, the Northern Ireland conflict reveals difficulties for this role. If, as discussed earlier, international law is to play this mediating role,[4] it cannot be seen simply to endorse or accommodate whatever claims the state may choose to make as to its security needs during the conflict. The bite of international law can operate to buttress the autonomy of key legal norms such as the right to life, so as to affect how the state (and in turn opposition groups) conduct the conflict (Ní Aoláin, 2000b). However, in Northern Ireland, supranational legal supervision was not always robust. The relatively indulgent attitude adopted by the European Court of Human Rights to UK security claims in Northern Ireland during the actual course of the conflict suggests that international human rights norms, coupled with interpretative mechanisms which often gave deference to state fact-finding, were not always effective.[5] This poses the question of whether

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the liberal-democratic character of a state serves as a shield against international scrutiny.[6]

The question of the mediating role of international law arises even more starkly with relation to international humanitarian law (given that this is a conflict-specific body of law). Here the questions apply not just to the state, but also in relation to armed opposition groups or 'non-state entities'. Whether the violence in Northern Ireland amounted to an 'armed conflict' in the technical humanitarian law sense is a moot point. The UK went to great lengths to deny the possibility of the applicability of international humanitarian law to Northern Ireland, for instance, by delaying ratification of two 1977 Protocols to the Geneva Convention covering non-conventional armed conflict until the peace process was well in hand.[7] Non-governmental organizations were, over time, less reticent about drawing upon international humanitarian standards, though fudging the issue of whether the norms were strictly legally applicable.[8] Non-state entities, while making reference to the conflict as a 'war', did not claim adherence to either 1977 Protocol, nor indeed, did they conduct their own use of violence with appropriate or specific regard to humanitarian norms.

In short, difficulties with the applicability of international humanitarian law further evidence the complexities faced by the liberal-democratic state in coming to terms with the fact that it may have had an armed conflict of sorts taking place on its territory, and furthermore, that it may have been a participant in it. It also starkly highlights the activities of non-state actors and the gap between the invocation of 'war' rhetoric without regards to the observance of humanitarian norms. Despite these difficulties, humanitarian law would seem to have particular uses during transition, for example, with relation to provision for prisoner-release (1977 Protocol II provides for amnesty following high-intensity internal conflicts), and in providing norms capable of dealing with the experience of the past. Thus, humanitarian law provides one reference point to address both the behaviour of state and non-state entities at conflict's end.

This brings us back full circle to endorsing the view that an understanding of the relationship between conflict and law is vital to understanding the post-conflict transition. In many respects the success of the transition in a law-based state turns on a reversal of the kind of legal de-legitimation that occurred during the conflict: There is an attempt to rebuild the legitimacy of domestic law and of legal institutions. If rule of law deficits can be linked to conflict escalation, then rule of law cures play a vital part in any attempt to negotiate an end to conflict (Bell, 1999).

(C) INSTITUTIONAL TRANSFORMATION

Given the connection between conflict and law described earlier, transitional justice claims invariably implicate legal institutions. Any conflicted society is likely to exhibit sharp difference between communities in the confidence

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displayed in legal structures and processes. There may be conflicting views over the extent to which legal institutions have been complicit in the maintenance and management of conflict, and diverging views about the necessity and capability of reform. As a result, legal reform is debated not just in terms of the intrinsic value of reasserting the rule of law, but also as a form of broader political affirmation or denial of certain constitutional and political pasts and futures. The consequences of this bargaining dynamic around legal reform can be significant, indicating a need to maintain law's stability while simultaneously acknowledging its failings during the conflict, and redressing these in the form of institutional revisions.

Peace agreements frequently include legal and other institutional reforms that take account of this reality. As practice in multiple jurisdictions has demonstrated, the totality of reform cannot be contained in a peace agreement, and instead such reform tends to form part of the post-negotiation landscape. Thus, institutional reform can occur incrementally outside the initial, formal, negotiating process, and works to addresses the causes of conflict on a more piecemeal basis. This practical reality means that institutional reforms become intrinsically tied up with the ongoing experiment of political accommodation. This can operate to the detriment of a coherent reform process, as parties embrace or reject legal reform not on its own terms, but because of its capacity to reshape critical elements of the initial agreement towards their own vision of transition.

In Northern Ireland the contested dynamic that has emerged around institutional transformation is rooted in two aspects. First, there is a lack of shared narrative by all parties on the causes of conflict and its manifestations (an issue explored further in section E). This has led to markedly different views on the role and legitimacy of the actions of legal institutions and actors during the conflict. Second, there is a debate about the extent to which legal reform needs to be tied to a particular constitutional settlement.

These realities have substantial impact on the politics of institutional reform. If, on one view, the institutions of the state are viewed as having 'done a good job in difficult circumstances', then demands for reconfiguration are seen as charged political assault on the integrity and neutrality of legal form and structure. Change can only be countenanced as necessary when couched in managerialist language, with an emphasis on 'professionalism', 'efficiency' and 'modernization', and tied to developments in democratic jurisdictions elsewhere (and preeminently in the rest of the UK) (O'Rawe, 2003). On this view, change is not linked to the experience of conflict but rather to the kind of on-going economic or management imperatives that exist anywhere.

Others argue for substantial reform or innovation (frequently articulated in a language of 'transformation'), rooted in a view of enormous institutional failing, evidenced by multiple human rights abuses. Viewed in these terms, the challenge becomes that identified in section B: Building the legitimacy of the legal institutions of the new dispensation, producing an imperative for root and branch reconfiguration.

The institutional pattern of many peace agreements has been followed in

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the case of Northern Ireland. The Belfast/Good Friday Agreement (the 'Agreement') provided for a Criminal Justice Review, reform of policing, mechanisms for enforcing rights, (including a bill of rights), judicial reform, new equality legislation, and discrete measures relating to prisoners, victims, and language policy. Any one of these issues serves to illustrate the tensions described earlier, and attempts at reform have often tried to negotiate a middle way between competing understandings of the parameters of change. Thus, the Patten report on policing both addresses the problems of past legitimacy (but only implicitly), while reframing the debate around 'good policing' (rather than good 'police'), justifying many reforms as innovative good practice *per se* (Independent Commission on Policing for Northern Ireland, 1999). It has consequently been criticized as failing to deal adequately with the legacy of the past human rights abuses, but also for 'going too far', in a reconstructive agenda that cannot solely be justified as required by neutral managerial and efficiency requirements. The report could thus be viewed as an attempt to address the *legacy* of institutional delegitimation without an exploration of the *process* of delegitimation that an examination of the past might have produced. As such, assessment of its success as a transitional device is likely to depend in part on whether explicit acknowledgement of past failings is viewed as a necessary part of successful transition, or whether the kind of compromise in relation to the past represented by Patten is viewed as an acceptable cost of peace-building.

(D) DEALING WITH THE PAST

As the etymology of 'trans-ition' makes clear, the concept implies a journey, which in paradigmatic transition is from a conflict-laden past to an anticipated peaceful democratic future. Successful transitions in recent years have almost invariably been characterized by attempts to engage with this past, suggesting an important instrumental value for the exercise. Conversely, this experience warns that a failure to address the question adequately may hinder prospects for a successful transition.

Dealing with the past may be viewed as comprising two aspects, 'undoing the past', (typically by attempting to 'undo' the displacement of people and dispossession of land which occurred during the conflict), and 'accounting for the past' (for instance, through the use of truth commissions and domestic or international courts and tribunals) (Bell, 2000). In the Northern Ireland transition, the focus has been almost exclusively on the latter, though arguments are now being made that the significant population displacement which occurred at the start of the Troubles can be understood as a form of deliberate displacement akin to the recent experiences of other jurisdictions such as Bosnia, though on a much lesser scale.

Devising legal mechanisms for dealing with the past probes the limits of classical legal discourse. International law increasingly articulates a seemingly inflexible demand for trials of those responsible for major violations

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(Orentlicher, 1991; Campbell, 2000), yet paradoxically, peace-making, reconciliation and truth-telling may be facilitated by a measure of immunity from prosecution (Cohen, 1995), and prisoner-releases have been a feature of most conflict-resolution processes (Gormally and McEvoy, 1995). Indeed, in the Northern Ireland process, prisoners are frequently presented as having played a major role in peace-making (McEvoy, 2001).

Truth commissions, with their novel approaches to accountability, may offer a way to square this circle, even if a degree of conflict with legal norms is involved (Roht-Arriaza, 1995). Yet such mechanisms cannot be said to represent an escape from law, since successful truth commissions almost invariably require a legal mandate (witnesses, for instance, need to be compellable) (Hayner, 2001). Others champion individual criminal trials as routes to truth and reconciliation (Akhavan, 1998). And yet others point (however critically) to alternative 'weeding out' (or lustration) mechanisms, whereby those involved in past violations (typically lower echelon functionaries) can be prevented by administrative or quasi-judicial means from public participation in the new institutions (such as in police forces) (Huyse, 1995).

The approach to the past in the Northern Ireland transition can be described as *ad hoc* and 'piecemeal' (Bell, 2003). There has been no unitary centralized mechanism for publicly re-examining the conflict, along the lines of the South African Truth and Reconciliation Commission. Nor is there widespread agreement on the institution of such a mechanism in the immediate future (Healing Through Remembering Project, 2002). Explicit acknowledgement of failure has been rare, though in some cases (as with the Patten report discussed earlier), the scale of change recommended contains an implicit narrative of institutional failure.

There are several instances, though, in which discrete conflict-related issues are being or have been addressed. Most prominent of these has been the continuing Saville Inquiry into the Army's 1972 Bloody Sunday killings (Hegarty, 2003). Another exploration has been through on-going criminal investigations in relation to criminal offences committed during the conflict, the most high profile of which produced the 'Stevens 3' report into collusion between elements in the security forces/services and loyalist paramilitaries (Stevens, 2003). Yet other initiatives have included a number of attempts to address the needs of victims (see, for example, Bloomfield, 1998; Department of Health and Social Services, 1998; Wilson, 1999; Healing Through Remembering, 2002): The provision of a de-facto amnesty through the early release of those convicted in special 'Diplock courts' (Northern Ireland (Sentences) Act 1998); the issuing of a number of apologies, (displaying greater or lesser degrees of apparent contrition) by paramilitary groups;[9] and the Cory inquiry, exploring whether further specific allegations of collusion require public inquiries.[10]

This piecemeal approach has had some instrumental benefits. Jurisdictions where a generalized exploration of the past has been agreed upon are generally those in which a high degree of societal consensus has emerged about the

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broad contours of that past (Bell, 2000; 2003). In Northern Ireland this consensus does not exist. Rather, as in many ethnic or quasi-ethnic conflicts, a conflict-about-the-conflict, or a 'meta-conflict' continues to exist (McGarry and O'Leary, 1995; Bell, 2000; Campbell, Ní Aoláin and Harvey, 2003). There remains no agreement as to what the conflict was about, or as to what caused it. Referring back to the earlier discussion of international legal regimes, there even remains a conflict as to whether any 'armed conflict' took place. And in a wide-ranging exploration, virtually all the parties have something to lose, particularly where questions of individual culpability for acts committed during the conflict may arise. In this environment, demands for an across-the-board exploration of the past might have proved an insurmountable obstacle to the peace process; the piecemeal approach circumvents this dilemma, allowing engagement with those issues for which there were specific political demands (Bell, 2003). And yet a generalized sense of unfinished business – a sense that closure on many conflict-related issues has not been achieved – persists in much of civil society (Healing Through Remembering, 2002). This poses the obvious question of whether achieving such a sense of closure is necessary, useful, or even possible. This in turn leads to the question of whether strategies of engagement with the past should be judged not simply in terms of their instrumental value in furthering transition, but perhaps in terms of a broader truth-telling imperative.

On the one hand, the lack of an overall narrative about the conflict impacts on on-going institutional reform in Northern Ireland. Every contestation in the reform process tends to become a surrogate continuation of the conflict, producing in turn an endless replay of the meta-conflict. On the other hand, it is arguable that to set out to establish the 'one great truth' about a conflict as complex as that in Northern Ireland may be to set the enterprise up for failure. It is possible to see a real problem here without retreating into the absolute relativism of the 'postmodernist black hole' (Cohen, 1995; Campbell, 2000: 33). It is also possible to see that a broader truth-eliciting process might be tasked with establishing particular truths that cumulatively, contribute to truth (rather than establishing *the* truth).

The problem of the past in the Northern Ireland transition reflects the classic dilemmas of established transitional justice discourses. These issues remain as relevant in the jurisdiction as elsewhere. There is at least one way though, in which the difficulties of instituting a unitary mechanism in Northern Ireland, and the consequent piece-meal approach, point to a disaggregation of broader dilemmas. If the stark choice sometimes presented between 'peace', 'justice' and 'truth' is unpacked, the Northern Ireland experience tends to suggest that the issue may be as much about timing as about substantive questions (Bell, 2003; 2004c). In these terms, the 'big problem' breaks down into questions of how interim mechanisms can be designed in such a way as not to preclude other possibilities in the future; questions of the timing of interim and overall initiatives; and technical questions springing from the need to keep past-focused initiatives operating in tandem with the political accommodation imperatives of the peace-building project.

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(E) POLITICAL ACCOMMODATION AND MINORITY RIGHTS

As with 'dealing with the past', the question of law's relationship to political accommodation revolves around the issue of how to reconcile normative legal demands with the pragmatics of peace-making. Furthermore, the two are linked – hence the need to keep both operating in tandem.

At one level, political accommodation and the move towards compromise among competing groups over access to governmental power, may seem to have little to do with law or transitional justice. Yet, the inclusion of self-determination as a right within international human rights instruments, and an emerging body of minority rights law, have blurred the distinction between political and legal mechanisms.[11] Here again, the context of the conflict forms an important backdrop. As Berman (1998) has noted, international self-determination law does not stand above domestic law conflicts; rather 'the power of international law to shape the identity of the protagonists of such conflicts cannot be separated from even its principled activities to remedy them' (p. 28). International law's adjudication on self-determination positions during a conflict are integrally related both to the course of the conflict, and to eventual self-determination outcomes.

Self-determination law has been described as having two aspects: External and internal. External self-determination underwrites change in the status of states, for example, for colonial to independent, or from one state to two or more (Thornberry, 1993). Internal self-determination focuses on the 'relationship between a people and "its own" state or government', lifting the veil of the state to question its legitimacy and relationship to the will of the people' (p. 101). Only external self-determination has a clear legal basis, although, as Thornberry notes, the roots of a concept of internal self-determination can be found in most legal articulations (cf. Crawford, 1993).

Questions of self-determination centrally raise the question adverted to earlier, that of the demos in the democratic: Whose right is it, and what is the unit for its exercise? Increasingly, in internal conflict, difficult questions of external self-determination are being dealt with through ambiguous language that satisfies the international community's notion of what external self-determination law requires, while capable of quite different meanings to different parties to the conflict (Bell and Cavanaugh, 1999; Bell, 2000: 161–91). Simultaneously, the seemingly all-or-nothing requirements of external self-determination law are mediated by turning to a range of policy options aimed at accommodating competing demands for power, underwritten by a notion of 'internal self-determination'. These include autonomy regimes, consociational mechanisms (such as power-sharing government with vetoes), and 'corporate federalism' (whereby power is devolved to ethnic groups not on a territorial basis but over certain spheres of life, for example, education or culture). Thus, in Bosnia-Herzegovina the international community insisted on a unitary state within existing (post-Yugoslavian) boundaries, even as partitionist claims were controversially met by establishing ethnic entities to which nearly all power was devolved

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(The General Framework Agreement for Peace in Bosnia and Herzegovina, 1995).

Although it is too early to talk of a legal 'right' to this broad concept of internal self-determination, the notion does find support in the proliferation of international instruments on minority rights, and is increasingly referred to by international bodies.[12] However, international law's attempt to provide blueprints for political institutions illustrates how some of the theoretical issues raised at the start of this article play out.

Firstly, there is the question of the normative requirements of self-determination law. Despite its notoriously ambiguous content, self-determination does have some clear normative content. Peace processes often implicitly pose the question of the extent to which that normative requirement can be ignored or manipulated. For example, in the Israeli/Palestinian conflict, the Oslo 'Declaration of Principles' was silent on the right of the Palestinian people to self-determination, thereby questioning whether an outcome consistent with Palestinian self-determination claims was even on the table.

Secondly, a fundamental question must be asked of situations in which the normative demands of self-determination law are less clear, as to whether it is useful for international law to aim to provide what are in effect self-determination blueprints. As Slaughter (1998) writes: 'The rise of group rights may be understood as the further colonisation of the political by the legal' (p. 134). However, she also notes that 'the relative success of informal efforts at mediating simmering ethnic conflicts suggests the value of expanding the repertoire of political solutions rather than searching for new rights and remedies.' (p. 129) And so the question must be posed as to whether international lawyers should strive to produce a normative response at all, or merely police the law/politics divide, acknowledging that where law ends, politics begins. At the minute the distinction between law and politics is to some extent being preserved by a distinction between hard law (external self-determination), and soft law (internal self-determination). However, soft law has a tendency to harden meaning so that this question is likely to become ever more pertinent in the future.

The use of a 'group rights' paradigm to address political institutions also raises difficult practical questions as to the relationship between group-oriented political structures and individual-oriented equality standards. Do power-sharing arrangements discriminate against the individual equality rights of 'others' who are not identified as members of the main political groupings (Wippman, 1998)? Do solutions fashioned around acknowledging one dimension of difference, namely ethnicity, marginalize equality for groups such as women? Or more positively, can addressing other types of difference, such as gender, contribute to addressing ethnic division by re-framing the problem? As discussed later (in section F), women have reason to be sceptical about the institutions of liberal democracy, and about the political and legal permutations which peace agreements produce, often in response to narrow definitions of 'the' conflict.

Finally, little work has been undertaken as to the *transitional* role which

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this form of constitutionalism takes (Teitel, 2000). In other words, are these mechanisms better viewed as permanent solutions to ethnic conflict, or temporary mechanisms, which, if successful, manage group conflict as non-violent, pending re-negotiation of the constitutional and territorial future?

Northern Ireland provides a good example of how these dilemmas play out in a classic example of constructive ambiguity (Bell and Cavanaugh, 1999). The Belfast/Good Friday Agreement's formulation in relation to external self-determination is that:

> it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland. (British and Irish Governments, 2003: Article 1(ii))

This formulation addresses the claims of both the main communal groups. For nationalists and republicans, self-determination is located by reference to the people of the entire island, while for unionists and loyalists, the fact that northern consent is required for re-unification means that a bar to this possibility exists, at least for the immediate future. Thus existing state boundaries remain intact for the immediate future, but British sovereignty over Northern Ireland is located not by reference to a UK claim as of right, but rather by reference to exercise of a right of self-determination involving the people of all the island.

In terms of the immediate exercise of political power – the sharp end of political accommodation – it is the internal dimension of the right to self-determination that takes centre-stage. This is true even if 'internal self-determination' is not the language explicitly used. In this regard, the Agreement stipulates a consociational form of government in which legislative and executive power is shared between the two communities, with a requirement that public power be exercised on the basis of 'parity of esteem'. Proof of the effect of these stipulations lies in the fact that the power-sharing Executive and Assembly have been suspended on four occasions. Moreover, as recent election results indicate (November 2003), a marked shift in the distribution of political representation is taking place within both nationalist and unionist communities, with benefits to Sinn Féin and the Democratic Unionist Party (unsurprisingly, suspension continues at the time of writing). Such internal political realignments are a feature of post-peace agreement landscapes in many jurisdictions. What should not be under-estimated is their capacity to undermine the broad accommodations reached in a prior comprehensive settlement, and their impact upon the course of the transitional process. Finally, straddling the external-internal self-determination divide is provision for North-South and East-West intergovernmental bodies, which some have considered 'confederal' in nature (O'Leary, 1999).

The consociational mechanisms of the Belfast/Good Friday Agreement are

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defended as a solution which by recognising competing nationalisms, enables their accommodation on the basis of equality (Eide, 1996; O'Leary, 1999). However, consociationalism is also under attack from a number of different perspectives. Some attack it as politically unnecessary, essentially denying that group accommodation is a problem in Northern Ireland. Thus, they argue for majoritarian devolution as in Scotland or Wales, often from a unionist perspective. Others argue, from a more legal viewpoint, that the mechanisms stand to ossify and entrench competing nationalisms, while excluding those who do not wish to be defined within these groups. These critiques leave it unclear whether there should be any attempt to accommodate competing group interests at all, or whether they view robust individual rights protections as sufficient to deal with minority rights. Interestingly, they draw on the Framework Convention's right 'not to be considered a member of a minority', exposing the tension inherent in minority rights documents between individual rights imperatives, and programmatic rights to group accommodation (cf. Wippman, 1998).

These debates, concretized by suspension and political deadlock in the post-election context in Northern Ireland, evidence yet another forum for the meta-conflict: On-going contestation as to what the problem is, and therefore what solutions will address it. However, while these debates play out politically, they also affect the design and reform of legal institutions, in ways similar to that of 'dealing with the past'. As regards the design of a proposed bill of rights, for example, debate has focused on the extent to which the bill should (a) underwrite consociational mechanisms entrenching them for the medium to long-term; (b) emphasize individual rights in a way which would put the consociational mechanism under legal attack, or (c) provide a programmatic standard relating to accommodation of groups on the basis of equality, which would underwrite the current mechanisms, and require the issue to continue to be addressed without requiring this particular mechanism in perpetuity (McCrudden, 1999; 2001; Northern Ireland Human Rights Commission, 2001). These debates can be considered the negotiation of a dilemma permanently present in any resort to a consociational formula in response to entrenched violent communal conflict: How to keep energy and innovation in the political system; how to create democratic stability without ossification and stagnation, and without working to the exclusion of groups (such as women) whose political voices have been silenced in the past.

(F) GENDER AND LAW IN SITUATIONS OF TRANSITION

Quandaries around consociationalism are but one example of a broader (and insufficiently researched) set of issues: The gendered dimensions of transition. Peace processes are typically deeply gendered, raising awkward questions about the neutrality of the transitional project. While women will often have been at the forefront of peace initiatives throughout a conflict, peace

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agreements are usually negotiated predominantly, if not exclusively, by men (Bell, 2004b). The conduct of violence and war is predominantly male, leading to a male bias in negotiations, and mediators are usually men (Askin, 1997; Yuval-Davis, 1997; Goldstein, 2001). This is despite the Platform for Action which emerged from the Fourth World Conference on Women in Beijing in 1995 which asserted that: 'In addressing armed or other conflicts, an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken, an analysis is made of the effects on women and men, respectively' (World Conference on Women, 1995: para 141; UN SC Resolution, 2000).

Such exclusion has a double effect. Arguably, it operates to narrow the problems faced to a 'male' conception of conflict revolving around allocations of power and territory, and stopping certain forms of violence (Ní Aoláin, 1999; Bell, 2004b). These questions may impact only peripherally on many women's day-to-day lives. They may leave untouched socio-economic exclusions, and even violence, which women may not see as compartmentalized into 'conflict' and 'non-conflict' related, but rather experience as a continuum, only partially addressed by cease-fires (Cockburn, 1999). It also means that women rarely sit at the tables where the issues of post-conflict transition and reconstruction are addressed. This reinforces the 'conceptual exclusion'. As Chinkin and Paradine (2001) have pointed out, feminist discourse has shown women to have reason to be profoundly ambivalent about many of the basic tenets of liberal-democratic constitutionalism. Without women, these questions are less likely to be brought to the table.

Only relatively recently has the gendered dimension of war and of international law, in particular, been closely examined (Askin, 1997; Ní Aoláin, 2000a). This work has been supplemented by consideration of the gender dynamics of ethnic conflict, and internal conflict more generally (Yuval-Davis, 1997). We would argue that this body of research creates a baseline from which more nuanced analysis of the relationship between gender, conflict, transition, and peace can be undertaken. It also operates to reveal that there is a tangible link between the experience of women during conflict and the exclusions we have identified in the transitional context. A gendered understanding of peace processes is required to address how women can practically assert a presence at peace negotiations, while simultaneously reframing the questions these processes revolve around. Addressing gender is not just a matter of addressing women's needs. The experience of how women work can be vital to peace-making and peace-building. In particular women are often well positioned to further connections between civic society (where women often predominate) and political institutions (where men often predominate), and in so doing reshaping the notion of what is politics, and what is democratic participation.

The Northern Ireland transition offers a graphic illustration of many of the concerns outlined earlier. However, it also offers an example of an attempt to integrate a gender perspective into both the negotiation process and to the post-agreement political environment. This was achieved through three

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different types of intervention (Bell, 2004b). Firstly, through women creating networks across communal divisions during both the conflict and the peace process, enabled by their very political invisibility. Thus, women found ways to deal with communal difference without requiring its prior negation or elimination. Secondly, building on this experience, women worked together with other marginalized groups to create rainbow coalitions which were significant in placing a 'human rights and equality' agenda on the table, and ensuring that this agenda met real problems (McCrudden, 1999; Bell, 2004b). Finally, women worked both within their own political groupings and through the establishment of a women's political party – the Northern Ireland Women's Coalition – to input into the negotiations leading to the Belfast/Good Friday Agreement. The result of these combined strategies was an Agreement whose human rights and equality commitments went well beyond addressing the 'nationalist/unionist' communal divide to address other exclusions. Interestingly, each operated to mutual benefit: Reform which negotiators saw as aimed at addressing conflict divisions created stronger mechanisms for human rights and equality than would have emerged from the traditional British approach to each, while radical institutional reform became easier to present in 'good practice' terms rather than 'concessions to nationalists' the more it operated to benefit a broader range of communities, including women.

The case of Northern Ireland illustrates ways of opening up processes, both conceptually and practically, to ensure the participation of women. However, it also indicates some difficulties. Firstly, while Northern Ireland evidences some successes with relation to peace agreement provision for women, such provision is still relatively scant, evidencing the need for further models of good practice to be explored. Secondly, there is the difficulty of implementing any ensuing gender commitments, not least given the sheer volume of work which the Agreement has created for women's groups. Thirdly, is the difficulty that any emerging political consensus between opposing nationalisms, may, where women's issues are concerned, work to their detriment, as recent Assembly debates on reproductive rights evidence. Finally, the political realignments evidenced in Northern Ireland's Assembly elections have also operated to squeeze out the representational space that the Women's Coalition had gained in the post-Agreement elections. This is further evidence of the capacity of the transitional environment to operate in non-linear and illiberal directions, in antithesis to the interests of gender mainstreaming and the consolidation of women's political interests.

CONCLUSION

We finish where we began – with an assertion of the need for a much broader conception of transitional justice than one that focuses solely on 'dealing with the past' (particularly where this past is viewed in terms of male conceptions of harm). Hence the demand for a theory of law in transition that is not past-specific and that avoids the pitfalls of a gendered approach.

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Part (though not all) of the solution may lie in seeing the transitional process in terms of the reversal of the delegitimation of domestic law and of legal institutions that occurred during the conflict. Thus the transition becomes a project of building the legitimacy of the law across the range of sites where rule of law deficits are evident in the conflict's wake. In doing so, we would assert that this does not limit the capacity of law and legal process to become a site of contestation in a post-conflict society, but it underscores the need for a degree of *a priori* legal legitimacy in order for that 'normal' contestation to take place. This approach is as applicable to the problems of institutional transformation and political accommodation as it is to dealing with the past. With it comes a particular focus on the experience of groups excluded during conflict, whether that exclusion was on the basis of politics, ethnicity or gender.

In building the legitimacy of domestic law and legal institutions, international law has a particularly important part to play by virtue of its externality to the parties to the conflict. This externality is directly related to the autonomous quality of international law – it is not an infinitely malleable set of standards, the meaning of which states are free to appropriate according to their whims at any particular time. We note, however, that in the post-9/11 world this autonomy is under particular threat. How this battle plays out will have important implications for the role of international law in situations of transition, particularly as the language of transition is increasingly invoked by the remaining superpower in a uni-polar world.

Northern Ireland provides intimations of some of these dilemmas. The UK's place as a leading western democracy meant that international law scrutiny of the state's behaviour during the conflict was not as robust as it might have been. This factor, together with a British strategy of avoidance of standards viewed as potentially troublesome (the 1977 Geneva Protocols are a case in point), meant that external checks, while important, were somewhat blunted. This attenuated external regime can be considered a contributory factor in the significant rule of law deficits that occurred during the conflict.

Addressing these deficits during the transition has not been an easy task, as the rocky record of the peace process illustrates. In some respects the very liberal-democratic character of the UK state has served, at least in the past, to hide the scale of the problem from itself. That said, the Northern Ireland transition does offer several positive lessons. Once its piecemeal approach to dealing with the past is seen as a work-in-progress rather than as the totality of the past-focused project, it may offer a way to satisfy the apparent clash between the needs of political accommodation and the imperative to deal with the past immediately. Questions of timing then become central. Initiatives around political accommodation during the transition display some success in addressing gendered deficits, and the formula in relation to self-determination suggests a creative exploration of the concept's internal and external dimensions. The consociational governmental model performed effectively in some respects, even if its future is unclear: In the short term because of suspension, and in the longer term because of possible political

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realignments. The ultimate success of initiatives around institutional reconfiguration will likewise take some time to measure, but at least some advances are clearly evident.

An overall assessment of the success or failure of the Northern Ireland transition is therefore some time off. Elaboration of the criteria for success will need to take account of shifting legal ground in the global legal and political environment. This will be no easy task. However, as this article has argued, central to this task is an understanding of the relationship between law and violent conflict, which cuts across pre- and post-transition landscapes, and acknowledges the complexity of the legal mechanisms required to manage, accommodate and overcome violence and its institutional legacies.

NOTES

1. The Nuremberg trials of the major German war criminals in the wake of the Second World War are probably the most important point of departure. For a roughly contemporaneous analysis, see H. Ehard (1949).
2. See UN Security Council Resolution 1373 (2001). Notable in this context is the amplification and expansion of draconian anti-terrorist legislation both by states experiencing conflict and by those which are relatively peaceful.
3. See *Murray v UK* (1996).
4. This issue is compounded by the realist assessment that without such relative autonomy, states would be free to use law in whatever way they wished, and there would be little point in examining the specific role played by law in transition. For a further exploration of this issue, see Campbell and Ní Aoláin (2003: 1210).
5. See *Ireland v United Kingdom* (1978) and *Brannigan and McBride v United Kingdom* (1993).
6. Contrast with *Aksoy v Turkey* (1996) and Greek case (1969). In *Brannigan and McBride v United Kingdom* (1993: paras, 14, 15 and 56), the Court made explicit reference to reviews of the PTA (Prevention of Terrorism Act) by Viscount Colville and others, which were conducted explicitly along the lines of the 'response of the liberal-democratic state' critiqued earlier in the article.
7. 1977 Protocol I covers both conventional wars and conflicts generally known as 'wars of national liberation'; 1977 Protocol II covers high-intensity civil wars. See Campbell, Ní Aoláin and Harvey (2003: 338).
8. Common Article 3 to the Four Geneva Conventions (1948). See Human Rights Watch (1991).
9. Combined Loyalist Military Command (CLMC) *Ceasefire Statement* (13 October 1994) and Irish Republican Army (IRA) *Statement of Apology* (16 July 2002).
10. See Northern Ireland Office/Department of Foreign Affairs (2001: paras 18–19).
11. See the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, 1992, the Framework Convention for the Protection of National Minorities, 1995 and also the Lund Recommendations on the Effective Participation of National Minorities in Public Life, available at www.osce.org/henm/documents/lund.htm.
12. Ibid.

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