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# The Paradox of Transition in Conflicted Democracies

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## ABSTRACT

Transitional Justice discourses have largely focused on "paradigmatic transitions." Such analyses emphasize dealing with the human rights abuses committed by prior authoritarian or illegitimate regimes. But, authoritarian entities may not be the only kind of states with a legacy of serious and systematic rights-violations. A similar legacy may manifest in broadly democratic states that have experienced prolonged political violence. These "conflicted democracies" present a number of paradoxes, which come to the fore when peace and transitional political process are agreed, thereby providing unique challenges in political and legal transformation. This article explores these paradoxes and challenges. It further draws out a more nuanced understand of the transitional process by conceptually separating war/peace transitions from illiberal polity/democracy transitions.

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## I. INTRODUCTION

"Transitional justice" presents an ever-expanding field of academic and policy interest.[1] Its discourses and analyses have been applied across a geographically and ideologically diverse range of jurisdictions emerging from authoritarian and frequently violent pasts. These have included Latin American states shifting from military to civilian rule,[2] the change from apartheid to majority rule in South Africa,[3] and Eastern and Central European states in post-communist flux.[4]

As its etymology makes clear, transition implies a journey. Underpinning academic analysis across the spectrum has been a particular conception of this journey: that of the nondemocratic state in the process of change to stable democracy.[5] Transition theory is therefore intimately tied in with particular conceptions of democracy. Thus, the starting point in terms of measuring the transition of state structures has been the authoritarian state, located on a sliding scale of repressiveness. Precise positioning on this scale will vary from state to state, but the scheme nevertheless provides a conceptual baseline of sorts. This common baseline not only serves to identify the enormous institutional change needed for successful transition, it also provides some kind of consistency in cross jurisdictional comparisons of the transitional moment.[6]

As a result, the comparisons and analyses that collectively make up transitional justice discourses have been informed by a particular conception of transition, which we have labeled the "paradigmatic transition" (the concept is explored further below). Analyses of such paradigmatic transitions display a heavy emphasis on dealing with the past. Indeed, it was the problem of engaging with the legacy of previous regimes' massive rights violations that led to the development of "transitional justice" as an identifiable set of discourses in the first instance.[7] Thus, the assumption underpinning much of the writing on law and legal institutions in the transitional context is that the regime is, to a greater or lesser degree, illegitimate. From this springs the problem of the legal status of the acts of the old regime[8] and the distinguishable but related problem of the use of law in the new dispensation's attempts to "police the past."[9]

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[1] *See generally* Ruti Teitel, Transitional Justice (2002); Transitional Justice: How Emerging Democracies Reckon with Former Regimes (Neil J. Kritz ed., 1995); Human Rights in Political Transitions: Gettysburg to Bosnia (Carla Hesse & Robert Post eds., 1999).

[2] *See* Alexandra Barahona De Brito, *Truth, Justice, Memory, and Democratization in the Southern Cone, in* The Politics of Memory: Transitional Justice in Democratizing Societies 119 (Alexandra Barahona De Brito, Carmen Gonzaléz-Enriquez & Paloma Aguilar eds., 2001); Rachel Sieder, *War, Peace and Memory Politics in Central America, in* The Politics of Memory: Transitional Justice in Democratizing societies 161 (Alexander Barahona De Brito, Carmen Gonzaléz-Enriquez & Paloma Aguilar eds., 2001).

[3] *See* Alex Boraine, A Country Unmasked (2000); Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 Fordham Int'l L.J. 1074 (2003).

[4] *See* Catherine Dupré, Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity (2003).

[5] As Huntington puts it in his classic work, "This book is about an important—perhaps the most important—global political development of the late twentieth century: the transition of some thirty countries from nondemocratic to democratic political systems." Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century xiii (1991).

[6] *See, e.g.,* Priscilla B. Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions (2003).

Yet authoritarian entities may not be the only kind of states to leave in their wake a legacy of serious and systematic rights violations. A similar legacy may manifest in states that have experienced prolonged, structured, communal, political violence, even where the political structures could broadly be considered "democratic." These states, which we term "conflicted democracies" (a more detailed analysis of the concept follows below) present a number of paradoxes, which become particularly obvious when structured processes aimed at ending political violence are put in place. Critically, the end goal of transition in conflicted democracies is the same as that in paradigmatic transitions: the achievement of a stable (and therefore peaceful) democracy. However, the conflicted democracy already has some kind of ideological commitment to, and therefore claims adherence to, "democratic values." Thus, paradoxically the conflicted democracy is faced with a program of action that its self definition should have rendered unnecessary from the outset.[10] The paradox both complicates and deepens the analysis of transitional societies.

It is this paradox that this article primarily explores. In doing so we use the transition associated with the peace process in Northern Ireland as a case study. There are, we believe, particular complexities in transitions that occur in a preexisting democratic framework. In this context the specificity of the "democratic" in the Northern Ireland transition remains underexplored. By unpacking the layered nature of the transition(s) in Northern

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[7] A classic example is the question posed by Michael Feher, "How should nascent democracies address the human rights violations that plagued their societies' recent past?" Michael Feher, *Terms of Reconciliation, in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA, *supra* note 1, at 325.

[8] *See, e.g.,* the discussion of the debate on this point between Lon Fuller and H.L.A. Hart in TEITEL, *supra* note 1, at 12–14.

[9] *See* Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past,* 20 LAW & SOC. INQUIRY 7 (1995).

[10] Colm Campbell, Fionnuala Ní Aoláin & Colin Harvey, *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland,* 66 MODERN L. REV. 317 (2003); Colm Campbell & Fionnuala Ní Aoláin, *Local Meets Global: Transitional Justice in Northern Ireland,* 26 FORDHAM INT'L L.J. 871 (2003); Bill Rolston, *Assembling the Jigsaw: Truth, Justice and Transition in the North of Ireland,* 44 RACE & CLASS 87 (2002).

Ireland, we explain integral parts of the settlement reached in the 1998 Good Friday [peace] Agreement[11] and the transition associated with it. As the comparative examples below demonstrate, our analysis is also partly applicable to a number of other democratic societies grappling with the legacy of internal conflict. In this application we reflect generally on the conflicted democratic state in transition, and specifically on the question of how legal form plays a pivotal role in shaping and driving the kinds of change experienced.

Part II of this article starts with an analysis of the "conflicted democracy" paradigm. In order to identify what is specific to transition in conflicted democracies, some assessment of conventional transitional justice discourse is necessary. Thus, Part III follows with an examination of the "paradigmatic transition," exploring movement from the authoritarian state, with which transitional justice discourses have generally been concerned, to ideal type liberal democracy. A template is thereby established, against which the "fit" (or its lack) of transition in conflicted democracies is measured in Part IV. This exploration is concretized in Part V of the article with an examination of the specificity of the Northern Ireland transition. Particular attention is focused on the attempt, represented by Northern Ireland's new consociational mechanisms, to enhance political and legal inclusiveness and on the particular problems faced by the liberal democratic state in coming to terms with the legacy of the past and with the challenge of institutional failure. Finally, some overall conclusions are presented about the extent to which exploration of the conflicted democracy in transition serves to push back the boundaries of transitional justice discourse.

## II. CONFLICTED DEMOCRACIES

The term "conflicted democracy" requires some further elucidation. An obvious starting point is to define our use of the term "democracy." There is an enormous body of literature, both critical and otherwise, on the meaning and implementation of the concept,[12] and we have drawn upon elements of this in exploration of the differences between procedural and substantive concepts of the term. We use the term widely to cover any state meeting minimal requirements of procedural democracy. This includes states that operated on purely majoritarian principles, however "hollow" the result. A state that is "democratic" according to this formula might fail to attract the consent of, or indeed repress, significant minorities and might fall well short if measured against tests of substantive democracy.

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[11] *See* Brendan O'Leary, *The Nature of the Agreement,* 22 Fordham Int'l L.J. 1628 (1999).

[12] Classic conceptualizations include Thomas H. Marshall, Citizenship and Social Class, and Other Essays (1950). Other relevant texts in this context are Guillermo O'Donnell, *Delegative Democracy,* 5 J. Democracy 55 (1994) (delegative democracy); Larry Diamond, Developing Democracy towards Consolidation (1999) (electoral democracy); Peter H. Merkl, The Federal Republic of Germany at Fifty; The End of a Century of Turmoil (1999) (defective democracy). Relevant feminist analysis would include Iris Marion Young, Justice and the Politics of Difference (1990).

Definitionally, a "conflicted democracy" involves a two part test, both elements of which must be met. First, there must be a deep seated and sharp division in the body politic, whether on ethnic, racial, religious, class, or ideological grounds. The measurement of such division is a political call and we accept that there may be differing views on what constitutes the experience of division within any society. Furthermore, in some societies, to name division in this manner constitutes a significant act in its own right, which may have both real and symbolic political value. Thus, division may constitute an "essentially contested concept" in its own right.[13]

Notwithstanding this, there are generally accepted markers for identifying such divisions. These include communal divisions and related identities as indicated by census data; representation of such division at the political level through elections or the lack of them; the language and tenor of political interaction within a state; and the oversight of international bodies such as the OSCE High Commissioner for National Minorities.[14]

Second, this division must be so acute, and the political circumstances such as to have resulted in or threaten significant political violence.[15] The phrase "significant" is employed both because the violence springs from (and to that extent denotes) the communal division (a group of individuals engaging in voluntarist terrorism in an homogenous society would not meet this test), and because the violence or threatened violence must have a certain intensity (small scale disturbances, such as a minor riot likewise fail to meet the test).

As regards this question of intensity, international human rights law provides some useful markers in its provisions for derogation. Derogation is the legally mandated right of states to limit the full protection of rights agreed to under international human rights treaty law when the state is faced with internal crisis or emergency. Notably, derogation is not incompatible with democratic principles, and many democratic states have exercised the right of derogation. Derogation is a useful marker for identifying conflicting democracies because its requirements, as amplified in the jurisprudence of regional courts and by the UN Human Rights Committee, are indicative that the state must be experiencing some form of profound internal crisis for activation purposes (at least theoretically, practice has in fact been mixed).[16] An important caveat must be entered in respect of *de facto* emergencies where states adopt what are, in effect, emergency powers, without formally recognizing that an emergency exists. We believe that *de facto* emergencies in democratic states also constitute markers for the existence of a conflicted democracy.

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[13] *See* W. B. Gallie, *Essentially Contested Concepts, in* Proceedings of the Aristotelian Society (London: The Aristotelian Society, 1955–56).

[14] *See* the website for the High Commissioner on National Minorities, *available at* www.osce.org/hcnm/. The function of the High Commissioner is to identify and seek early resolution of ethnic tensions that might endanger peace, stability or friendly relations between OSCE participating states.

[15] This would exclude violence below a certain threshold, a comparable standard for which can be taken from the minimum standards such as The Turku Abu Declaration of Minimum Humanitarian Standards of 1990, revised in 1994. Declaration of Minimum Humanitarian Standards, *reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-sixth Session*, U.N. ESCOR, Comm. on Hum. Rts., 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).

As surveys of democratic states that have exercised the right of derogation demonstrate,[17] the reasons for derogation often involve the experience of internal conflict of some form, accompanied by violence directed against the state, its agents and institutions. However, a key point to note here is that democratic states are frequently reluctant to concede the existence of a formal conflict occurring within the state, and derogation will often be used by the state as a means to cloak the existence of a genuine internal conflict. In short, if states themselves were to equate the application of the term "conflicted democracy" to mean acknowledgment of an internal conflict of some form, or even a marker for the existence of an emergency, the term would be hotly politically contested.

This is where the application of another body of international law becomes equally appropriate. International humanitarian law (IHL) generally regulates the existence of armed conflict—both internal and international. As we have pointed out elsewhere, the application of the law of internal armed conflict by democratic states to situations of internal violence is contested and rare.[18] States are generally reluctant to acknowledge the application of IHL for a variety of reasons primarily because they assume that it undermines the external and internal legitimacy of the state. We contend that in situations of communal violence where Common

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[16] *See, e.g.*, Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) at 55 (1961).

[17] *See, e.g.*, INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS (1983); *Study on the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, Comm'n on Hum. Rts., 35th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982) (*Questiaux Report*).

[18] *See, e.g.*, FIONNUALA NÍ AOLÁIN, THE POLITICS OF FORCE, CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND (2000); Campbell, Ní Aoláin & Harvey, *The Frontiers of Legal Analysis, supra* note 10.

Article 3 (the lowest legal threshold for humanitarian law) is applicable as a matter of fact and law and the states in question are democratic,[19] it would also be appropriate to use the term "conflicted democracies."

Thus, our starting point is to identify two markers, both legal in form, applicable to "conflicted democracies." This does not exclude the applicability of additional markers (both legal and factual) that may denote the existence of a conflicted society. The first identifier is the state's own exercise of the right of derogation under international human rights treaty norms, or the existence of a *de facto* emergency. This in and of itself is sufficient. The second is the applicability of Common Article 3 to the Geneva Conventions. Because any situation amounting to a Common Article 3 conflict would also amount to one justifying derogation, the humanitarian law standard in effect reinforces the human rights (derogation) standards. In both cases, the form, extent, and experience of violence is critical to the application of the legal categories.

It is also fair to acknowledge that the experience and measurement of such violence is heavily disputed. Moreover, there are a lack of independent markers generally agreed upon by state parties, markers that if established would allow that measurement to take place. So we add an overriding caveat to this discussion: democracies where the level of political violence amounts to a "public emergency" justifying derogation or to an "armed conflict" should be regarded as prime rather than exclusive examples.

It is possible to imagine situations where these somewhat technical threshold tests have not been met but still might be appropriately considered conflicted democracies. To give some examples: Sri Lanka clearly comes within the definition. It is generally agreed that the level of violence during the conflict amounted to a situation justifying derogation and that the conditions of applicability of Common Article 3 were met (and probably those of 1977 Protocol II, although the state has yet to ratify the instrument).[20] Great Britain, faced with Angry Brigade (anarchist) violence starting in 1969, did not; the violence was minor, and more importantly, did not reflect any major societal division.[21] Northern Ireland, by contrast, does meet the test: political violence was twice judged by the European Court of Human Rights to constitute a "public emergency," and the situation may have amounted to an "armed conflict" in IHL terms (at least in the early 1970s).[22] Borderline examples could include Quebec at the time of the FLQ violence and the employment of the War Measures Act,[23] and Italy faced with the Red Brigades and right wing terrorism in the 1970s.[24]

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[19] Clearly El Salvador poses certain problems in terms of the depth of its substantive democracy, but the example is useful in terms of identifying applicable intensity of violence thresholds. *See generally Report of the Secretary-General on the United Nations Observer Mission in El Salvador*, U.N. Doc. S/1994/375, 31 Mar. 1994. We note that Common Article 3 is the lowest possible threshold of application for international humanitarian law. It is possible that states may also satisfy the requirements for Protocol II Additional to the Geneva Convention which tends to correspond to the classic two-sided civil war experience within a state.

[20] *See generally* the Human Rights Watch website on Sri Lanka, *available at* www.hrw.org/doc?t=asia&c=slanka. *See also* L. Zegveld, The Accountability of Armed Opposition Groups in International Law 146 (Cambridge Univ. Press, 2002); L. Moir, The Law of Internal Armed Conflict 84, 85, 120 (Cambridge Univ. Press, 2002). For details of ratifications of the 1977 Protocols *see* the ICRC website, *available at* www.icrc.org.

In conclusion, it is also relevant to speculate, though we do not address the issue substantively, that an analysis of such non-paradigmatic cases could lead to a much broader theory of legal and political transition.[25] In this context, the transition becomes one of: (a) from procedural to substantive democracy, or at least involving a deepening of substantive democracy, and (b) from violence to peace.

## III. TRANSITION: PARADIGMS AND CONSTRUCTS

We now turn to an analysis of the features of "paradigmatic transitions," namely, the authoritarian and frequently violent state in transition to peaceful democracy. While not all transitional contexts share all these features, listed below are characteristics that have typically shaped the international community's judgment on pretransitional regimes. Because the characteristics of these regimes also function as the rationale for political transformation, they have also shaped the nature of internal accommodations arising from the transition.

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[21] *See* ANGRY BRIGADE, 1967–84: DOCUMENTS AND CHRONOLOGY (Jean Weir ed., 1985).

[22] Colm Campbell, *Wars on Terror and Vicarious Hegemons: The UK, International Law and the Northern Ireland Conflict*, INT'L & COMP. L. Q. (forthcoming April 2005); *see also*, NÍ AOLÁIN, THE POLITICS OF FORCE, *supra* note 18, at 218–47 (charting high levels of violence and the existence of no go areas in the jurisdiction mapping on to territorial control as required for the application of international humanitarian law).

[23] *See* B. Jorgensen, Emergency Powers in Canada and Northern Ireland (1985) (Ph.D. Thesis, University of Cambridge) (on file with University of Cambridge). *See also* Sean M. Maloney, *A Mere Rustle of Leaves: Canadian Strategy and the 1970 FLQ Crisis*, 1 CANADIAN MILITARY J. 71 (Summer 2000).

[24] For an analysis pointing in the direction of including Italy in such a category (though not employing our terminology), *see* TOBIAS JONES, THE DARK HEART OF ITALY: TRAVELS THROUGH TIME AND SPACE ACROSS ITALY (2004).

[25] We also acknowledge that the term "conflicted" democracy may also have relevance to societies which have been termed by Fox and Nolte as "Intolerant Democracies." These democracies are those who may respond undemocratically when resisting challenges from antidemocratic actors who have triumphed within the democratic process. The challenge to these democracies has mostly been presented as "how intolerant a democracy may become towards such actors in order to preserve itself without relinquishing the claim of being democratic." *See* Gregory H. Fox & Georg Nolte, *Intolerant Democracies,* 36 HARVARD INT'L L. J. 1 (1995).

In the authoritarian context, once the transition begins, there is typically no widespread resistance to the need for some kind of significant change in the political order (though evidently there will be sites of localized resistance from elite actors).[26] In many situations, this internal dynamic corresponds with, and is partly reflective of, persistent external acknowledgment of the need for transition.[27] All of this reflects a negative judgment on the legitimacy of the pretransition regime. It is important to acknowledge that the paradigmatic transition has also generally been recognized to present a choice in terms of mode of transition,[28] usually framed as a choice between a compact and a rupture. The mode is critical to the experience and form of transition as well as to its successful outcome.[29]

Here it may be useful to distinguish two conceptions of legitimacy, which can be labeled "ought" and "is" questions. "Ought" questions assess legitimacy by reference to the compatibility of a particular regime with normative (typically political science) standards. As regards normative conceptions of legitimacy ("ought" questions), South Africa provides a compelling example of a regime judged illegitimate by virtue of minority racist rule. Here, a combination of international political pressure allied with economic and political sanctions worked to create an environment in which change was anticipated and positively supported.

In these contexts, it is evident that only regime change will satisfy the demands for change.[30] Thus, in Chile, Argentina, and Greece, military regimes ceded power to democratic government, and the Eastern European communists bowed to open electoral processes. Such questions crop up frequently in analyses of transitions from authoritarian states; thus, a military dictatorship may be judged "illegitimate" because it is undemocratic.

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[26] However, as a number of key commentators have noted, the position of elites is critical to the nature and form of the transition experienced. *See* HUNTINGTON, *supra* note 5, at 114 (specifically his typology of power relations at the time the transition to democracy takes places). *See also* Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past,* 20 LAW & SOC. INQUIRY 51 (1995).

[27] The Security Council has invoked Chapter VII of the United Nations Charter to impose sanctions on Southern Rhodesia and South Africa. For a list of the sanctions imposed *see* Use of Sanctions Under Chapter VII of the U.N. Charter, *available at* www.un.org/News/ossg/sanction.htm. Reference here to the Sanctions regime on Zimbabwe (Smith government) and South Africa. *See also* Sebastion Bohr, *Sanctions by the United Nations Security Council and the European Community,* 4 EUROPEAN J. INT'L L. 256 (1993). So for example we had the series of UN Resolutions on Apartheid, the Council of Europe's views on Greece prior to their departure from the Convention system.

[28] *See* Katherine Hite & Leonardo Morlino, *Problematizing the Links between Authoritarian Legacies and "Good" Democracy, in* AUTHORITARIAN LEGACIES AND DEMOCRACY IN LATIN AMERICA AND SOUTHERN EUROPE 25, at 31 (Paola Cesarini & Katherine Hite eds., 2004).

[29] Such pacts have been described as, "negotiated compromises in which contending forces agree to forego their capacity to harm each other by extending guarantees not to threaten the other's vital interests." Terry Lynn Karl, *Dilemmas of Democratization in Latin America,* 23 COMPARATIVE POLITICS 1, 11 (1990). Such pacts are not necessarily singular and in this sense map onto the distinction we make in this analysis of multiple transitions. *See infra* at subpart A.

[30] *See, e.g.,* Chile's military regime to a democratic one; Greek generals hand over to a civilian government; Argentina military change over to a civilian government; Eastern European communists bow to open electoral processes.

By contrast, "is" questions of legitimacy typically focused on the extent to which the citizenry of a state actually accepts the laws and institutions as legitimate, and on the means by which acceptance of legitimacy is created or frustrated (issues with important sociological and sociolegal dimensions).[31] In such analyses of the state's legitimation mechanisms, a debt, particularly to Weber,[32] but also to Habermas,[33] is obvious, a point returned to below. These "is" questions are important in all kinds of transitions.[34] But, as will be seen below, they can achieve quite specific importance in relation to transition in conflicted democracies.

In many transitional contexts there is, as pointed out above, a preoccupation with and tension around dealing with the human rights violations (generally serious and systematic) committed by the previous regime. This is allied with general agreement on the need for major change in the institutions of the old state complicit in these violations. Frequently, this need is expressed in a doctrine of institutional and constitutional "transformation," a doctrine with a strong cathartic resonance. The most evident expression of this past focused preoccupation can be seen in the proliferation of truth commissions, designed to accommodate and process this imperative.[35]

In the paradigmatic transition, one "transitional moment," or at least a singular transitional process, can be identified. There was a specific point at which the Berlin Wall came down, and at which the apartheid government and the Argentinean military relinquished power. This is related to the undemocratic nature of the regimes and to the blocking function played by the regime's control of political authority. Authoritarian regimes, by nature, maintain a monopoly on political expression within the state. Once a meaningful reform process is put in train, it spells the death of the old regime. The clearest example is the series of events from the introduction of Gorbachev's doctrine of "Glasnost" to the fall of the Berlin Wall and the collapse of the Soviet backed governments in eastern and central Europe.

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[31] *See generally* CHARLES TOWNSHEND, MAKING THE PEACE: PUBLIC ORDER AND PUBLIC SECURITY IN MODERN BRITAIN (1993) (Offers valuable insights in the periodic "crises of order" characteristic of modern Britain. He also argues that the traditional virtues of the unwritten constitution may turn into vices in the face of persistent disorder and political violence. Specifically noting that when the state commits acts that are illegitimate it undermines its own claims to legitimacy).

[32] *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parson trans., 1930).

[33] *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 507 (1996). *See also* JÜRGEN HABERMAS, LEGITIMATION CRISIS (1988).

[34] As Huyse has remarked of transitional situations, "What a new democracy needs most, however, is legitimacy." *See* Huyse, *supra* note 26, at 51, 56.

[35] For a critical view of the operation and costs to victims of such truth finding bodies *see* Brandon Hamber, *Dealing with the Past: Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT'L L.J. 1074 (2003); Angela Hegarty, *Dealing with the Past: The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland,* 26 FORDHAM INT'L L.J. 1148 (2003).

Another compelling consistency is that the changes brought about by the transition are generally relatively uniform throughout the state. This is a reflection of the point that inherent in the idea of an authoritarian, nondemocratic state is a high degree of uniformity in the nature of its internal political arrangements. It is virtually impossible, for instance, to think of an undemocratic, authoritarian state, being organized on a quasi-federal basis with one or more exceptional liberal democratic provinces. Discontinuity within any part of the political unit would present an explicit challenge to the remainder of the state.

Notably, whether realistically or not, the paradigmatic transition sees itself as a process of closure. There is typically a "deal," followed by a period of constitutional and institutional change, and possibly "reconciliation."[36] At that point, the transition ends. While the reality is more complex, as evidenced by the protracted series of political agreements in the Israeli-Palestinian context, the ideal type, paradigmatic transition is a finite and contained affair. Conceptually, this links to a pervasive "ideal" type distinction between the normal and extraordinary in legal regulation.

### A. Constructing and Conflating "Transition"

This question of endpoint, and therefore the closure of transition, is related to the issue referenced earlier: that transition implies a journey, with a starting point and a finishing point. This journey implies a need for clarity and unambiguous markers in the transitional process. Transition, therefore, has an inherent duality; by virtue of this it can be defined by a set of oppositional markers or antinomies. In the paradigmatic transition, for instance, the "democratic v. nondemocratic" antinomy has dominated debate.

While this approach highlights an important reality (the importance of the shift to democracy), it also risks conflating a number of distinguishable, though often co-terminus, transitions. In many of the states that form the subject matter of transitional justice analyses, there is not only a movement towards democracy, there is also a movement away from violent conflict.

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[36] *See* Christine Bell, Peace Agreements and Human Rights (2000).

The two are related, but they are not quite the same thing. For example, the transition in the former Yugoslavia can be conceived both in terms as a movement towards some kind of democratic model (for instance that envisaged for Bosnia Herzegovina in the Dayton Accord),[37] and as a movement towards peace.

A similar set of foci is possible when the question of pretransition political violence in South Africa is examined. In Argentina, the transition from military to civilian rule can be seen both in terms of a movement to democracy and a response to the "dirty war" and the disastrous Falkland/ Malvinas military adventure; parallel points could be made about the Salvadorean transition (civil war), and that in Portugal (colonial wars). Likewise, transitions in eastern and central Europe can be located by reference to the end of the Cold War.

Thus, we argue for the need to conceive of transitional situations not as involving one single transition, but in terms of at least two primary sets: a movement towards democracy (the "democratic v. nondemocratic" antinomy) and that towards peace (a "war v. peace" antinomy). This is not to suggest that there may not be other co-terminus primary transitions occurring (economic change provides an obvious example),[38] but for the purposes of the present paper our focus is on the first two. We argue that many of these additional antinomies should be considered as the out workings or facets of the two primary sets, and therefore as secondary, a point illustrated in Figure 1.

## B. The Liberal Democratic End Goal as Ideal Type

In order to set the scene for the exploration of the complexities of the conflicted democracy in transition, some further exploration of the liberal democratic end goal envisaged in paradigmatic transition is necessary. This in turn entails a return to the antinomies around which paradigmatic transition is constructed. The ideal type liberal democratic state operates with the consent of the governed. It is this consent that guarantees its legitimacy in every sense. Free and fair elections, and participatory

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[37] Fionnuala Ní Aoláin, *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, 19 Michigan J. Int'l L. 957 (1998).

[38] A related development, which can be briefly mentioned here is an increasing focus on the presence or absence of socioeconomic transition in situations such as South Africa, and a critical examination of the relationship between this and democratic transition. *See* Hamber, *supra* note 36. For a more general analysis in the South African context of addressing (or not) "structural violence" involving denial of social and economic necessities see Johan Galtung, Peace by Peaceful Means: Peace and Conflict, Development and Civilization 197–99 (1996).

**FIGURE 1**

**Unpacking Paradigmatic Transition**

| *Post-Transition* | *Pre-Transition* |
|---:|:---|
| 1. Democratic | Non-Democractic |
| Governmental legitimacy | Regime illegitimacy |
| Rule of law respected | Rule of law absent or degraded |
| Acknowledgment of human rights violations | Denial of human rights violations |
| Transformed insititutions | Repressive institutions |
| 2. Peace | War |
| Political contestation | Violent conflict |
| Disarmament/weapons decommissioning | Armament |

mechanisms, provide compliance with normative requirements of democracy; from this flows demonstrable consent to the laws and institutions thereby generated. Its political space is therefore open. Theoretically, at least, it is inclusive (or at least it is ideologically opposed to structural political exclusivity). In Weberian terms, it enjoys a monopoly on the legitimate use of force within its boundaries. Its self definition contains the liberal acceptance of the "good" in both political and social relationships. This is what the post-transition society is generally assumed to aspire to. Democratic outcomes from transition guarantee its legitimacy, something that is missing in the nondemocratic pretransition regime.

Law is key to this democratic outcome. The pretransition regime is likely to view law, in true undemocratic fashion, as a source of obligations for its citizens, rather than for itself. This is contrasted with the position post-transition generating a clear distinction around the "rule of law" (fig. 1 above). In the post-transition context, human rights violations that were previously denied can now be recognized (a process that can be encouraged if formerly violent nonstate actors acknowledge their culpability). This move can be expressed as an "acknowledgment v. denial" antinomy. Acknowledgment of such failings paves the way for significant or "transformative" institutional change (this concept is further explained below) generating an antinomy around "transformed v. repressive" institutions.[39]

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[39] Evidently our emphasis here lies on the state's experience of transition and its acknowledgement of past human rights violations. This is not to underplay the reality and extent of human rights violations by third parties, specifically by nonstate actors, and the extent to which they have been responsible for a greater number of violations, as well as unhindered by any rules of engagement that would be felt more heavily by the democratic state. We also note that where nonstate actors are unwilling to engage in a fulsome accounting for past human rights violations, the state's interest in or willingness to "go it alone" is much more limited.

Regarding the other primary antinomy, that of "peace v. war," some earlier analyses were perhaps somewhat optimistic in their characterization of "peace." More recently, a sober recognition that some kind of conflict is an inevitable part of the human condition (and not necessarily one to be avoided)[40] has focused less on the ending of conflict than on transformation from a violent to a nonviolent way of doing politics, one that can be expressed as a "nonviolent conflict v. violent conflict" antinomy. This is likely to result in the disarming of previously armed actors; thus, the "disarmament v. armament" antinomy can be considered one facet of that of "peace v. war."

This analysis does not claim to describe what actually happens in real life transitions. For instance, the operation of law in the pretransition state may be more complex than the picture painted above (as the example of South Africa illustrates),[41] and the situation obtaining in states that are widely recognized as having undergone transition may be a lot less rosy than predicted. Rather, our concern has been to identify key core elements that together have heavily influenced an ideal type or paradigmatic model of transition. By unpacking these elements, we have suggested that this model can best be viewed as being constituted of at least two primary sets of transitions, each of which could also be considered as a kind of ideal type ("democratic v. nondemocratic" and "peace v. war").

We argue that while these are related, they are nevertheless distinguishable. We further claim that the key to unlocking the paradox of transition in conflicted democracies is first to disaggregate the two—to recognize that a transition viewed in terms of democracy may not be precisely co-terminus with transition viewed in terms of conflict. Second, there is a need for a fuller exploration of the "democratic": specifically for an emphasis on its substantive rather than its formal, procedural aspects. Before moving to examine how these considerations play out in the Northern Ireland context, some further generalized exploration of the problem of conflicted democracies is necessary.

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[40] For an insightful analysis of this point in the Northern Ireland context *see* Colin J. Harvey, *The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland, in* HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 9 (Colin J. Harvey ed., 2001).

[41] *See* RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID 1980–1994 (1995); DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY (1991).

## IV. SQUARING THE CIRCLE: CONFLICTED DEMOCRACIES IN TRANSITION

### A. Liberal Democracy and the Problem of the Transitional "Fit"

Inevitably, actual practice in liberal democracies falls short of ideal type standards, in some cases, considerably so. In this context, the liberal state's self-identification as the holder of common goods can operate to bias the system against critical self assessment, thereby underestimating its own capacity to function in a biased, exclusive, or discriminatory way. All states inevitably commit human rights breaches. This is no less true of the liberal state.[42]

However, a general assumption exists that democratic states do not commit systematic human rights violations, because once the initial breach is discovered, their own internal human rights protections should provide correctives and prevent reoccurrence.[43] Implicit in this observation is a judgment on the effectiveness and capacity of the human rights infrastructure in the democratic state. A fundamental paradox arises when a democratic state engages in such practices. The paradox is compounded by the failure of the state to prevent or remedy systemic violations and by the frequent blindness of the international human rights system in "seeing" the form of violations taking place.[44]

It is true that all states are, to a greater or lesser extent, permanently engaged in a process of managing institutional change (though typically nondemocratic states tend to be more ossified than others). Therefore, there is inevitably a gap between actual institutional performance and optimal response to a changing environment. But, because liberal democratic states must operate in a manner that is responsive to the governed, this gap should be narrower. In particular, institutions with a human rights competence should manifest a much narrower responsive gap than those in nondemocratic states.

When systematic human rights violations take place within the democratic state, it indicates that a defining aspect of the political process is dysfunctional, and moreover, threatens the very self-identity of the polis. This is amplified if the democratic state fails to acknowledge the depth of its responsibility for human rights violations in the transitional context. In our view, such denial operates to pose substantial obstacles to institutional reform and to the process of transition itself.

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[42] *See, e.g.,* Selmouni v. France, 1999 Eur. Ct. H.R. 66 (2000), 29 EHRR 403 (violation of art. 3, Torture).

[43] Evidence of this assumption is gleaned through an examination of the application of the concept of administrative practice in the European human rights system. *See, e.g.,* The Greek Case, 1969 Y.B. Eur. Conv. on H.R. 2 (Eur. Comm'n on H.R.); Donnelly & Others v. United Kingdom, Application no(s) 5577/5583/72, 5 April 1973 (Donnelly in particular illustrates the trend of the European Court's jurisprudence to limit the application of the administrative practice doctrine).

[44] *See* Fionnuala Ní Aoláin, *The Emergence of Diversity: Differences in Human Rights Jurisprudence,* 19 Fordham Int'l L.J. 101 (1995) (examining different standards of scrutiny for democratic and nondemocratic states in emergency situations).

For completeness, we also acknowledge that violence by nonstate actors has enormous and detrimental effects on the body politic, and that there are interfaces between the state's willingness to respond to human rights violations and parallel developments on the part of nonstate actors. However, this article does not seek to chart those effects but rather focuses on the role of the state in the process of change.

This brings us to reflect on the difference between transformation and reform in the transitional context. Whereas nondemocratic societies may be faced with demands for institutional transformation, in democratic societies the imperative is typically to *reform* rather than to *transform*. Whether this typology is correct depends significantly on whether the democratic state has been marginally or substantively compromised from the events giving rise to the transitional process, and specifically on the extent to which the state has engaged, colluded, or acknowledged its involvement in the fraught issue of human rights abuses.

The general assumptions about the forms of violation experienced in democratic societies, and about the institutional capacity of such states to respond, are indicative of the areas where democratic transitions run into most enforcement difficulties. In fact, as we argue below, the need to transform may be no less present in the conflicted democracy, and the language of reform alone may not be sufficient to deliver the institutional and structural changes demanded by the transitional process.[45]

## B. Law and Legitimacy in the Conflicted Democracy

The role and capability of law has been identified as a critical aspect of a society's capacity to transform.[46] In many of the societies that have formed the basis of analysis for transitional justice discourse, law has operated as a vehicle for political reform through the dual functions of constitution-making and legislative rule-making.[47] Moreover, the skeleton of legal rules added to narrative forums provided by legal procedure have been the means to confront the human rights abuses of previous regimes through multiple mechanisms such as trials, truth commissions, and inquiries of various kinds. Legal form can provide a safe and stable means to assist in the journey of transition for many societies. Its neutral operation is the primary signal that a transformation is taking place and that regime change is real. But, this is not always straightforward. As Teitel has noted, the operation of law in times of transition is also highly paradoxical, in part because legal institutions and rules may have buttressed the existence of a repressive regime.[48]

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[45] Mary O'Rawe, *Transitional Policing Arrangements in Northern Ireland: The Can't and Won't of Change Dialectic*, 26 Fordham Int'l L.J. 1015, 1073 (2003).

[46] Teitel, *supra* note 1.

[47] Constitution of the Republic of South Africa (1996) as adopted on 8 May 1996 and amended on 11 Oct. 1996 by the Constitutional Assembly, *available at* www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark; Dayton Peace Agreement signed

For the democratic society in transition, the role of law is particularly complex in ways that are markedly different than in nondemocratic societies. There are a variety of reasons for this. First, there is a general assumption that the rule of law operates fairly in democratic societies. Its failure to operate fairly, or in more extreme cases, its repressive operation, has extraordinary consequences for the integrity of the democratic state and the rule of law itself. Second, in the authoritarian state there may be little public confidence in law as a means to redress the inadequacies of the political system. This is not true of the democratic state. Where citizens have resorted to law as a means to address the failure of the formally democratic state, failure inflicts enormous damage on to the confidence of the public in the rule of law and in legal institutions. Third, while there may be a public and international appetite for dismantling and reconstructing flawed legal institutions in authoritarian transitions, there is generally little incentive for this in democratic transitions.

The damage to the rule of law in democratic societies that have experienced conflict can be particularly acute. This is because, as has been thoroughly documented in the Northern Ireland context,[49] law operates to both manage and ameliorate the experience of conflict for the state. We also

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in Paris on 13 Dec. 1995, *available at* www1.umn.edu/humanrts/icty/dayton/daytonaccord.html. *See also* General Framework Agreement for Peace in Bosnia and Herzegovina, U.N. Doc. S/1995/999 (1995), *reprinted in* 35 I.L.M. 75 (1996). Three models of law can be identified in these Constitutions/Treaties: 1) purely repressive—classic authoritarianism; 2) law operates—but what it says and what it does are entirely at odds—paper perfect no meaning (Communist rule of law system); and 3) partly functional–ethnic democracy or formal but not substantive democracy examples include Israel (High Court), South Africa, early Supreme Court jurisprudence during the military regime in Argentina.

[48] Teitel notes "Law is caught between the past and the future, between backward looking and forward looking, between retrospective and prospective, between the individual and the collective." TEITEL, *supra* note 1, at 6.

[49] *See* KEVIN BOYLE, TOM HADDEN & PADDY HILLYARD, LAW AND STATE: THE CASE OF NORTHERN IRELAND (1975); KEVIN BOYLE, TOM HADDEN & PADDY HILLYARD, TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE (1980); DERMOT WALSH, THE USE AND ABUSE OF EMERGENCY LEGISLATION IN NORTHERN IRELAND (1983); *See* AOLAIN, THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND, *supra* note 18.

argue that the appearance of an operational rule of law can in fact cloak the extent of dysfunctionality in a state. All of this raises the question averred to earlier of the relationship between law and legitimacy. In the ideal type liberal democracy, law's legitimacy is axiomatic. But, in the conflicted democracy, the law's complicity in human rights abuses (whether through the facilitation of abuse, or in its failure to provide redress), can create a situation where communities at the sharp end of violent conflict, confidence in law and in legal institutions collapses. The result (in a sociological sense) is a loss of legal legitimacy.

The conflicted democracy may therefore evidence a legitimation paradox to add to the others. In a normative ("ought") sense, the state's adherence to democratic standards (for instance its employment of regular elections) may be taken to guarantee the legitimacy of its laws and institutions, but in a sociological ("is") sense, there may be a pronounced loss of legal and institutional legitimacy within communities most affected by the violence. Transition requires that these various paradoxes be addressed: specifically it requires the building or rebuilding of the legitimacy of the law across sites of profound societal alienation.

In an important respect, what these issues highlight are the limitations of a concept of the "democratic" that focuses on the procedural at the expense of the substantive. Substantive conceptions of democracy require the adoption of strategies calculated to generate the kind of inclusiveness that is so manifestly absent in the conflicted democracy. The issue is closely tied with that of legitimacy. Successful transition requires the building of the legitimacy of law and legal institutions amongst communities where the experience of exclusion during the conflict has been most pronounced.

This is not an easy task. In a conflicted democracy, a high degree of institutional resistance can be anticipated, because the formal democratic character of the state will serve to shield key institutions (typically the police and the criminal justice system) from the kinds of criticisms often leveled at institutions of the authoritarian state. Thus the elite status of the institutions in question may remain relatively intact, a status buttressed by an inadequate or absent acknowledgment of the role of these institutions in repressive state strategies. The point can best be illustrated by an examination of the Northern Ireland case study.

## V. NORTHERN IRELAND IN TRANSITION

### A. Northern Ireland, Democracy, and the Transitional Template

Mapping the Northern Ireland transition onto the transitional justice template is complex. This is because, as we have outlined above, transitional justice discourse has, in the past, been exclusively associated with an authoritarian or nondemocratic model of change. The 1998 Good Friday Agreement (GFA), which followed the 1994 and 1997 paramilitary cease fires, is generally affirmed as a critical turning point for the jurisdiction. It contains many of the necessary ingredients required to place Northern Ireland in the transitional category.[50]

The Agreement is composed of three strands reflecting the complexity of Northern Ireland's position (part of the Birtish state yet also part of the island of Ireland): Strand One—internal political arrangements within Northern Ireland; Strand Two—bilateral relationships between Northern Ireland and the Republic of Ireland; and Strand Three—multilateral relationships between Northern Ireland, the United Kingdom, and the Irish Republic. Strand One is particularly notable for its sophisticated consociational arrangements which have sought to transcend the internal political deadlock within the jurisdiction and give political security to all political parties across the religious and political divides. In addition to the substantial contributions the Agreement makes to the construction of self-determination and territorial integrity principles in international law,[51] it also mandates significant changes to policing, criminal justice, deeper rights protections, and the release of paramilitary prisoners, to mention but some of its most compelling provisions.

While there are many novel elements in the Agreement, much was prefigured in a number of earlier political initiatives.[52] Arguably, the particular formula represented by the Good Friday Agreement only became possible because of important changes in the nature of the state over the previous quarter century of conflict. This assertion is not inconsistent with the significance to be accorded to the process of change experienced within paramilitary groupings in Northern Ireland. This is illustrated by the willingness of some groups to move from the use of violence to a position of broad engagement with the peace process. This suggests that while the GFA is of cardinal importance in the transition, it would be a mistake to take it as the sole point of departure. As we will analyze further below, key to the state's metamorphosis was a shift in its internal constitutional arrangements, as well as the internalization of a profound political message about the requisite degree of internal democracy required within Northern Ireland to end the conflict.

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[50] *See The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland, supra* note 10.

[51] *Id.* at 326–33.

[52] This idea of an extended transitional process also figures in relevant political science literature. *See, e.g.*, Thomas Carothers, *The End of the Transition Paradigm,* 13 J. Democracy 5 (2002). Carothers identifies a set sequence of stages which include opening, breakthrough, and consolidation. *Id.* at 7.

While the UK as a whole has long functioned as a liberal democracy, with a vibrant constitutional discourse and an impressive democratic pedigree, the same could not always be said of Northern Ireland. Created in 1921 according to a "home rule" formula, Northern Ireland had its own legislature and government, though its relationship with the rest of the UK could not quite be described as "federal."[53] Parliament in London always retained a theoretical right to pass any legislation it wished for the region. But in practice, a convention grew up whereby "transferred" Northern Ireland matters were not discussed at Westminster, much less legislated for. Thus, for the first fifty years of Northern Ireland's existence, one political party that represented one ethnic group in a radically divided society was permanently in power.

The result was a series of discriminatory practices (reformed somewhat from 1969–1972) framed by an unresponsive legal system with a quiescent judiciary and ultimately buttressed by permanently available "emergency" legislation.[54] Thus, while regular elections were held in Northern Ireland and some procedural conditions of democracy were met (though claims of gerrymandering were frequent), the state was simultaneously profoundly exclusionary of its Catholic (largely nationalist) minority that formed about a third of the population. Its democratic credentials were therefore markedly hollow.

At this point the Northern Ireland state corresponded in several respects with the authoritarian state with which much transitional justice discourse is concerned. Thus, while the discussion in Part III noted that the authoritarian state is likely to be relatively uniform (and thus unlikely to tolerate the existence of a liberal democratic province), Northern Ireland's position in the United Kingdom during the first 50 years of its existence represented the opposite phenomenon: a democratically dysfunctional entity which a liberal democratic state allowed to exist within it.

The imposition of direct rule by the London Government in 1972 represented a radical break, but one characterized by a significant bifurcation. On the one hand came a reforming agenda in the equality field based upon mainstream British practice and international example. This is broadly in line with what could be expected in a liberal democratic state: progressive change over a number of decades and a more responsive judiciary giving these innovations an ever increasing bite. With this came a number of attempts at a political solution that prefigured aspects of the GFA: the failed 1973 Sunningdale Agreement and the more successful 1985 Anglo Irish Agreement. Yet, contrastingly in tandem came a set of abrasive military orientated security initiatives (until 1977 the Army was the dominant security arm) backed by fresh emergency and antiterrorist legislation that entailed multiple human rights violations, as political violence and terrorism continued.[55]

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[53] On the legal underpinning of the Northern Ireland constitution, *see* HARRY CALVERT, CONSTITUTIONAL LAW IN NORTHERN IRELAND: A STUDY OF REGIONAL GOVERNMENT (1968). McGarry argues that between 1921 and 1972, Northern Ireland approximated to an ethnic democracy, and notes that an "ethnic" democracy is not "properly democratic or capable of delivering justice and long term stability." *See* John McGarry, *Democracy in Northern Ireland: Experiments in Self Rule from the Protestant Ascendancy to the Good Friday Agreement*, 8 NATIONS & NATIONALISM 451 (2002).

[54] *See generally* both works by BOYLE, HADDEN & HILLYARD, *supra* note 49; *See also* COLM CAMPBELL, EMERGENCY LAW IN IRELAND, 1918–1925 (1994); Tom Hadden, Kevin Boyle & Colm Campbell, *Emergency Law in Northern Ireland: The Context, in* JUSTICE UNDER FIRE (Anthony Jennings ed., 1st ed. 1988, 2d ed. 1990).

The violence in Northern Ireland is generally framed as one between warring internal constituencies (Protestant and Catholic/Unionist and Nationalist). While this is partly correct, it is not quite the entire picture. The conflict and its resolution did not take place in a neutral universe. Rather, the laws and institutions of the state became deeply involved in the causes and management of the conflict. Thus, we argue that while the state is currently deeply involved in facilitating the end of conflict, it is also, deeply compromised by its legal failings during the conflict. These failings contributed to a situation in which, despite significant progressive change in some areas under direct British rule, Northern Ireland still suffered from an international perception of ambiguous legitimacy.[56] Prior to the Good Friday Agreement the state failed to meet one of the key tests of the liberal democratic state: it contained a significant proportion of the population whose allegiance the state had failed to attract, and who therefore remained profoundly alienated.

In terms of the poles, which, as was suggested in Part III, much of the discourse around transitional justice is constructed, it is relatively easy to get a fix on the "peace v. war" antinomy in Northern Ireland. Since the 1994 and 1997 paramilitary cease fires, Northern Ireland has not been entirely free of political violence and terrorism, but the number of violent incidents has considerably decreased. There has also been real but slow progress on paramilitary weapons decommissioning. A clear transition away from violence can therefore be measured.[57]

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[55] *See* Stephen Livingstone, *Using Law to Change a Society: The Case of Northern Ireland, in* Law, Society and Change 51 (Stephen Livingstone & John Morison eds., 1990) (for an analysis of the negative impact on social and legal progress brought about by the combination of these two approaches).

[56] For an analysis of these mixed international perceptions *see* Adrian Guelke, *International Legitimacy, Self Determination, and Northern Ireland*, 11 Rev. Int'l Stud. 37 (1985).

[57] In this context see the reports of the Independent Monitoring Commission established to monitor the Northern Ireland peace process. Independent Monitoring Commission, First Report (2004), *available at* www.nio.gov.uk/imcreport.pdf; Independent Monitoring Commission, Second Report (2004) (second report), *available at* www.nio.gov.uk/2nd_imc_report.pdf.

The Northern Ireland transition can also easily be mapped in terms of conflict transformation, and thus onto the "nonviolent conflict v. violent conflict" antinomy. Since the provisions in the Good Friday Agreement in relation to eventual sovereignty over Northern Ireland (whether British or Irish) are open ended, the Agreement operates to substitute political contestation for violent conflict. Indeed, much of the behaviors of the parties since the Agreement can be viewed in precisely these terms, helping to explain why the working of the Agreement has been such a stop-start affair (at the time of writing the Assembly and Executive created by the GFA had been suspended on four occasions).[58]

A distinguishing feature about the Northern Ireland "deal," as captured by the Good Friday Agreement is that it makes no final accommodation on the contested issue of the jurisdiction's ultimate sovereignty. Unlike the paradigmatic transitional moment where the accommodation is identified by the closure it offers on the "big" questions, in Northern Ireland the matter is left suspended. The Agreement sets out the means to resolve the dispute rather than actually closing the issue.[59] The unpredictability of final outcomes affirms the Good Friday Agreement as a classically transitional document.

The applicability of the "democratic v. nondemocratic" antinomy is considerably more problematic in Northern Ireland. The inclusive consociational political arrangements within Northern Ireland provided by the GFA, coupled with the residual role of the Westminster Parliament and the links with democratic institutions in the Republic of Ireland (which some have considered "confederal" in nature),[60] all mean that Northern Ireland now clearly represents a particular model of liberal democracy, a point elaborated further upon below. However, the first 50 years of the Northern Ireland state was also a period characterized by severe democratic dysfunctionality.[61] Its patchy democratic history suggests that in terms of the central "democratic

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[58] *See The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland, supra* note 10, at 323.

[59] Some might argue that while such sovereignty is theoretically open ended, the practical realization and implementation of this change would be formidable. It is also possible to speculate that, were transition to a unitary Irish state to occur, there might well be a disaffected unionist minority within the territory mirroring many of the experiences and political insecurities as previously expressed by the minority Catholic community in Northern Ireland. As we have set out more fully elsewhere, we take the view that the sovereignty provisions of the Agreement are transitional and quite unique in form and substance. *Id.*

[60] *See, e.g.,* O'Leary, *supra* note 11.

[61] This democratic deficit has been evidenced by the particular structure of governmental lawmaking in a devolved context, including the deficits of the standing committee structure, the small amount of parliamentary time given over to debate of Northern Ireland affairs, and the lack of input by locally elected political representatives. *See* STEPHEN LIVINGSTONE & JOHN MORISON, AN AUDIT OF DEMOCRACY IN NORTHERN IRELAND (1995).

v. nondemocratic" antinomy, Northern Ireland cannot be absolutely placed in either frame—though at various points of the conflict it has evidenced aspects of both poles.

Northern Ireland can best be seen as a site of multiple sequential transitions. None of these transitions correspond precisely with the stark central antinomy, and only one of which (the most recent) is co-terminus with the "peace v. war" antinomy.

The picture of change, and thus of transition that emerges in a state with an overall liberal democratic framework, is therefore considerably more complex than that occurring in relation to the classic authoritarian state. The democratic state may be able to reform itself during the "war" in a sense in which the authoritarian state cannot (Fig. 2 below). Were the latter to do so,

**FIGURE 2**
**Contrasting Paradigmatic Transition with Transition in Conflicted Democracies**

| | *Paradigmatic Transition* | *Transition in Conflicted Democracies* |
|---|---|---|
| Democratisation Dimension | Movement from authoritarianism to procedural and substantive democracy | Advance from procedural to substantive democracy |
| Peace-making/Conflict-Transformation Dimension | May involve co-terminus move from war to peace (where violence present), or not (where violence absent) | Movement from violent conflict to political contestation |
| Institutional Dimension | Generalised acceptance of a paradigm of institutional transformation | General official preference for a paradigm of institutional reform rather than transformation |
| | Little resistance to change | Significant resistance to chance |
| Past-focussed Dimension | Widespread acknowledgement of past failings | Limited acknowledgement of past failings |
| Temporal Dimension | Emphasis on one 'transitional moment' | Site of multiple sequential transition |
| | Little reform prior to transition | Significant reform during conflict |
| | Process of closure | Open-ended |
| Geographical Dimension | Relatively uniform change throughout state | Change limited to conflicted region |
| International Dimension | Significant international consensus on need for major chance | Limited international consensus on need for major change |

the floodgates would be opened, and the state would cease to be authoritarian. When eventually, political violence ends in the Basque country, and the change from the undemocratic Franco era, though democracy,[62] to the institution and outworking of Basque self rule is mapped, it is likely that similar conclusions will be drawn.

In the democratic state, a caveat must be entered when using such phrases as the "transitional moment." There may be a moment at which a transition from political violence occurs, and which therefore can be mapped clearly onto the "peace v. war" antinomy, but this will not be precisely co-terminus with any straightforward "democratic v. nondemocratic" antinomy. And in any case, it is likely that reforms introduced by the democratic state during the conflict will have lessened the sense of grievance from which violence may have sprung, and therefore lessen the quantum of violence, even before the violence ending "transitional moment." This was certainly the case in Northern Ireland,[63] and the Basque country seems to display a similar tendency.[64]

Finally, we wish to highlight another key dimension of the liberal democratic state's response to transition: that of geography. Even under direct British rule there were several instances in which the security forces engaged in grievously unlawful behaviors. The most important of these are the well documented allegations of collusion between elements in the security forces and loyalist paramilitaries (who fought to maintain the link with the UK).[65] Some parallels emerge in the Basque country in relation to the assassinations carried out by off duty members of the security forces under the banner of Grupos Antiterroristas de Liberación (GAL).[66] No state could tolerate such practices as its general modus operandi without ceasing to be a liberal democracy. It is only because the practices are geographically limited and thus the general fabric of the state is partly insulated, that this liberal democratic fabric is, to that extent, preserved (though we would argue that such activity is always corrosive of democracy).[67] To reinforce a point made earlier: an authoritarian state at the transitional moment is likely to display a high degree of relative uniformity. But for a liberal democratic state, the prospect of transition is likely to arise precisely because it is not uniform (Fig. 2 above).

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[62] On the post ranco transition in general, see Paloma Aguilar, *Justice, Politics and Memory in the Spanish Transition, in* The Politics of Memory: Transitional Justice in Democratizing Societies, *supra* note 2, at 92.

[63] For statistics of ongoing paramilitary violence, see the 3rd Report of the Independent Monitoring Commission, *available at* www.nio.gov.uk/3rd_report_of_the_imc.pdf.

[64] In relation to violence in the Basque region: during the ETA cease fire between 1998–1999 six people were killed. The figure rose dramatically in 2000 to twenty-three. Official Statistics can be found on the Spanish Ministry of the Interior website, *available at* www.mir.es/oris/infoeta/indexin.htm.

[65] Current investigations are starting to reveal in full the extent of the collusive practices. On 17 April 2003, Sir John Stevens, Commissioner of the Metropolitan Police, published a brief summary of his third investigation into collusion in Northern Ireland. The summary catalogues systematic collusion between undercover forces and loyalist paramilitaries added to ongoing official attempts to derail the process of investigation, *available at* www.met.police.uk/commissioner/MP-Stevens-Enquiry-3.pdf. The investigation by former Canadian Supreme Court Judge Peter Cory into the controversial deaths of six persons including Patrick Finucane, Rosemary Nelson, Robert Hamill, and Billy Wright has also revealed serious concerns about the state's practices. On 1 April 2004, the Cory Reports were published. For a full text version of the reports *see* the Northern Ireland Office website, *available at* www.nio.gov.uk/press/040401a.htm.

## B. Inclusivity and Political Space in Northern Ireland

In asserting the significance of Northern Ireland's geographical place, namely on the territory of a leading western democratic state, we wish to explore the depth of internal democratic transformation necessary both to end conflict and to renew faith in the political process. We have asserted above that a key element of transition is building the legitimacy of the law and of legal institutions within communities whose experience during the conflict has been one of exclusion. The success of the transition in that regard is likely to be intimately linked to the success or otherwise of building inclusive space in the political sphere.

The state in Northern Ireland has been a contested entity; the legacy of that contestation is to be found in the open-ended nature of the GFA in relation to eventual sovereignty over the region. In the recent past, the laws and institutions of the state have been deeply involved in the causes and management of the conflict. The state is thus faced with the complexity of acknowledging the depth of political and legal change required within Northern Ireland. This includes both the extension of democracy from procedural form to meaningful substance and of enhancing perceptions of the legitimacy of the law.

In tracking the staged nature of Northern Ireland's internal legal transformations we also encounter its gradual political reinvention. There are two particular insights to be gained from this. First, that transition in a conflicted democracy involves not simply the kind of change associated with the one "transitional moment" of paradigmatic transition, but also more gradual, even glacial, shifts (Fig. 2 above). Second, the seemingly innocuous widening and deepening of the democratic process creates profound paradoxes and complexities for the democratic state. This can surprisingly operate to pose both ideological and practical obstacles to the transformation process itself.

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[66] *See* Paddy Woodworth, Dirty War, Clean Hands: ETA, the GAL and Spanish Democracy (2001).

[67] A similar point can be made about French behavior in Algeria. Though Algeria was viewed in French constitutional law as being part of France, the widespread torture and arbitrary killings that characterized the final years of French rule would not have been tolerated on the French "mainland." Although, as pointed out above, Israel seeks to fudge the status of the West Bank in particular, it nevertheless tolerates behavior by its security forces in that area that it would not find acceptable on the Israeli side of its pre-1967 borders.

The problem for the United Kingdom in coming to terms constitutionally and institutionally with a transition in Northern Ireland is that it is challenged by multiple sites of reform. The most apparent of these is the deeply consociational nature of the Good Friday Agreement, which substantially redefines the nature of internal political participation in Northern Ireland.[68] Its consociational elements function as a micro democratic system within the macro system of the United Kingdom. The liberal democratic state is therefore presented with the paradox of two quite different models of democracy provided for within its territorial boundaries. While previous political initiatives in Northern Ireland, particularly the (consociational) 1973 Sunningdale Agreement, sought to open up the region's internal political processes, the conceptualization behind such reform was minimalist.[69] The Good Friday Agreement marks a radical departure in its detailed attention to internal political arrangements, as well as its attention to the depth of the democratic experience by all communities within the state.

Thus, the achievement of a more sophisticated "public sphere" in which to tolerate, embrace, and force political interaction is a potential byproduct of the Good Friday Agreement. The consociational political arrangements have been decisive in creating a participatory and inclusive political capacity in the jurisdiction. Even if present attempts to revive the suspended institutions were to fail, our view is that an eventual return to the formula represented by the GFA is the only way in Northern Ireland political parties can be centrally involved in the governance for the region. The only alternative is an increasing sharing of authority by the two sovereign states involved (the United Kingdom and the Republic of Ireland).

Evidently, creating a bigger public sphere in a society which has been wrecked by violence and sectarianism is no simple task, nor is it the product of some magic political formula that produces an alignment of particular institutional structures within the state. Rather, it is a task of what Habermas has termed facilitating "intermeshing discourses" in the field of politics.[70] In a post conflict society, or one emerging from conflict, public space is both limited and narrow in view. When sectarian communities have either withdrawn from public view or manipulated it as a forum for destruction of the other, the public sphere is in dire need of rehabilitation.

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[68] *See* Good Friday Agreement, Apr. 10, 1998, Ir.-U.K., Strand 1, ¶ 1–25, *available at* www.nio.gov.uk/agreement.pdf.

[69] Essentially the focus of these initiatives was on power sharing but within the constraints of majority rule.

The first component of rehabilitation mandates that the public sphere is inclusive.[71] That requires shedding preexisting political hierarchies and placing subsystems of political action in the public arena. In Northern Ireland, this necessitated accepting a negotiation process which included all political parties and a broad array of other political interests, particularly the political representatives of organizations which had historically adopted violence as a means of strategic confrontation with the state. However, the outcome is not only defined by the process itself, but in the reflection of greater egalitarianism in the new political order. Thus, the Good Friday Agreement redefined the political sphere by widening the right of political participation broadly.

The inclusion of previously excluded political actors challenges the democratic system in many ways. There is no doubt that the expansion of political representation was absolutely necessary to ensure deeper and more coherent participation in political life for the jurisdiction's excluded communities. The particularity of political reform can be explained as necessary because of the unique sectarianism of Northern Ireland's society (though this explanation constitutes a narrow and politically colored interpretation in its own right). An obvious concern, as manifested by the results of recent elections, is the shrinking of this public and political space in the post Agreement context.[72] Whether this is simply a transitory feature of the transitional landscape or indicative of deeper legacies from the conflict is difficult to discern at this juncture.

Inclusiveness bears some further reflection in this context. In a transitional society the concern about inclusiveness rests on the incorporation of the following problematic actors. First are minority or marginal communities hitherto excluded from a share in society's political functioning. Second are groups whose political identity is rooted in a commitment to destroy the state as it has hereto functioned, and thereby the privileges which define other groupings' sense of place within the social structure. Third are actors whose self-definition revolves around the use of violent means, where war is one of the threats and counter threats to be traded in the bargaining process of society's formation. Finally are groupings whose societal identity is constructed and perpetuated on hegemonic status, where any change to accommodate the other will inevitably produce a negative standing for themselves relative to their current position. Inclusiveness requires the bringing of all or some of these actors in tandem to the negotiation and accommodation table.

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[70] *See* BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY, *supra* note 33, at 507.

[71] Radical political theorists such as Habermas argue that, in many societies increasingly differentiated along functional lines, "an ever greater number of persons acquire an ever larger number of rights of access to, and participation in, an ever greater number of subsystems." *Id.* at 504. Such extended sites of public participation lay the foundation for a radical restructuring of political participation. This is what is termed in traditional sociological thinking as political inclusion. Our analysis above suggests that this model may not be sufficient for post or emerging conflict societies.

[72] *See* European Election: Northern Ireland Result, *available at* news.bbc.co.uk/1/hi/northern_ireland/3766315.stm.

The second component in rehabilitating the public sphere is opening up the realm of what constitutes the political. The Good Friday Agreement expanded rather than contracted the scope of the political.[73] Thus, the range of issues at the table was and is larger, more diverse, and closer to the myriad of community interests that are a reflection of what at the grassroots level is experienced in the public sphere. The Good Friday Agreement is a persuasive demonstration of the fact that these interlocking discourses are the anchors from which accommodations can be reached on the harder territorial and symbolic issues. They also function to challenge the view of what constitutes the political for the wider democracy in which they are situated.

We would argue that the Northern Ireland transition poses critical questions about the internal inconsistencies of the democratic state. It tells us that the democratic state is not always internally coherent, and that the application of the democratic experience is not necessarily uniform within it. But it lays fertile ground for exploring the complexities raised for the state itself as a result. Thus we conclude that the transitional process can confront the democratic state with its own limitations in ways that may be entirely unexpected.

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[73] This has been further augmented by the statement of both Irish and British governments in April 03 (Hillsborough Declaration) where they affirm in paragraph 2:

> The overwhelming majority of people in Northern Ireland want to live in a society which is normal, peaceful and secure; is inclusive of all its members, irrespective of their religious, political or cultural affiliations; demonstrates equality of opportunity and full respect; allows their voices to be heard and their concerns to be fairly and reasonably addressed through a democratic process that is fair, inclusive and durable; has a justice and policing system that enjoys widespread confidence and support and has the capacity to address criminality in all its forms, with resort to military intervention only in exceptional circumstances; and provides an overall sense of safety and confidence which contributes to an environment in which the opportunities for economic and social well-being are maximized.

*Available at* www.nio.gov.uk/joint_declaration_between_the_british_and_irish_governments.pdf.

### C. "Seeing" the Problem: Institutional Failings

Across the transitional landscape, one of the most profound challenges to states has been the experiment of institutional change. Analyses of transition in the authoritarian state have frequently grappled with the question of how to accommodate the institutional legacy of the old dispensation in the new, given that an entirely fresh institutional start is rarely an option. Institutions with a law enforcement or security role pose unique challenges. Such elite bodies are generally renowned for their ossified and rigid structures and typically viewed as repressing the governed, rather than operating with their consent.

As discussed above, the solution to this quandary of accommodation has often been framed in terms of conceptions of institutional "transformation." In such "transformed" institutions, while there may be significant carry-through of personnel from the old, there is likely to be some sifting of 'bad apples' (perhaps through a process of "lustration").[74] Change therefore goes beyond mere reform; rather a clean break with the past is marked by altered legal and organizational frameworks, by additions of personnel, and by a radical change in institutional ethos.[75]

By contrast, the picture in the democratic state should be one of institutional continuity rather than of disjunction. Because the institutions of the state operate (in theory at least) with the consent of the governed, they could be expected to be more responsive to the need for change; thus the gap between required and actual performance could be expected to be much smaller. One might expect that the change required could be captured in a paradigm of incremental reform.

While in theory this approach seems both logical and reflective of the formal distinctions between the democratic and authoritarian regime, in practice the paradigm may be of limited value in relation to conflicted democracies. First, the paradigm takes no account of the critical distinction that needs to be made between a formal and substantive democracy. Only substantively democratic societies are capable of delivering justice and correspond with the notions of equal citizenship critical in representative societies. Second, it may underestimate the extent of transformation required in the conflicted democratic state. Third, while the scale of human rights violations which have taken place in the democratic context may be lesser than those experienced in an authoritarian regime, the impact of these violations in the democratic state may be proportionately more corrosive than elsewhere.

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[74] *See* Maria Los, *Lustration and Truth Claims: Unfinished Revolutions in Central Europe*, 20 Law & Soc. Inquiry 117 (1995); Huyse, *supra* note 26, at 51; Arthur L. Stinchcombe, *Lustration as a Problem of the Social Basis of Constitutionalism*, 20 Law & Soc. Inquiry 245 (1995). It is also worth noting here that the operation of lustration laws has not been as extensive or far reaching as initial legislation might have suggested. The reason, it seems, is that in many post communist societies the level of participation across the population in the prior regime makes it impossible to mark out those with entirely "clean hands." *See generally*, Teitel, *supra* note 1.

[75] G. Simpson & P. van Zyl, Witch-hunt or Whitewash? Problems of Justice in Transition in South Africa Occasional paper, Johannesburg: Centre for the Study of Violence and Reconciliation (1997) (on file with author); Hamber, *supra* note 35.

In a democracy, the failure of the rule of law runs counter to societal expectations; by contrast, in an authoritarian state, the concept "rule of law" may have little popular resonance.

Finally, institutional change in the democratic transitional context poses the problem of acknowledgment. Institutions must affirm that they were either or both complicit in conflict and inadequate to respond to the community needs in which they were situated. Both conclusions are problematic for the liberal rule of law state in ways that they are not for the authoritarian state in transition (Fig. 2 above). The consequences of this quandary, we argue, are then played out in the nature and form of institutional change that takes place.

The question of institutional change has been a critical feature of the Northern Ireland political landscape for many decades. Faced, from 1969 onwards, with the challenge of grappling with the dysfunctional institutional legacy of the Stormont authorities, the British Government instituted a number of inquiries which seemed to have little difficulty in grasping the need for extensive change.[76] The result was the abolition of the "B Specials" (a markedly partisan police reserve) and the reorganization and disarming of the Royal Ulster Constabulary (though disarmament proved temporary).[77] The relative ease with which the British government saw the need for fundamental change can be interpreted as a forced understanding by the British political system of the inappropriateness of the political structure in Northern Ireland.

In short, the undemocratic devolved government in Northern Ireland pre-1972 was proving embarrassing to the integrity of the UK's democratic system. Once forced to act, London could accept the need for change, despite local resistance. We argue that change here was easier for the state because it was externalized to some degree, seemingly aimed at "another" dysfunctional, and democratically deficient political structure.

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[76] *See* VIOLENCE AND CIVIL DISTURBANCES IN NORTHERN IRELAND IN 1969: REPORT OF TRIBUNAL OF INQUIRY, 1972, Cmnd. 566, *available at* cain.ulst.ac.uk/hmso/scarman.htm; REPORT OF THE ADVISORY COMMITTEE ON POLICE IN NORTHERN IRELAND, 1969, Cmnd. 535, *available at* cain.ulst.ac.uk/hmso/hunt.htm.

[77] For more information *see* A Chronology of the Conflict, *available at* cain.ulst.ac.uk/othelem/chron/ch70.htm.

The problem of recognition and acknowledgment for the United Kingdom has been particularly pronounced around the behavior of military and police forces, reflecting the broader inability of the state to confront unresolved issues of political and legal legitimacy in the jurisdiction. This blind spot becomes quite clear when we assess the response of the British government to the failings of its own institutions and military forces once direct rule was imposed in 1972. Without doubt London found it much easier to acknowledge earlier failings by the RUC and B Specials than to acknowledge those of the British Army (which it controlled) during the 1970 "Falls Curfew"[78] and the January 1972 "Bloody Sunday" killings (a failure reflected in the dubious findings of the first official inquiry into the events of the day).[79] Once direct British rule was imposed, resistance to acknowledging ongoing security force failings became deeply entrenched.

A number of factors may help to explain this resistance. First, there was the perceived need to maintain security force morale in the face of increasing political violence and terrorism. At a deeper level, the security forces post 1972 were operating under the aegis of the Westminster liberal democratic Government. This meant that key actors within the security establishment were better placed to resist criticism and change, precisely because of the powerful legitimacy which came from their being embedded within the liberal democratic state. Moreover, political ownership of the actions of military and police forces creates an extraordinary psychological barrier to acknowledging their failings. A complex relationship arises when the governing branch fails to have sufficient distance from the actions of its law enforcement institutions, and thereby cannot perceive cause and effect in the state's response to terrorism and the causality of the violence.

Some parallel dynamics were evident in the international arena. We suggested above that in the paradigmatic transition there typically exists a high degree of consensus at the international level (most obvious at that of intergovernmental organizations about the need for fundamental change). In relation to Northern Ireland, pressure at this level was at its most intense at the start of the conflict while the Stormont authorities still remained in place.[80] Once direct rule was imposed, such criticism was less evident. This can be explained partly in terms of a lessening in the scale of human rights violations from the mid-1970s onwards (though significant conflicts related to human rights violations continued).

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[78] *See* Colm Campbell & Ita Connolly, *A Model for the "War Against Terrorism"?: Military Intervention in Northern Ireland and the 1970 Falls Curfew*, 30 J.L. & Soc'y 341 (2003).

[79] Report of the Tribunal Appointed to Inquire into the Events on Sunday, 30th January 1972, 1972, H.L. 101, H.C. 220, *available at* cain.ulst.ac.uk/hmso/widgery.htm.

[80] For an account of international initiatives in Northern Ireland, including action at the UN Security Council level, *see* Martin O'Brien, Northern Ireland at the United Nations, 1960–1996 (1996) (unpublished LLM dissertation, Queen's University Belfast) (on file with author). On the latter point, *see also* R. Harvey, *The Right of the People of the Whole of Ireland to Self Determination, Unity, Sovereignty and Independence,* 11 N.Y.U. J. Int'l L. & Comp. L. 167 (1990).

But a further factor is almost certainly to be found in the extent to which a liberal democratic form of governance serves to insulate the state from international criticism. Thus, we argue that at the Council of Europe level the European Court of Human Rights displayed a much more indulgent approach to measures taken by the British Government in response to the Northern Ireland emergency than was evident towards the response of the Turkish Government and the Greek military Government to their respective real and purported emergencies. It is also arguable that the underlying reason for this differentiation lies in perceptions of the liberal democratic nature of the British Government on one hand, and on the other, the flawed democratic pedigree of the Turkish Government and the frankly undemocratic nature of the Greek junta at the time of the Colonels' rule.[81]

The legacy of this set of institutional reflexes has significant consequences for the transitional process. In particular, accepting that the state was neutral and relatively blameless in its conduct during the conflict meant that key institutional actors in Northern Ireland were well placed to resist change during the current peace process. McEvoy describes how particular security doctrines under which the liberal democratic nature of the state was taken to bestow an ipso facto legitimacy on security force action against terrorism meant that the authorities were unable to see the potential for conflict resolution of the 1994 paramilitary cease fires.[82]

A similar point can be made about seeing the need for institutional transformation.[83] While institutional transformation constituted a core aspect of the Good Friday Agreement, its form and modalities were farmed out to various commissions and reviews,[84] and this process served to facilitate substantial renegotiation of the terms and scale of change. This contestation continues to the present and indicates the extent to which institutional reform in the democratic transition encounters greater sites of resistance than others, in part because change goes to the very heart of the political order and its narrative of the conflict's story.

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[81] Ní Aoláin, *supra* note 44, at 114–26; Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 644–47 (2001).

[82] *See* Kieran McEvoy & Brian Gormally, *"Seeing" is Believing: Positivist Terrorology, Peacemaking Criminology, and the Northern Ireland Peace Process*, 8 CRITICAL CRIMINOLOGY 9 (1997).

[83] Thus, early in the peace process, the then Secretary of State for Northern Ireland (Sir Patrick Mayhew) indicated that significant reform of the RUC would not be part of the peace dividend. M. Brogden, *An Agenda for Post-Troubles Policing in Northern Ireland—The South African Precedent*, 17 LIVERPOOL L. REV. 4 (1995).

[84] THE REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND, A NEW BEGINNING: POLICING IN NORTHERN IRELAND (1999), *available at* www.belfast.org.uk/report/fullreport.pdf; CRIMINAL JUSTICE SYSTEM REVIEW GROUP, REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN NORTHERN IRELAND: A GUIDE (2000), *available at* cain.ulst.ac.uk/issues/law/cjr/report30300.htm.

As Bell has noted, the peace agreements do not generally proscribe the details of institutional change; rather they sketch out in broad terms the need for change and identify the targeted institutions.[85] In the Northern Ireland context the targeted institutions in the negotiations leading up to the Good Friday Agreement included the police, the courts, the prosecutions service, and the prisons. From this emphasis came the provisions of the Agreement dealing with the establishment of an independent commission on policing (instituted in the Patten Commission);[86] those providing for a review of the criminal justice system (not independent but "with an independent element");[87] and those providing for the release of prisoners convicted in the special juryless "Diplock" courts.[88]

What has become apparent in the post conflict phase in Northern Ireland is that the debates around institutional reform and transformation have become sites for contenting the peace agreement itself, and a means for those institutions to robustly defend their own structure and internal conception. This contestation is a subject of substance and merit in its own right. However, what we would like to bring attention to here is the challenge that this kind of institutional reform poses when it is cited in a democratic context. As part of the United Kingdom, and notwithstanding the specificity of these institutional forms in Northern Ireland, all these bodies have organic constitutional and legislative links with the United Kingdom. To acknowledge their flaws is, in some sense, an acknowledgment of a wider structural failing in legal process and state accountability during the course of the conflict.

Thus, as far as possible, the United Kingdom has sought to contain the implications of the Northern Ireland transitionary process to the geographical location of the conflict. This has meant that the process of transition itself is constrained by the watchful eye of the dominant state which fears on two grounds. First, that reform processes in Northern Ireland will have substantial implications for the United Kingdom as a whole. This is a scenario that has generally been avoided and is seen most readily in the government's dealing with a Bill of Rights for Northern Ireland.[89] Second, as institutional reform of the law enforcement agencies continues, the vexed question of their complicity in and responsibility for human rights violations is never far away. In a world where political responsibility ultimately lies with the United Kingdom's executive branch, such exposure creates profound discomfort for the state itself.

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[85] Bell, *supra* note 36.

[86] The Report of the Independent Commission on Policing for Northern Ireland, *supra* note 84.

[87] *See* Good Friday Agreement, Strand 3, Policing and Justice, ¶ 5, *supra* note 68.

[88] *Id.* at Annex B, Prisoners; *see also* Kieran McEvoy, Paramilitary Imprisonment in Northern Ireland—Resistance, Management, and Release (2001).

Finally, unlike many authoritarian transitions, there is also no broader appetite for dismantling the entire legal apparatus in Northern Ireland. Part of this unwillingness is located in an official assessment that the legal process operated fairly throughout the conflict.[90] There is some (albeit limited) acknowledgment of the "bad apple" phenomena, which would allow that state officials and institutions might have at certain times behaved inappropriately or outside the law. However, no systematic conclusions are sought and in fact are vigorously denied. This means that when institutional reform processes commence there is a persistent tension between the need for transformative change, propelled by internal political communities, and the fear that in doing so the state's narrative of its own behaviors will be compromised.

The result has frequently been a battle between competing models of change, a point that can be illustrated in the post Agreement criminal justice debate. Criminal justice reform was an arena clearly marked out by the Agreement.[91] However, the dominant paradigm in implementation has been more clearly to reform rather than to transform. The Criminal Justice Review reported in March 2000, that while there have been criticisms that the Review did not go far enough, it clearly contained transformative aspects.[92] The Review manifested the tension between a technocratic model of reform, versus a "transformative" model with an emphasis on novelty, and the empowerment of previously excluded communities.

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[89] Of notable concern here are the provisions of the Hillsborough Declaration, *supra* note 73, ¶ 25 & Annex 3, which seeks to contain the Bill of Rights to "conflict extras" and seems to clamp down on the wider array of rights protection proposed by the Bill of Rights consultation process as published by the Northern Ireland Human Rights Commission. *See generally* Northern Ireland Human Rights Commission, Bill of Rights Working Group, *available at* www.nihrc.org.

[90] *See* Stephen Livingstone, *And Justice for All? The Judiciary and the Legal Profession in Transition*, in Human Rights, Equality and Democratic Renewal in Northern Ireland (Harvery ed., 2001).

[91] *See* Good Friday Agreement, Strand 3, Annex B, Review of the Criminal Justice System, *supra* note 68. The contours of a similar dynamic can be identified in relation to the changes to the policing system in Northern Ireland. In the context of policing reform, a similar dynamic has been identified. *See* O'Rawe, *supra* note 45, at 1015–73.

[92] *See* Committee on the Administration of Justice, Annual Report 2001–2002 12–14 (2002), *available at* www.caj.org.uk/reports/Annual%20Report%202001-2002.pdf.

The government responded to the Review by publishing an Implementation Plan and the Justice (NI) Bill.[93] There was evident dilution of the Review's proposals in both documents, particularly in the context of prosecutorial reform. The legislation which proposes to implement the government's views has been the subject of heated debate from both political parties and the nongovernmental sector. The debates continue as devolution of the criminal justice matters and policing now constitutes a key aspect of ongoing transitional political discussions.

Matters have been pushed along by the recent publication of a revised plan by the government for the implementation of criminal justice reforms, in addition to the appointment of Lord Clyde as a Justice Oversight Commissioner to provide independent scrutiny of the implementation process.[94] His office was considerably hampered by the failure to place it on a statutory basis and had initially operated without either a fixed office or staff. The ad hoc nature of his appointment expresses the state's fundamental disquiet with over-activism in the criminal justice field.

The narrative of criminal justice revision in Northern Ireland confirms Bell's observation about the detail and enforcement of institutional change being left to the post "deal" context.[95] This means that critical issues become sites for ongoing political contestation as well as offering the possibility to some parties to revisit the content of the "deal" itself. Moreover, as we assess the role of the state in this process, the Criminal Justice Review demonstrates how the process of institutional reform can encounter deeply entrenched resistance to change from key institutions and actors.

In a sense, it is as if the pause given by the gap between negotiation, agreement and institutional review allows institutions to regroup. This can operate to swell momentum against institutional change. Governmental resistance (as evidenced by the Criminal Justice legislation)[96] confirms that change in the local environs of Northern Ireland is not viewed in isolation from the rest of the United Kingdom. Deep institutional revision is ultimately seen as affecting the operation of parallel bodies in other parts of the country. Such widespread effect is vigorously avoided by the state.

Finally, affirming the need for deep institutional changes brings with it an implicit recognition of failings by the bodies in questions. This recognition in turn makes an important contribution to the retrospective construction of the conflict narrative—one that compromises the democratic state and makes it deeply uncomfortable.

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[93] *See generally* the Implementation Plan, *available at* www.nio.gov.uk/pdf/impplans2.pdf.

[94] *See* the Criminal Justice website of the Northern Ireland Office, *available at* www.nio.gov.uk/criminal-justice.

[95] Bell, *supra* note 36, at 32.

[96] Justice (Northern Ireland) Act 2002, Commencement No. 1 (2002) (N.Ir.Stat.), *available at* www.hmso.gov.uk/acts/acts2002/20020026.htm.

## D. "Seeing" the Problem: The Specter of the Past

As the vast literature on transitional justice makes clear, the most compelling issue for the transitional state is how to respond to the failings of a previous regime. We believe that "dealing with the past" poses specific problems for the democratic state and some of these issues are explored below. The most evident problem encountered by the democratic state lies in coming to terms with the human rights violations it may have committed during an internal conflict. As outlined previously the democratic state is generally assumed not to commit systematic violations of human rights, because once the initial breach is discovered, its own internal human rights protections should provide correctives and prevent reoccurrence.

Transitional processes often operate to highlight both the prevalence of human rights violations and the failure of the state. The reason for this is that transitional processes are generally contemporaneous with truth-telling processes. Part of resolving conflict involves acknowledging what took place during conflict. In that context, the state is called upon to be transparent about its conflict management tactics and thus to acknowledge the human rights violations it may have been responsible for. For all states this is a difficult process, but it has a particularly difficult resonance for the democratic state. As stated above, the democratic state is politically self defined by values which would seem to exclude certain types of behaviors in a way that is not true of the authoritarian state. When the democratic state and its agents have been responsible for systematic human rights violations it is called upon to examine its own political identity in a way which does not arise for the authoritarian state. For the democratic state, there is no easily accessible marker between the illegitimate old and the legitimate new, as there is with a formerly authoritarian state that has undergone transition.

During the course of the Northern Ireland conflict, oversight of the systematic aspect of human rights abuses by both state and nonstate actors was limited in nature. The Northern Ireland situation was briefly considered under the 1503 United Nations procedure, which deals with systematic country violations, but quickly removed from extended review.[97] The scrutiny of international courts, notably the European Court of Human

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[97] The former UN Sub-commission on the Prevention of Discrimination and the Protection of Minorities began consideration of the situation in Northern Ireland under the 1503 procedure in 1972, apparently focusing on the treatment of internees following the introduction of internment in August 1971. The confidentially surrounding the procedure means that limited information is available; indeed it was only in 1984 that limited details of the 1972 examination got into the public domain. *See* Howard Tolley, Jr., *The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications*, 6 Hum. Rts. Q. 420 (1984).

Rights, was valuable, though as noted above, it was not particularly stringent.[98] The ECHR's primary limitation is that it only examines individual cases, and the procedural limitations of the system mean that there was and still is significant time lag between the appearances of the state before the Court.

In Northern Ireland, this facilitated a form of judicial amnesia whereby the Court was both procedurally and jurisprudentially prevented from taking into account systematic patterns of state behaviors, as evidenced by a series of cases showing systematic human rights violations arising in the same jurisdiction.[99] A number of international human rights organizations undertook significant reviews of the human rights situation in the jurisdiction throughout the course of the conflict.[100] However, these did not amount to an overview of the state's role throughout the course of the conflict as a whole. All this meant that the state was, to an extent, insulated from systematic international scrutiny. Moreover, the international reviews generally responded to particular human rights concerns and never forced the state to fully reflect on the paradoxes of its own behavior throughout the conflict.

In the current transition, the past, as Bell puts it, has been dealt with in a piecemeal fashion.[101] The Good Friday Agreement makes no explicit reference to dealing with human rights violations that have taken place during the conflict, though discrete engagement with the past is seen in the measures which deal with prisoners and references to victims of the conflict, sprinkled throughout the document.[102] In addition, there have been a number of past specific initiatives, outside of the GFA framework (most notably the Saville Inquiry into the Army's 1972 Bloody Sunday killings).[103] However, as we have amply demonstrated elsewhere, the past is never far away in Northern Ireland, and dealing with human rights abuses which have occurred throughout the conflict has been an entrenched feature of the transitional legal and political landscape.[104]

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[98] *See generally*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 79 (1978); Brogan v. United Kingdom 145B Eur. Ct. H.R. (ser. A) at 16 (1987); Brannigan & McBride v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) at 31 (1992); McCann and Others v. United Kingdom, 324 Eur. Ct. H.R. 97 (1995).

[99] Aisling Reidy, Françoise Hampson & Kevin Boyle, *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 Netherlands Q. Hum. Rts. 161 (1997) (analysis of the same problem in relation to Turkey).

[100] Lawyers Committee for Human Rights, Human Rights and Legal Defense in Northern Ireland: The Intimidation of Defense Lawyers, the Murder of Patrick Finucane (1993); Lawyers Committee for Human Rights, At the Crossroads: Human Rights and the Northern Ireland Peace Process (1996); Lawyers Committee for Human Rights, Beyond Collusion: The UK Security Forces and the Murder of Patrick Finucane (2003); Human Rights Watch, Human Rights in Northern Ireland (1991).

[101] *See* Christine Bell, *Dealing with the Past in Northern Ireland,* 26 Fordham Int'l L.J. 1095, 1095 (2003).

[102] *Id.* at 1099–100 (referencing and outlining these "discrete measures").

[103] *See* Angela Hegarty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 Fordham Int'l L.J. 1148 (2003).

While aspects of the dilemmas faced in the Northern Ireland transition were unique to the region, some resonate with the experience of other democratic or quasi democratic states in a transitional context. Although comparisons with the Portuguese transition are remote and somewhat contingent, some illuminating parallels nevertheless present themselves. The transition in Portugal from the fall of Salazar in April 1974 was not unitary; rather it offers a picture of a complex multistage transition in a Western European state. The political organization of the state in the two years following the fall of the dictatorship did not correspond with liberal democracy in any conventional sense. Instead, politics was dominated with the middle ranking leftist army officers who had led the coup against Salazar. The result was a widespread series of purges, both legal and "savage" (i.e. extra legal) of perceived supporters of the old regime, amid severe social turmoil. It was only from April 1976 onwards that a process of incipient democratic consolidation began, gathering pace from 1982 onwards, and receiving the stamp of international legitimacy when the state joined the European Economic Community in 1986.[105]

Costa Pinto describes how at an officially sponsored 1999 exhibition on Portugal in the twentieth century to celebrate "twenty-five years of Portuguese democracy" (i.e. the period from April 1974 onwards), visitors were treated to graphic images of the Salazar era, followed immediately by panels displaying social and political change up the date of the exhibition.[106] Pointedly, no attempt was made to deal with the turmoil of the first two years of the transition. This reflects a broader problem that Portuguese society has encountered in coming to terms with the troubled "double legacy": that of the Salazar dictatorship and of the years immediately following its overthrow. While the societies and state structures in Portugal and in Northern Ireland in the last quarter century have been very different, the experience of multiple and sequential transitions in both places has meant that some commonality can be identified. Specifically both states have had difficulty in grappling with the implications of violations that occurred during a period viewed as in some sense "democratic." Moreover, this difficulty has contrasted with the relative ease by which failings have been officially acknowledged in relation to a period that was viewed as being authoritarian or at least democratically dysfunctional (Fig. 2 above).

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[104] *See Local Meets Global: Transitional Justice in Northern Ireland*, *supra* note 10, at 1217–20; *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*, *supra* note 10, at 339–42.

[105] On the accession of Portugal to the European Economic Community, see Portugal and the European Community, *available at* aei.pitt.edu/archive/00000962/01/enlargement_portugal_23_79.pdf.

[106] *See* António Costa Pinto, *Settling Accounts with the Past in a Troubled Transition to Democracy: The Portuguese Case, in* The Politics of Memory: Transitional Justice in Democratizing Societies, *supra* note 2, at 82–83.

A comparison that is perhaps less remote can be found in the current Spanish debate about a possible truth commission. Following the unearthing of the remains of the bodies of some people who had disappeared during the Franco era, the question of the necessity for a Spanish truth commission was raised before the UN Working Party on Disappearances and Arbitrary Killings.[107] The issue was a particularly sensitive one, given that Spain's ruptura pactata (negotiated break) marked a transition that famously avoided any generalized exploration of the past.[108] Such examination had largely been telescoped into one exploration of responsibility for the bombing of Guernica.[109] It was perhaps surprising, that, in a break with previous attitudes, the governing party in Spain indicated its approval in principle for the establishment of a truth commission, should one be deemed necessary.

The matter is now under consideration.[110] Significantly though, it appears that if established, the remit of any such commission may end in the Franco era. Thus, while the roots of current Basque political violence and terrorism lie in that period, the record of the Spanish state in its suppression post Franco are unlikely to attract attention. The mechanism can be expected, therefore, to involve exploration neither of the activities of GAL,[111] nor of ongoing allegations of ill treatment of terrorist suspects.

This likely focus can most obviously be explained in terms of the context and the manner in which the issue was raised before the UN

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[107] *See An Association goes to the UN so . . . that Spain investigates to the Disappear in the Civil War [sic], available at* www.elmundo.es/elmundo/2002/08/21/espana/1029891185.html, 21 Aug. 2002. Giles Tremlett, *Franco's Secrets Haunt Spain*, The Guardian, 21 Oct. 2002, *available at* www.guardian.co.uk/international/story/0,,815843,00.html. The Working Group has examined two cases concerning Spanish disappearances; see the relevant information regarding those cases, *available at* www.nodo50.org/haydeesantamaria/memoria_historica/victoria_ginzberg.

[108] *See* Aguilar, *supra* note 62.

[109] The investigation, while not officially sponsored, was nevertheless granted some access to official archives. *Id.* at 114.

[110] Giles Tremlett, *Spain Poised to Seek the Graves of Franco's Disappeared*, The Guardian, 23 Aug. 2002, *available at* www.guardian.co.uk/international/story/0,,779206,00.html; Elaine Sciolino & Emma Daly, *Spaniards at Last Confront the Ghost of Franco*, N.Y. Times, 11 Nov. 2002, at A3; *The Authors of "The Graves of Franco" ask the Government Support for the Exhumations* [sic], *available at* www.elmundo.es/elmundo/2003/07/18/sociedad/1058495998.html.

[111] Nor it seems, will any more light be shed on the activities of GAL through criminal prosecutions in Spain. *See* Paddy Woodworth, *GAL Verdict Concludes Investigation into Spanish Dirty War Crimes*, Irish Times, 27 June 2003, at 15.

Working Party. Another factor may be the ongoing violent conflict in the Basque country; truth commissions imply a degree of closure that may be premature. But nevertheless, as in relation to Northern Ireland and Portugal, a clear contrast is evident between the willingness to acknowledge the failings of an authoritarian past, and the difficulty of coming to terms with failings under democracy.

The question of a possible truth commission has also been raised in the Israeli-Palestinian context,[112] but it has attracted little official enthusiasm, much less concrete action. One possible explanation for the neglect of the question lies in the fact that the current peace process (at least as perceived by the international community) is ultimately predicated on a model of separation rather than sharing. A two state solution would bring little immediate need for a common understanding of overlapping historical legacies. But a truth commission would also bring Israel face to face with some uncomfortable historical realities. The Israeli state, which consistently refers to its democratic credentials in both external and internal discourse, would have to address failings not only in relation to the territories occupied in 1967 (where exceptionality is always going to be an issue), but also with events going back to the foundation of the state, and therefore with territory that Israel regards as fully its own. Once again, to ignore the issue seems like a more attractive option than facing the paradox of a democratic state behaving profoundly undemocratically.[113]

All the cases outlined here underscore the particular tension that democratic states, and even states with partial democratic credentials, demonstrate in dealing with human rights abuses that occur under their control. All these jurisdictions reveal that the actuality of systematic human rights violations are profoundly linked to unresolved issues of state legitimacy, minority representation, and the insecurity of the state over its own potential territorial disintegration. In all cases, formal democratic structures have provided insufficient political binds to hold the body politic together. Here the state has a somewhat stark choice. One option is to genuinely open up the political process to full and equal representation, and to accept the territorial, secessionist or political restructuring that it may follow. The other option is to resort to repressive means and quell these political leanings.

The problem for the democratic state is that such repression inevitably entails human rights constraints and violation, which lie in polar opposition to the self identity of the state. In the transitional process, these tensions and the responsibility of the state for its repressive choices are laid bare; not surprisingly, the situation is not a comfortable one.

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[112] *See* Stanley Cohen, *Justice in Transition? Prospects for a Palestinian-Israeli Truth Commission*, MIDDLE EAST REPORT, MAY–AUG. 1995, AT 2–5.

[113] DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES (2002).

## VI. CONCLUSIONS

The process of transition in the conflicted democratic state presents a core paradox around which others locate: the state is brought face-to-face with the need for a program of action which its self definition should have rendered unnecessary. Unpacking the implications of this paradox and comparing and contrasting the picture that emerges with that of the authoritarian state in paradigmatic transition not only offers insights into transition in conflicted democracies, but it also throws up important questions about how paradigmatic transition is constructed. The result points to a need to rethink some important aspects of the broad transitional justice field.

As regards paradigmatic transition, the discussion above points to the need for a recognition that established transitional justice discourses frequently conflate at least two primary kinds of transition: that from authoritarianism to democracy, and that from war to peace (we have left to one side for the purposes of this paper the question of economic transition). If the insights from this paradigmatic discourse are to be applied to transition in conflicted democracies, these two transitions (authoritarianism to democracy, and war to peace) must be disaggregated. Transition in the conflicted democracy will involve a transition from peace to war, but not straightforwardly, one from authoritarianism to democracy.

One important effect of this analysis is to focus attention on what precisely is meant by the "democratic." We have argued that the key to unlocking this aspect of transition in conflicted democracies is to conceptualize change in terms of a movement from procedural to substantive democracy: a deepening, rather than an introduction, of democratic standards. Thus, as is frequently the case with paradigmatic transition, transition in conflicted democracies can be disaggregated into a transition relating to violence and one relating to democracy. But the latter is conceptually quite different in the case of conflicted democracies.

This ties in with the geographic dimension adverted to earlier. A state with an overall democratic system, both procedurally and substantively, may yet contain within it a region with a legacy of democratic dysfunctionality (as was the case of Northern Ireland within the UK). Even in this region, where the commitment to the democratic may have been expressed more in procedural than in substantive terms, the baseline from which transition is to be measured is different from that in the classic authoritarian state.

Particularly where that region's autonomy vis-a-vis the central government is challenged, the state is likely to manifest a capacity for reform during the conflict to a much greater extent than in the case of the authoritarian state. This means that change is less likely to be limited to one "big bang" event at the time of transition; there may also be incremental and progressive change over a long period.

This capacity for incremental change, coupled with an assessment of the overall democratic nature of the state, means that international consensus on the need for major change is likely to be much more limited in the case of a conflicted democracy than with an authoritarian state. For the same reason, at the point of transition, there is likely to be less pressure on the institutions of the conflicted democracy responsible for rights violations, and these institutions are likely to be better placed to resist change. The democratic nature of the state may thus make it more difficult for the authorities to acknowledge past failings, and to "see" the problem of institutional failure.

We have argued that the model of institutional transformation can be as valid for the conflicted democracy in transition as it is for the authoritarian state. We suggest that resistance to such transformation can be deeply embedded, and lies in the incapacity of the democratic state to acknowledge its role as an actor in conflict, as well as its complicity in perpetuating systematic human rights violations. Without such acknowledgment, or at least a process which can rectify the effects of the state's behaviors, the transitional process can be stymied and under-paced. The unwillingness of the state to fully affirm or redress its limitations also creates a space in which political, military and paramilitary elements opposed to major change can regroup and act to undercut significant elements of the "deal" that has changed the conflict situation.

Overall, we thus believe that transitional justice discourse itself would strongly benefit from substantive theoretical engagement with transitions that fall outside of the authoritarian model. The benefit lies in a more nuanced understanding of the variety and forms of transition, as well as an understanding of the need to thoroughly apply the deep transformative paradigm to a variety of dysfunctional political contexts.