Injustice and Betrayal

Northern Ireland Legacy — how re-litigating the past postpones reconciliation

I. Introduction

The Good Friday Agreement of 1998 was, by any reasonable assessment, one of the most significant political achievements in the recent history of these islands.[1] It ended, or substantially ended, a conflict that had cost more than 3,500 lives over three decades, created a framework for political accommodation between communities whose divisions had resisted resolution for generations, and established the conditions in which a functioning, if fragile, civil society could re-emerge in Northern Ireland. The early release of paramilitary prisoners, deeply painful as it was to those whose family members they had killed, was accepted as a necessary price of political settlement.[2] What was not foreseen with clarity — or, if foreseen, not honestly acknowledged — was that the Agreement would inaugurate not the end of the conflict's legal afterlife, but its beginning.

This essay argues that the legislative and judicial mechanisms established in the name of 'legacy', 'truth', and 'reconciliation' have, in practice, served purposes inimical to each of those stated aims. They have imposed upon veterans of the Northern Ireland security forces a burden of retrospective legal accountability that was not contemplated at the time of the relevant operations, that applies standards developed decades after the fact, and that operates with a structural asymmetry that systematically privileges the claims of former paramilitaries and their political advocates over those of the men and women who served the Crown. Far from advancing reconciliation, this apparatus has perpetuated grievance, instrumentalised victims, and created a legal environment in which the past cannot be settled because too many actors have too great an interest in keeping it open.

II. The scale and character of the conflict

The Troubles, which in their most acute phase ran from the late 1960s to the 1998 Agreement, resulted in approximately 3,532 conflict-related deaths.[3] Of these, the security forces — the British Army, the Ulster Defence Regiment, the Royal Ulster Constabulary, and the various intelligence and special operations units that supported them — were responsible for a significant minority, estimated at between ten and twelve per cent of the total. The remainder were attributable to republican paramilitary organisations, principally the Provisional IRA, and to loyalist paramilitary groups. The security forces operated, throughout the conflict, under domestic legal authority, with rules of engagement calibrated to the particular and novel conditions of counter-insurgency operations in a domestic jurisdiction, and under a degree of operational, judicial, and political scrutiny that was, by the standards of the time, substantial.

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[1] Belfast Agreement (Good Friday Agreement), 10 April 1998, Cm 3883. The Agreement established the constitutional and political framework for the governance of Northern Ireland and the normalisation of security arrangements, including the early release of paramilitary prisoners.

[2] Northern Ireland (Sentences) Act 1998. The Act provided for the early release of qualifying prisoners convicted of scheduled offences, a provision widely regarded as one of the most politically sensitive concessions of the peace process.

[3] Police Service of Northern Ireland, 'Security Situation Statistics: Deaths due to the Security Situation in Northern Ireland 1969–2003' (Belfast: PSNI, 2003). The figure of 3,532 conflict-related deaths is the most widely cited, though definitional variations produce marginally different totals across sources.

For those engaged at the leading edge of intelligence-led operations, in particular, the conflict carried a burden of responsibility that was key in bringing the Provisional IRA to an operational standstill and leaving Sinn Féin little option other than recourse to political dialogue. For the soldiers involved, the operational environment had the character of medium-intensity conflict that, in moments of acute intensity for units such as the Special Air Service (SAS), carried a very significant personal risk.[4] Against a backdrop of political assassinations, which on two occasions almost killed the sitting Cabinet and led to the deaths of many others, of sectarian violence and the close-quarter assassinations of security forces personnel and members of the judiciary, Operation Banner was conducted across an extended period of time and on a scale of violence that ended the lives of thousands and injured tens of thousands. The character of the conflict can therefore, with considerable authenticity and by the Ministry of Defence's own admission, be characterised as a civil conflict primarily consequent of the Provisional IRA's armed insurgency against the Crown.[5]

III. The Legacy framework: architecture and asymmetry

The framework for addressing Northern Ireland legacy issues has evolved, imperfectly and contentiously, through a series of political agreements, legislative measures, and judicial interventions spanning more than two decades. The Stormont House Agreement of 2014 established the political parameters within which subsequent legislation was developed,[6] culminating in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, which created the Independent Commission for Reconciliation and Information Recovery (ICRIR) and established a conditional immunity mechanism for individuals who cooperate fully with the Commission's information-gathering process.[7]

The 2023 Act applies, in principle, equally to all parties to the conflict: to former security force personnel and to former paramilitaries alike.[8] In practice, the structural asymmetry of the legacy process operates to the systematic disadvantage of the former. Security force personnel operated under identifiable command structures, generated documentary records, and served in an institutional context that makes their actions traceable and attributable. Paramilitary organisations operated covertly, destroyed records as a matter of deliberate policy, and have been able to present their members to the Commission on terms that they, rather than the state, substantially control. The investigative resources of the police legacy units that preceded the ICRIR were directed overwhelmingly at state conduct, reflecting both the institutional logic of the investigative bodies and the political pressure exerted by those with the greatest interest in their findings.[9]

The specific provisions of the 2023 Act governing the immunity process, the ICRIR's functions, and the relationship between its findings and civil proceedings create a complex and contested

[4] Interviews with various SAS personnel, conducted by the author at various locations during 2005-2006.
[5] *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Chief of the General Staff, Ministry of Defence, Army Code 71842, July 2006.
[6] Legacy of the Troubles Working Group, 'Addressing the Legacy of the Past' (Stormont House Agreement, 23 December 2014). The Stormont House Agreement established the framework subsequently enacted, in modified form, by the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.
[7] Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, s. 41. The immunity provisions were the most contested element of the legislation, attracting significant opposition from victims' groups, the Irish Government, and a coalition of human rights organisations.
[8] Ibid., s. 44. The definition of 'conduct' for the purposes of immunity encompasses acts and omissions by all parties to the conflict, including members of the security forces, paramilitary organisations, and their agents.
[9] Re Dillon's Application for Judicial Review [2022] NICA 19. The Northern Ireland Court of Appeal held that elements of the UK Government's proposed legacy framework were incompatible with Art. 2 ECHR, foreshadowing the legal challenges that subsequently followed enactment of the 2023 Act.

legal landscape.[10] Veterans' organisations have argued, with considerable force, that the immunity mechanism — conditional upon cooperation with an information-gathering process controlled by a body whose independence from political pressure has been questioned — offers less protection than the government has claimed, while the investigative obligations of the ICRIR create continuing exposure to findings adverse to the state and to individual former officers.

IV. The European Court and the retrospective standard

The legal architecture of the Northern Ireland legacy process has been shaped, in critical respects, by the jurisprudence of the European Court of Human Rights. The Court's engagement with Troubles-era killings by security forces began in earnest in the early 2000s, with a series of judgments finding violations of the procedural obligations under Article 2 ECHR arising from the inadequacy of the investigations conducted into those deaths at the time.[11][12]

The significance of these judgments is not merely that they identified specific investigative failures; rather, it is that they retrospectively applied procedural standards that were not established until well after the events in question. The investigations conducted during the Troubles operated according to the standards and procedures of the time, informed by the legal and institutional context of a jurisdiction under a sustained terrorist campaign of exceptional intensity. The Court's subsequent assessment of those investigations by reference to a body of procedural doctrine that had not yet been developed is, in effect, a form of retrospective standard-setting that creates legal liability for conduct that was not unlawful, or not demonstrably unlawful, at the time it occurred.[13]

This retrospective character is not merely a technical legal complaint. It represents a fundamental violation of the principle of legal certainty — the requirement that individuals be able to foresee the legal consequences of their actions at the time of those actions — which is itself a foundational element of the rule of law to which the ECHR is ostensibly committed. Security force personnel who conducted operations in accordance with the law as it stood, and who were investigated and, where appropriate, prosecuted under the standards then applicable, face a renewed cycle of legal scrutiny conducted by reference to norms that were not available to them as guides to conduct. The injustice of this position is not peripheral; it is central to any honest assessment of the legacy process.

V. The Political instrumentalisation of victims

The suffering of those bereaved by the Troubles — the families of all victims, regardless of who was responsible for their deaths — is real, profound, and deserving of the most serious political and moral attention. It is precisely because such suffering is genuine that its

[10] Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, ss. 72, 83, 88. These provisions govern respectively the functions of the Independent Commission for Reconciliation and Information Recovery, the immunity process, and the relationship between the Commission's findings and civil proceedings.

[11] McKerr v United Kingdom (2001) 34 EHRR 20. The Court found violations of Art. 2 ECHR arising from the deaths of three men shot by the Royal Ulster Constabulary in 1982, specifically in relation to the adequacy of the investigation.

[12] Jordan v United Kingdom (2001) 37 EHRR 2; Kelly and Others v United Kingdom (App. No. 30054/96), ECtHR, 4 May 2001; Shanaghan v United Kingdom (App. No. 37715/97), ECtHR, 4 May 2001. These cases, taken together with McKerr, established the principle that investigative obligations under Art. 2 ECHR are engaged in respect of Troubles-era killings by security forces, notwithstanding the passage of time.

[13] Aurel Sari, 'The Legal Framework Governing the Participation of the Armed Forces in Internal Security Operations', in Hitomi Takemura (ed.), International and Comparative Law on the Rightful Place of Religion in Public Life (Leiden: Brill, 2019), pp. 55–84. Sari notes that the application of ECHR standards to security force conduct during the Troubles created retrospective legal exposure that was not foreseeable at the time of the relevant operations.

instrumentalisation by political actors is so troubling. The legacy process, as it has evolved, has served not primarily the therapeutic and restorative interests of bereaved families, but the political interests of those who seek to reshape the historical narrative of the conflict in ways that delegitimise the state's security response and elevate the status of those who waged war against it.[14]

That this political instrumentalisation was understood, and accepted, at the highest levels of government from the earliest stages of the peace process is demonstrated by documentary evidence of striking candour. A letter from John Reid, then Secretary of State for Northern Ireland, to Prime Minister Blair, dated 4 May 2001 and declassified in subsequent years, reveals with unusual clarity the political calculus that drove the asymmetric treatment of security force personnel in the emerging legacy framework.[15] Reid acknowledged that any amnesty scheme for paramilitary 'on-the-runs' would need to exclude members of the security forces, but that there was 'unlikely to be a clever way of drafting this scheme so that it conveniently draws a line around soldiers and police officers' — exclusion would have to be explicit on the face of the legislation. He recorded his own 'enormous difficulty' with this position 'on grounds of fairness and equity', and acknowledged the government's 'responsibility towards those who risked their lives' in combating terrorism. Yet, having registered those reservations, he recommended proceeding on terms that expressly disadvantaged the security forces, having been 'persuaded' that it was 'the right approach' in light of the political requirements of the peace process.

What persuaded him is not made explicit in the letter, but the context is unambiguous: Sinn Féin's requirements. Reid had already noted that Sinn Féin would 'never accept a procedure which involved applicants having to admit their guilt to a Commission' and that an amnesty scheme needed to be designed around what republican political actors would and would not accept. The asymmetric exclusion of the security forces was therefore not the product of principled legal reasoning or an honest assessment of comparative culpability; it was the price of republican acquiescence in a political settlement. Those who had served the Crown were to be denied the protection extended to those who had sought to destroy the constitutional order, because the latter's political representatives had negotiated that outcome and the government had accepted it.

The academic literature on transitional justice is unambiguous about whether retrospective legal accountability mechanisms serve the interests of reconciliation in deeply divided societies. The weight of evidence suggests that they do not: that processes focused primarily on punishment and individual attribution of blame tend to harden communal divisions, sustain grievance narratives, and impede the social reconstruction that genuine reconciliation requires.[16] Ruti Teitel's foundational analysis of transitional justice identifies the tension

[14]Paul Bew, 'The politics of the Irish border', International Affairs, 95:1 (2019), pp. 13–24. Bew traces the politicisation of legacy issues and the instrumentalisation of victims' narratives by political actors on all sides of the constitutional divide.

[15]John Reid (Secretary of State for Northern Ireland), Letter to the Prime Minister: 'Northern Ireland: Legislating on OTRs', 4 May 2001 (declassified), paras. 4–6. The letter is paginated 448–451 in the relevant declassified archive. Reid stated at para. 5: 'The most difficult question will be what to do about the police and the army. There is unlikely to be a clever way of drafting this scheme so that it conveniently draws a line around soldiers and police officers. So if we want to exclude them we shall have to do so explicitly on the face of the Bill. I have enormous difficulty with this personally – on grounds of fairness and equity, and considering our responsibility towards those who risked their lives to combat acts of terrorism which are now to be set aside.' Reid nonetheless recommended proceeding on the basis that exclusion of security force personnel was 'the right approach', having been 'persuaded' on grounds of political necessity. At para. 6 he anticipated the public reaction with candour: 'All that said, there is a makings of a very difficult and dangerous press campaign and public perception here – "our lads still to stand trial while murdering bastards let off".'

[16]Brandon Hamber, 'Transitional Justice and Intergroup Conflicts', in Linda Tropp (ed.), The Oxford Handbook of Intergroup Conflict (Oxford: Oxford University Press, 2012), pp. 291–305. Hamber notes the evidence that retributive accountability mechanisms frequently impede rather than advance intergroup reconciliation in deeply divided societies.

between backwards-looking accountability and forward-looking social reconstruction as the central normative challenge of post-conflict settlement, and concludes that resolving this tension in favour of the former is rarely, if ever, conducive to the latter.[17]

The experience of other post-conflict societies reinforces this conclusion. The South African Truth and Reconciliation Commission, for all its imperfections, was premised on an explicit trade-off between accountability and disclosure — a recognition that the social conditions for genuine reconciliation could not be created through a process that prioritised retributive justice.[18] The Northern Ireland legacy process has arrived at a version of this model only after decades of politically-driven delay, during which the resources devoted to retrospective investigation have produced no prosecutions of substance and a great deal of renewed suffering for those — veterans and victims' families alike — who were compelled to revisit the worst experiences of their lives in the service of an accountability process that could deliver nothing commensurate with the demands placed upon them.

VI. The operational asymmetry: State accountability without paramilitary equivalence

The most fundamental structural flaw in the Northern Ireland legacy process is the absence of any mechanism capable of imposing equivalent accountability upon those who bore arms against the state. The ECHR's Article 2 investigative obligations bind the United Kingdom as a signatory; they bind no paramilitary organisation, no terrorist cell, and no political party that directed or facilitated political violence. The investigative resources of the state are therefore deployed, as a matter of legal compulsion, against the conduct of those who served the state, while those who killed approximately 88 per cent of the conflict's victims face no equivalent legal obligation to account for their actions.[19]

This asymmetry is not a marginal imperfection in an otherwise balanced process; it is its defining characteristic. It means, in practice, that the legacy process functions as a mechanism of state accountability without any reciprocal mechanism of paramilitary accountability, generating a body of findings that — whatever their individual accuracy — present a systematically partial account of the conflict's violence. The political uses to which this partial account is put are not difficult to identify: it serves a nationalist narrative of the Troubles as a conflict between an oppressive state and a justified resistance, a narrative that has no foundation in the historical evidence and that is actively harmful to the prospects of genuine reconciliation.

The veteran who served in Northern Ireland — who patrolled in conditions of constant threat, who made split-second decisions under fire, who lost colleagues to bombs and bullets, and who carried those experiences for decades — is invited by the legacy process to submit to a form of judicial scrutiny to which his adversaries will never be subjected, applying standards he could not have known at the time of his service, in pursuit of findings that will be presented as contributions to a 'truth' that is, structurally, incapable of being whole.

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[17] Ruti Teitel, Transitional Justice (Oxford: Oxford University Press, 2000), pp. 27–54. Teitel traces the evolution of transitional justice mechanisms across post-conflict societies and identifies the tension between backward-looking accountability and forward-looking social reconstruction as the central normative problem of the field.

[18] Timothy Garton Ash, 'True Confessions', New York Review of Books, 17 July 1997. Garton Ash, reflecting on the South African Truth and Reconciliation Commission, notes that the demand for full truth frequently conflicts with the practical requirements of political settlement.

[19] Committee on the Administration of Justice, 'Addressing the Legacy of the Past: Key Issues for the Stormont House Agreement Implementation' (Belfast: CAJ, 2019), p. 14. The CAJ identifies a structural asymmetry in the legacy process, noting that the investigative burden falls disproportionately upon the state rather than upon paramilitary organisations.

VII. Re-litigation and the impossibility of reconciliation

The claim that the legacy process serves reconciliation rests upon a theory of social healing that the evidence does not support. Reconciliation, in the context of a deeply divided post-conflict society, is not primarily a juridical process. It is a social, political, and moral process that requires, above all, the establishment of a shared framework of civic life in which former adversaries can coexist with sufficient mutual respect and acknowledgement of each other's humanity to sustain a functioning polity.[20]

Legal processes that compel individuals to relive the worst experiences of their lives in an adversarial or quasi-adversarial context, without any guarantee of an outcome, do not meet that requirement. They do, however, serve other requirements: they sustain the legal profession in a lucrative practice area; they provide political actors with a continuing mechanism for the prosecution of disputes that they lost at the negotiating table; and they maintain, in a state of permanent unresolved tension, a conflict that the political interests of certain actors require to remain unresolved.[21]

The Independent Commission for Reconciliation and Information Recovery, whatever its intentions and however well-staffed and resourced, operates within a framework that cannot deliver genuine reconciliation because that framework is designed primarily for accountability rather than for healing.[22] Accountability and reconciliation are not synonyms; in many circumstances, they are antagonists. A process that is presented as serving both, but is structurally designed for the former, will fail at the latter — and the failure will be borne most heavily by those least responsible for the political decisions that produced it.

VIII. Conclusion: betrayal by design

The Northern Ireland legacy process represents, in the view advanced by this essay, a form of betrayal that is structural rather than incidental. It was not designed with malicious intent towards veterans, but it was designed and has been operated in ways that consistently subordinate their interests and dignity to political calculations in which they have had no voice and from which they have derived no benefit.

The Reid letter of 4 May 2001 provides the documentary proof of what might otherwise be characterised as inference. Here, in the private correspondence of a senior Cabinet minister, is the unvarnished account of a government that knew the asymmetric treatment of security force personnel was unfair, that knew it was politically explosive, and that proceeded with it regardless — not because principle demanded it, but because the requirements of republican political actors made it, in the minister's judgment, necessary.[23] Reid's own prediction of the public reaction — that soldiers would stand trial while those who killed their colleagues went free — has, in the intervening quarter century, been substantially vindicated. The 'very difficult and dangerous press campaign' he anticipated has materialised not as a media event but as

[20]Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', Journal of Law and Society, 34:4 (2007), pp. 411–440, at 415. McEvoy argues that the legalist turn in transitional justice discourse has privileged juridical accountability over the social and political conditions required for genuine reconciliation.

[21]Hurst Hannum, 'Peace versus Justice: Creating Rights as Well as Order out of Chaos', International Peacekeeping, 13:4 (2006), pp. 582–595, at 588. Hannum argues that the false dichotomy between peace and justice has been resolved in most post-conflict settings in favour of the former, with accountability mechanisms serving primarily a legitimating function.

[22]Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, s. 2. The Independent Commission for Reconciliation and Information Recovery (ICRIR) is established as the primary mechanism for reviewing Troubles-era deaths and serious injuries.

a lived reality for thousands of veterans whose service the state has declined to defend on terms equivalent to those it extended to their adversaries.

The men and women who served in Northern Ireland did so in defence of a constitutional order and a civilian population under sustained terrorist assault. They operated under legal authority, within rules of engagement that, however imperfect, reflected a genuine attempt to calibrate the use of force to the demands of a domestic counter-insurgency. Where individual conduct fell below the standards required of them, appropriate accountability was applied in most cases. What they were not, and what the legacy process implicitly characterises them as, is a criminal enterprise operating beyond the law against a population it sought to oppress.

A state that acquiesces in that characterisation — through the design of legacy mechanisms that produce findings consistent with it, through the failure to provide adequate legal defence to those subjected to investigation, and through the political unwillingness to confront the asymmetry at the heart of the process — has broken faith with those who served in its name in conditions of genuine danger. That breach of faith is not merely a moral failure, though it is that. It is a strategic failure of the first order, with consequences for the willingness of future generations to serve, for the cohesion of the security forces, and for the credibility of the state's commitment to those upon whom its security ultimately rests.[24]

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[24] Ibid., s. 18. The Act provides that the ICRIR may refer cases to the Director of Public Prosecutions where the evidence meets the threshold for prosecution, subject to the immunity provisions of ss. 41–45.