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Violence, Law and the (Im)possibility of Transitional Justice

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**Violence, Law and the (Im)possibility of
Transitional Justice.**

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Abstract:

Since its emergence less than twenty years ago, transitional justice has established itself as a coherent field of activity, held together by a set of common assumptions about the value of justice in times of political transition. The requirements of transitional justice are increasingly institutionalised in international law and policy, creating a clearly defined model. However a range of critical perspectives have also been brought to bear on the emergent policy and practice of transitional justice. These critiques have highlighted the blind spots and the ways in which the model of transitional justice itself has set the boundaries of inclusion and exclusion in the transitional space. The purpose of this thesis is to ascertain the impact that the institutionalisation of the 'field' has had on transitional justice discourse. Using the work of Jacques Derrida, and 'deconstructing' the model of transitional justice, the thesis builds on existing critiques to expound at a theoretical level the relationship between the concepts of violence, law and justice that underpin the field. It asks whether as a 'field' transitional justice continues to accommodate divergent perspectives, or whether the effect of the institution of transitional justice in international law and policy has been to create a bounded 'theatrical space' within which efforts at post conflict peace making must play out. Rather than exploring discrete sites of silence and invisibility the thesis asks the bigger question of *why* some voices and some experiences are excluded from transitional justice discourse. In so doing it proposes a coherent theoretical framework within which these disparate critiques can be understood. This is achieved by highlighting the relationship between violence, law and justice in constructing understandings of conflict and transition. Ultimately the thesis reveals the limitations of a normative concept of transitional justice that does not remain responsive to critique. In so doing it interrogates the relationship between law and justice in a way that has not yet been undertaken.

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CHAPTER 1: INTRODUCTION

1. WHAT IS 'TRANSITIONAL JUSTICE'?

Transitional Justice [n]: the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

This definition of transitional justice first appeared in a report published in 2004 by the Secretary General of the United Nations on the 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies'.¹ For transitional justice scholars and activists, its publication represented a watershed.² It was the moment in which transitional justice—a concept that had emerged less than a decade previously³—became institutionalised and given definite form in international policy. Since the publication of the Report, this definition has been cited extensively as the generally accepted definition of 'justice' in the aftermath of war, violence or repression. The effect of the codification of transitional justice in this, and subsequent, United Nations reports has been the emergence of an institutionalised model, with a clearly defined list of options for post conflict states seeking to address an abusive past.⁴ These include trials, truth commissions and reparations, which can all be used in pursuit of justice. The model is characterised by its use of law as a means of moving conflicted societies from a state of war, conflict or repression, towards peace and justice.⁵ A normative model is intended to transcend politics, thereby ensuring that just outcomes

¹ Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies (2004) UN Doc. S/2004/616 para 8 (hereinafter 'Secretary General's Report'). The mechanisms may include individual prosecutions, reparations, truth-seeking, institutional reform, or vetting and dismissals, or a combination thereof.

² Jelena Subotić, 'The Transformation of International Transitional Justice Advocacy' (2012) 6 International Journal of Transitional Justice 106, 116

³ See Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321

⁴ See also United Nations, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General to the Security Council' (Un Doc S/2011/634, United Nations 2011) (hereinafter 'Secretary General's Report 2011').

⁵ See generally Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000)

are achieved through the application of objective standards that incorporate principles of justice.⁶

The study and practice of transitional justice has more recently been characterised as a ‘field’ of inquiry.⁷ In drawing the distinction between a ‘field’ and a ‘discipline’, Bell defines transitional justice as comprising ‘both a sphere of activity and a sphere of academic knowledge, with a praxis relationship between the two’,⁸ and a field of activity held together by a common claim to legitimacy rather than a more coherent ‘discipline’ with its own common procedures and methods.⁹ This looser definition of ‘field’ is intended to allow transitional justice to accommodate divergent disciplinary perspectives within a more or less common framework of understanding as to its purpose. The effect of the institutionalisation of transitional justice is therefore not limited to the evolution of academic discourse. In very practical terms the conceptualisation of transitional justice as a distinct field of endeavour has profoundly influenced the way in which it has developed in practice.¹⁰ The model therefore engages a number of different levels, from academia, to policy and practice.

The purpose of this thesis is to ascertain the impact that the institutionalisation of the ‘field’ has had on transitional justice discourse. It asks whether as a ‘field’ it continues to accommodate divergent perspectives, or whether the effect of this institution has been to create a bounded ‘theatrical space’ within which efforts at post conflict peace making must play out.¹¹ In exploring the way in which the field has been instituted in law and policy the thesis ultimately asks whether the dominance of law helps or hinders the pursuit of justice. These questions are posed with reference to the field of transitional justice generally, and illustrated with reference to the example of the transition in Northern Ireland.

⁶ *ibid.* Discussed in Chapter 2

⁷ Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’ (2009) 3 *International Journal of Transitional Justice* 5.

⁸ *ibid.* 7.

⁹ *ibid.*

¹⁰ For a good overview see Subotić (n 2).

¹¹ Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes tr, Routledge 2001) 29 (hereinafter ‘*On Cosmopolitanism and Forgiveness*’).

2. AIM OF THE THESIS

While the field of transitional justice has expanded rapidly since the term first emerged, its development has been largely reactive to practice. Theorising has tended to follow practice rather than drive it.¹² While research is now beginning to exert a more discernable impact on policy in some areas,¹³ transitional justice remains a field in which theory has not managed to keep pace with practice.¹⁴ This thesis seeks to address this gap by presenting a comprehensive theoretical inquiry into the foundations of the field of transitional justice and the way in which it has evolved. This does not take the form of a historical account or evaluation of the field,¹⁵ but rather of a more focused deconstruction of how the ways in which transitional justice has been conceptualized has influenced its ability to deliver the underlying goal of establishing lasting peace. In particular the thesis presents a detailed deconstruction of the role of law in transition. To do this it addresses three key themes that underpin all work in and on transitional societies: violence, law and justice.

a. Research Questions

Using the themes of violence, law and justice to illustrate underlying theoretical arguments, the thesis is structured around three key objectives. The first is to interrogate the foundational assumptions of transitional justice and the ways in which these assumptions have shaped the field, focusing in particular on the role of law in transition. To achieve this the literature review surveys the way in which transitional justice has evolved to become the dominant language in which the move from war to

¹² Good examples of the theorisation of practice include Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regimes' (1991) 100 Yale Law Journal 2539, identifying a normative 'duty to prosecute' in international law, and Priscilla Hayner's extensive study of truth commissions that laid the groundwork for the inclusion of such commissions within the definition of transitional justice. Priscilla Hayner, 'Fifteen Truth Commissions – 1974-1994' (1994) 16 Human Rights Quarterly 597.

¹³ See, for example, Louise Mallinder, *Belfast Guidelines on Amnesty and Accountability* (Transitional Justice Institute 2014). See also UN Women, 'A Window of Opportunity: Making Transitional Justice Work for Women' (2nd edn, United Nations 2010)

¹⁴ See Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 Journal of Law and Society 411; Harvey Weinstein, 'Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief' (2011) 6 International Journal of Transitional Justice 1.

¹⁵ This has been done by Arthur (n 3).

peace is discussed.¹⁶ The methodology builds on this analysis by asking how theory can contribute to our understanding of the significance of the dominance of the model of transitional justice. The second objective is to challenge the assumption of a linear progression that underpins much of the theory and practice in this field. The justification for a distinct role for law in transition is that it can facilitate a move from violence towards the rule of law. This progression is addressed in Chapters Four and Five, which build on the analysis presented in the methodology chapter to ask whether violence and law can ever be separated. If the distinction between these two states of being is revealed to be a false one this raises the question of whether law can ever adequately address deep-rooted political conflict. The final objective is to ascertain the impact that a narrow vision of transitional justice, underpinned by a strictly normative concept of law, has on the possibility of justice in transition. Chapter Six therefore addresses the relatively overlooked relationship between law and justice. It asks whether relying on the oppositional structure of law to achieve political reform risks simply reproducing patterns of conflict, ultimately making justice impossible to achieve. In addressing these questions the thesis seeks to ask some of the big questions that have been absent from transitional justice research to date.¹⁷

b. Method

To address these research questions the thesis draws on the work of Jacques Derrida, and in particular his approach of deconstruction,¹⁸ to explore the dynamics of transitional justice. Deconstruction for these purposes is characterised as an on-going process of questioning. Rather than searching for a solution to the dilemmas of transitional justice, deconstruction requires awareness of oppositions, of differences and divisions and a willingness to work with difference rather than suppress it.¹⁹ The thesis therefore deconstructs some of the core assumptions upon which transitional justice is based, and in so doing generates new insights into some of the more persistent problems of transition. To achieve this the thesis translates deconstruction into a language that is familiar to transitional justice scholars generally, but also to

¹⁶ Bell (n 7)

¹⁷ McEvoy (n 14).

¹⁸ For a basic explanation of deconstruction see Jacques Derrida, 'Letter to a Japanese Friend' in Peggy Kamuf and Elizabeth G Rottenberg (eds), *Psyche: Interventions of the Other Volume III* (Stanford University Press 2008) 1 (hereinafter 'Letter').

¹⁹ This dynamic cannot be reduced to a single citation but is discussed in detail in Chapter 3.

lawyers in particular.²⁰ This requires a focused approach to the transitional justice literature. Although a relatively new field of inquiry, transitional justice has already generated a very significant volume of literature. While providing a substantial review of this literature, the thesis focuses most closely on texts that either define the field, or that subject it to substantial critique, thereby exposing its limits. Finally, in order to illustrate how deconstruction can further our understanding of transitional justice, the thesis draws on the example of the transition in Northern Ireland. Therefore, texts that specifically address that particular case have also been chosen. These are then used to illustrate broader trends in transitional justice. The aim is to set up a dialogue between the singular example of Northern Ireland and the general theoretical argument. The discussion of Northern Ireland therefore presents an empirical re-reading of research on the Northern Ireland conflict as a means of demonstrating how deconstruction can cast new light on seemingly intractable problems of violence, law and justice. When seen in these terms the example of Northern Ireland serves to illuminate the significance of the theory and highlight the specific insights brought to bear by deconstructing transitional justice.

The background to the transition in Northern Ireland is discussed in section 3 below. However as a matter of research design it is worth highlighting some of the features of the Northern Ireland experience that make it a particularly good example through which to explore the potential of deconstruction for transitional justice research. There is an extensive body of literature that analyses post-conflict Northern Ireland as falling within the rubric of transition. It has been researched individually,²¹ it has been included in multi state comparisons,²² and it has been compared to other paradigmatic

²⁰ In adopting this approach inspiration is drawn from the work of Martii Koskenniemi, who in his text *From Apology to Utopia* seeks to 'defer the more "radical" consequences which such an outlook might produce in order to remain as close as possible to the style and problematique which international lawyers will recognise as theirs.' Martii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 7.

²¹ See eg Anne Smith, 'Constitutionalising Equality: The South African Experience' (2008) 9 *International Journal of Discrimination and the Law* 201; Paul Van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa' (1999) 52 *Journal of International Affairs*; Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *Modern Law Review* 935; Christine Bell, 'Dealing with the Past in Northern Ireland' (2003) 26 *Fordham International Law Journal* 1095.

²² Aeyel Gross, 'Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel' (2004) *Stanford Journal of International Law* 47; Mayam Kamali 'Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa' (2001) *Columbia Journal of Transitional Law* 89.

examples in the field.²³ It provides clear evidence of the application of the logic of transitional justice to political and legal debates whose influence can be traced from research into policy and practice.²⁴ It is also nearly twenty years since the Belfast Agreement was signed. The passage of time allows for analysis of the ways in which the discourse of transitional justice has shaped the post-conflict political and legal landscape. It is now possible to reflect on both the achievements and the shortcomings of the Agreement in a way that is not possible with less distance from a peace process. Further, and perhaps most significantly, as a result of this distance from the ceasefire and the failure to fully address the legacy of the past, resistance to the Agreement and the framework of transition is beginning to emerge. Northern Ireland has a well-developed civil society that actively campaigns in respect of issues related to transitional justice. There is a vocal victim's sector that plays a significant advocacy role in respect of the needs of victims. This helps to illustrate the ways in which domestic political agendas are shaped and meaning in respect of the past is constructed. In Northern Ireland the law is a key site of political struggle and deconstruction helps to explore the significance of this dynamic. It exposes as problematic the way in which internationalised discourses of transition and human rights have shaped the debate in Northern Ireland. For example, arguments in favour of legacy mechanisms are clearly articulated and framed with reference to existing international law and policy and to the practice of other transitional societies. There is also clear line of resistance to some claims in respect of dealing with the past. While not as clearly articulated, there is a discernible line of resistance that is not borne of a lack of information on transitional justice, nor of a lack of opportunities to engage but rather of a suspicion of the motives that underlie transitional justice activism. The existence of these clearly visible cleavages make Northern Ireland a good example of the way in which law itself enshrines violence and determines the relative strength of each side. Northern Ireland is therefore an ideal example through which to explore the significance of how meaning is constructed in transitional justice. There are clearly defined yet competing positions, both of which hold their own narratives. Deconstruction helps to explain why it has not been possible so far to reconcile these

²³ Anne Smith 'Internationalisation and Constitutional Borrowing in Drafting Bills of Rights' (2011) 60 *International and Comparative Law Quarterly* 867; Brandon Hamber, 'Past Imperfect: Strategies for dealing with past political violence in Northern Ireland, South Africa and countries in transition' (The Centre for the Study of Violence & Reconciliation, 1999).

²⁴ This is discussed in detail in chapter 6.

competing positions, nor to make progress on establishing mechanisms that would facilitate this task.

However, the significance of this example is not limited to Northern Ireland. Resistance to dealing with the past in Northern Ireland arises largely from the fact that the debate has coalesced around a relatively narrow set of options. These were termed the ‘landscape of legal options’ by the Consultative Group on the Past as far back as 2009.²⁵ Derrida uses the term ‘theatrical space’ to illustrate the effect created when public discourse on a political issue such as dealing with the past becomes enclosed within legal parameters.²⁶ Describing the performative force of the legal concepts of crimes against humanity and human rights that underpin transitional justice, Derrida describes how ‘[t]his ... transformation structured the theatrical space in which the grand forgiveness, the grand scene of repentance... is played, sincerely or not.’ The emergence of a legal model of transitional justice in the realm of international law and policy served to enclose the definition of transitional justice within permissible boundaries, imposing order but yet inherently limiting the terms on which the past could be engaged.²⁷ The range of legal options created by transitional justice discourse continues to dominate the issue of dealing with the past in Northern Ireland.²⁸ This thesis argues that the effect of this narrowing of the options has impacted directly on the willingness of some parties to engage in the debate, exposing the ongoing tension between law and politics in this context. Ultimately, resistance to dealing with the past in Northern Ireland reveals the inability of law to fully account for political complexity. While the thesis takes Northern Ireland as its example, this ‘theatrical space’ of transitional justice is replicated in other contexts. Debate in Northern Ireland simply reflects broader trends in international law and policy that have largely enclosed transitional justice within set parameters. Deconstruction exposes the way in which meaning is constructed in this context. It provides the tools necessary to interrogate the claim that law can transcend political division. This interrogation is necessary in all cases in which the discourse of transitional justice is

²⁵ Consultative Group on the Past, ‘Report of the Consultative Group on the Past’ http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf (accessed 17 November 2015).

²⁶ Derrida (n 11).

²⁷ See Subotić (n 2). This is discussed in detail in Chapter 6.

²⁸ See Kieran McEvoy and Louise Mallinder, ‘Truth, Amnesty and Prosecutions: Models for Dealing with the Past’: 2nd Submission to Haas-O’Sullivan Talks (Belfast, 2013).

brought to bear. While the sites of resistance may vary with context, the underlying role of law remains constant. Therefore exploring the significance of deconstruction for our understanding of transitional justice through the example of Northern Ireland usefully generates insights into the nature of law and its role in perpetuating violence that speak to the discourse of transitional justice wherever it is applied.

The thesis represents a highly contextualised engagement with post-structural theory. It seeks to demonstrate to transitional justice scholars and practitioners alike the benefits of critical engagement as a means of evaluating the field. The original contribution of the thesis lies in this critical approach to the overarching model of transitional justice. In addressing the research questions outlined above the thesis brings a number of new insights to transitional justice research. Most notably it demonstrates the value of critical engagement at a macro-level for understanding the deeper dynamics of transitional justice. It uses theory to demonstrate the limitations of a normative concept of transitional justice that does not remain responsive to critique. In so doing it interrogates the relationship between law and justice in a way that has not yet been undertaken. However there is one final point to note – a point that arises directly from the choice of deconstruction as a means to interrogate the claims of transitional justice. The purpose of deconstructive analysis is to challenge the idea of a ‘true’ interpretation of the meaning of justice. The place of the writer within the field of transitional justice must therefore be acknowledged. A writer will always be inscribed within a determined system.²⁹ This thesis ‘marks [one] reading and the writing of [one] interpretation’ of transitional justice.³⁰ Any writer in the field works within the history of transitional justice. They draw upon a language that was already there, and operate within an existing network of understanding.³¹ There will always be other interpretations, other views on the question of justice. The thesis makes no claim to be putting forward an authoritative understanding of the requirements of justice in transition. There is nothing to say that this interpretation is better than others. What is important, however, is that the existence and validity of alternatives is recognized. Therefore this thesis is presented as one among many interpretations of

²⁹ Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr. John Hopkins University Press, 1976) 160.

³⁰ *ibid.*

³¹ *ibid.*

the shape of the field, its constituent inclusions and exclusions, and its ultimate aspirations.

3. NORTHERN IRELAND: A CONFLICTED DEMOCRACY

The thesis draws on the example of the ‘transition’ in Northern Ireland to illustrate some of the theoretical insights that Derrida’s work brings to transitional justice. Northern Ireland is a relatively well-studied jurisdiction when it comes to transitional justice.³² Despite having undergone a range of legal reforms pursuant to the 1998 peace agreement, including measures intended to address the legacy of the conflict,³³ the issue of how to ‘deal with the past’ continues to dominate political discourse. At the time of writing, political agreement has been reached on the creation of what are termed ‘legacy mechanisms’ to replace the existing ‘piecemeal’ approach for dealing with the past that has been adopted to date.³⁴ These mechanisms, if established, will include a Historical Investigation Unit (HIU), an International Commission for Information Retrieval (ICIR), an Oral History Archive and an Implementation and Reconciliation Group (IRG).³⁵ All of the mechanisms will be designed to satisfy transitional justice requirements in terms of truth and justice. The proposals are discussed in more detail in Chapter 6. Suffice to note that now, as the implementation of these mechanisms is debated, is an opportune moment to reflect on what ‘justice’ means in this context, and how these legacy mechanisms might best pursue it.

Since its establishment in 1920 Northern Ireland has been defined by division. The creation of a separate parliament for the six counties in the North of Ireland was a

³² For a snapshot see: Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, ‘The Frontiers of Analysis: Re-framing the Transition in Northern Ireland’ (2003) 66 *Modern Law Review* 317; Colm Campbell and Catherine Turner, ‘Utopia and the Doubters: Truth, Transition and the Law’ (2008) 23 *Legal Studies* 374; Patricia Lundy and Bill Rolston, ‘Redress for Past Harms? Official Apologies in Northern Ireland’ [2015] *International Journal of Human Rights* <<http://dx.doi.org/10.1080/13642987.2015.1050235>> accessed 19 October 2015; Marny Requa, ‘Truth, Transition and the Inquiries Act 2005’ (2007) 12(4) *European Human Rights Law Review* 404; Cheryl Lawther, *Truth, Denial and Transition: Northern Ireland and the Contested Past* (Routledge 2014).

³³ These include the reform of the criminal justice system to ensure that it complies with Article 2 of the ECHR. See Gordon Anthony and Paul Mageean, ‘Habits of Mind and “Truth Telling”: Article 2 ECHR in Post-Conflict Northern Ireland’ in McEvoy et al (eds), *Judges, Transition and Human Rights* (OUP 2007) 181. This is discussed in Chapter 6.

³⁴ Christine Bell, ‘Dealing With the Past in Northern Ireland’ (2002) 26 *Fordham International Law Journal* 1095.

³⁵ Stormont House Agreement (2014).

response to a long history of conflicted Anglo Irish relations.³⁶ Increasingly militant demands for Irish independence from British rule in 1916 had led to Unionists who wished to maintain a constitutional link with the United Kingdom making demands for their own provisional government in Ulster. These demands were met in the Government of Ireland Act of 1920.³⁷ The Act, which was to remain the de facto constitution of Northern Ireland for a further fifty years, created two separate jurisdictions in Ireland with two separate parliaments, one for the Irish Free State and one for Northern Ireland. The boundaries of Northern Ireland were, for the purposes of the Act, defined as the six counties of Ulster that comprised a Unionist majority.³⁸ Nationalists argued that the Act, and by definition partition, was unnatural and did not correspond with any existing sense of nation—indeed that it was not for a nation, but set up specifically to pacify a section of a province within a nation.³⁹ Further, it was argued, the Act served to stereotype racial and religious differences by constituting an artificial political area under an ascendancy party.⁴⁰ Nevertheless, as a result of the Government of Ireland Act, Northern Ireland remained part of the United Kingdom. Since its creation it has suffered sporadic violence and, in recent years, it has also suffered significant levels of political violence. The reasons for the outbreak of this violence are discussed in Chapter Three. The division between nationalists and unionists that drove the decision to partition Ireland had lasting consequences for Northern Ireland. The conflict in Northern Ireland has been most commonly characterised as an ethnic conflict.⁴¹ Divisions are drawn along ‘ethnic’ lines, equated roughly with religious affiliation. Catholics are characterised as Irish nationalist or Irish republican in their political views. This is contrasted with Protestants, who are most likely to be unionist or loyalist in their politics. The acceptance of this ethnic conflict paradigm presents a useful, if somewhat simplified, lexicon for understanding

³⁶ The choice to focus on modern history is a pragmatic one. For some the history of the conflict dates back as far as 1172 and the Norman conquest of Ireland. See, e.g., John Derby, ‘Conflict in Northern Ireland: A Background Essay’ in Seamus Dunn (ed), *Facets of the Conflict in Northern Ireland* (Macmillan Press 1995).

³⁷ Sinn Féin’s refusal to take its seats at Westminster following the 1918 general election meant that Irish representation was by and large absent for the passage of the Government of Ireland Bill through the Commons. See Thomas Hennessy, *A History of Northern Ireland 1920-1996* (Gill and MacMillan, 1997) 8.

³⁸ Government of Ireland Act (1920) Art 1(2)

³⁹ *ibid* 17.

⁴⁰ *ibid* 9.

⁴¹ See the influential analysis of Brendan O’Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (Athlone Press, 1993)

political divisions. Indeed this division continues to be mirrored in attitudes towards transitional justice, as discussed in Chapters Five and Six.

Since the outbreak of the most recent ‘Troubles’, as the violence in Northern Ireland is euphemistically known, three thousand three hundred and thirty six people have been killed, and thousands more injured.⁴² It is this period of violence, from 1969 until the signing of the peace agreement in 1998, that defines, in transitional justice terminology, the ‘war’ from which it is in transition. The fact that Northern Ireland is part of a democratic state distinguishes it from what have been termed the ‘paradigmatic’ transitions upon which the field of transitional justice was constructed.⁴³ There was not complete breakdown of law and order. Indeed many of the institutions of justice continue to exist post-transition, albeit in a reformed legal and political context. It also means that the boundaries between right and wrong are not so clearly drawn in the context of Northern Ireland as they may have been in other transitions. For example, in the Latin American transitions, what was at issue was the extensive use of extra-legal or extra-judicial violence by the State against political opponents, in clear violation of international human rights law.⁴⁴ Similarly in the case of mass atrocity or genocide, such as occurred in Rwanda, while there may be debate over how justice is delivered,⁴⁵ there is little doubt as to the illegal nature of the violence. In contrast, in Northern Ireland, the fact that the state was a democracy and ostensibly committed to the rule of law meant that there was, and still is, considerable contestation over the legitimacy of the use of political violence to challenge the State and its response to that violence.⁴⁶ As noted by Leebaw, transitional justice in this context ‘condemns as shameful actions that may previously have been championed as

⁴² For documentation of the victims of this violence see McKittrick and others, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Mainstream Publishing 1999) 1474.

⁴³ Colm Campbell and Fionnuala Ní Aoláin, ‘The Paradox of Transitions in Liberal Democracies’ (2005) 27 *Human Rights Quarterly* 172.

⁴⁴ For an account of the place of the Latin American transitions in the evolution of the field see Ruti Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Law Journal* 69 (hereinafter ‘Genealogy’).

⁴⁵ Rwanda is a paradigmatic example of the local vs global binary in transitional justice. See, e.g., Phil Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (Cambridge University Press 2010).

⁴⁶ The challenges that this new direction in transitional justice poses for the model (as it originally emerged) is discussed in detail by Campbell and Ní Aoláin (n 43).

a matter of duty to a particular political community'.⁴⁷ The existence of competing narratives over the causes of the conflict and the legitimacy of violence means that negotiating transition has been a rocky road.⁴⁸ Seventeen years after the Agreement was signed there remains considerable division over the past. While the legal framework of transitional justice has helped to shape debate in this regard, it has not been able to effectively transcend difficult and divisive political issues.⁴⁹

The timing of this thesis as a deconstruction of the model of transitional justice *per se* is therefore important. What will be demonstrated is that we cannot judge in the present whether a particular action or decision is just or unjust, legitimate or illegitimate.⁵⁰ Rather, our understanding of events depends on a continual process of negotiation between the past, the present and the future. Our understanding of the present depends not only on how it relates to the past, but also on how it is interpreted in the future. The Belfast Agreement and the period immediately following it required a re-evaluation of popular understandings of the violence of the Troubles. This was necessary in order to allow for prisoner release, for example, or for the inclusion of Sinn Féin in executive government. Similarly, understandings of the Agreement itself continue to be influenced by the way in which it is interpreted in the present day. The meaning ascribed to the Agreement was not fixed at the time of signing, but rather continues to be subject to an on-going process of negotiation.⁵¹ The lapse in time between the Agreement, its characterisation as having given rise to a 'transition' in Northern Ireland and the presentation of this thesis, allows for deconstruction of the Agreement and the application of the discourse of 'transition' to Northern Ireland that is only possible with the passage of time. Such analysis of the 'transition' would not have been possible ten years ago, as the language of transition was first applied to

⁴⁷ Bronwyn Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 Human Rights Quarterly 95, 101.

⁴⁸ This is evidenced in the fact that since the original peace agreement was signed in 1998 there have been two more rounds of high level talks aimed at resolving difficult conflict related issues, both of which have led to new agreements. See Agreement at St Andrews (November 2006) (and most recently the Stormont House Agreement (n 35).

⁴⁹ This is reflected in the on-going political controversy over issues such paramilitary violence that continue sporadically to threaten the stability of the new institutions. See Henry McDonald, 'Government Creates Northern Ireland Ceasefire Monitor After IRA Claims' *The Guardian* (London, 18 September 2015) <<http://www.theguardian.com/uk-news/2015/sep/18/government-northern-ireland-ceasefire-monitor-ira-claims>> accessed 19 October 2015.

⁵⁰ For discussion see Chapter 3.1.C

⁵¹ This is discussed in detail in Chapter 5.

Northern Ireland.⁵² Any contribution to the present debate must therefore be read in that context.

4. OUTLINE OF THE THESIS

The thesis comprises six substantive chapters. The first two chapters set the context for a deconstruction of transitional justice by exploring the way in which the field has been constituted and how post-structural theory brings a new perspective to the existing body of literature. They therefore lay the groundwork for the following three chapters that deconstruct the model of transitional justice as it is currently applied in the Northern Ireland context. Chapter 2 consists of a detailed literature review of the field of transitional justice. It outlines the way in which the field of transitional justice has evolved to become the dominant language in which the move from war to peace is discussed, thereby creating a 'theatrical space' of transitional justice. To distinguish this account from existing histories or normative accounts of transitional justice, the Chapter focuses on two key features of this development. The first is the way in which the field has come to be dominated by law. The second is the role that binary oppositions have played, and continue to play, in our understanding of transitional justice. The Chapter argues that the field of transitional justice is founded on a series of binary distinctions, for example, war versus peace and acknowledgement versus denial. It is argued in this chapter that transitional justice is firmly rooted in this oppositional model. Theorizing often assumes a move from one form of being to another, from violence to rule of law, or from divisive politics to impartial legality.⁵³ Similarly, oppositions underlie our assessment of the legitimacy of certain forms of action. The distinction between victim and perpetrator dictates who is included and excluded in the transitional phase.⁵⁴ The existence of an oppositional model facilitates a particular way of thinking about transitional justice initiatives, determining those

⁵² This is resonant with Derrida's point that we can never tell at the moment that a new law or new legal order emerges whether it will be just or unjust. Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell and others (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992) 13 (hereinafter 'Force of Law').

⁵³ See Leebaw (n 47).

⁵⁴ See Claire Moon, 'Narrating Political Reconciliation: Truth and Reconciliation in South Africa' (2006) 15 *Social and Legal Studies* 257.

deemed legitimate (trials, for example) and those deemed illegitimate (amnesties).⁵⁵ The Chapter suggests that what has emerged is a mainstream of transitional justice - that reflected in international law and policy - and a margin that consists of critical reflection on the possibility of transitional justice. In surveying these critical approaches, this chapter locates the thesis both in the context of the mainstream and the critical margin.

Chapter Three then proceeds to outline how a Derridean approach can contribute to the existing critical transitional justice literature. The primary aim of this chapter is to explore how deconstruction can contribute to our understanding of the significance of the creation of a 'theatrical space' of transitional justice. The chapter presents a clear and concise explanation of deconstruction, illustrated with reference to transitional justice. This takes the form of a detailed discussion of Derrida's work, focusing on his interpretation of how meaning is constructed. In particular it introduces the concept of a violent hierarchy of meaning whereby seemingly oppositional concepts, such as violence and law, are locked in an on-going process of negotiation in which each attempts to assert its dominance over the other. It further introduces the idea of metaphysical violence that helps to conceptualise the effect of law when introduced into sharply contested political contexts. The theme of violence is central to Derrida's work. From his early work on language and linguistics to his more recent interventions in respect of law, politics and ethics, violence underpins Derrida's analysis of how we construct meaning. Through discussion of this work it is suggested that post-structural theory can bring new insights into how we conceptualise transitional justice. Chapter Four then begins a substantive engagement with transitional justice in Northern Ireland. Following on from the explanation of deconstruction in Chapter Three, this chapter develops Derrida's understanding of violence and explores it in the context of law and political conflict. Situations in which transitional justice arises are characterized by the presence of political violence that challenges the legitimacy of the State and its law-making authority. This anti-state violence will inevitably be met by a response from the State. This response can and should be legal, in that the State responds to the violence and its causes through the legal system. However, often the response involves the use of physical force by

⁵⁵ See Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart 2008) for discussion.

the State in defence of its authority. This element of violence and response gives rise to the oppositional rhetoric of legitimate versus illegitimate uses of force. The use of the separate terms of violence (illegitimate, illegal) and force (legitimate, legal) illustrates the way in which law and violence are cast as opposites, as two separate phenomena. But, for Derrida, revolutionary violence casts new light on the relationship between violence and law. Rather than accepting the two as separate phenomena, a Derridean analysis reveals the traces of violence within the law itself. The aim of this chapter is to question whether violence and law can ever be separated. It considers the position of the State in claiming a monopoly on the use of force, and the implications that this has for the ability of the State to justify life and death decisions.⁵⁶ In the case of Northern Ireland, the interplay between violence and law was made visible through the introduction and maintenance of a regime of emergency powers that defined the possibilities of legitimate challenge to the State. The necessity of a 'security' response to political violence dominated legal and political discourse during the 'Troubles', subordinating human rights arguments in respect of the actions of the State. Finally, the Chapter discusses the possibility that, where anti-state violence is successful in overthrowing a regime, that violence will inevitably be legitimized as 'a means to the end of social and legal transformation'.⁵⁷ Indeed, this possibility of founding a new law or legal order may even be used to justify the recourse to violence.⁵⁸ This dynamic has clear resonance in the context of transitional justice. Deconstruction of the relationship between law and violence therefore offers critical insights into the way in which violent challenge to the State, and the response of the State to that challenge, are framed.

Chapter Five builds on the analysis of the relationship between violence and law presented in Chapter Four to explore in more detail the nature of law itself. It considers the idea of the moment in which law is founded as a moment of metaphysical violence, and the way in which this violence is perpetuated through legal interpretation. This Chapter draws out in more detail the relationship between political violence and the metaphysical violence of the law. Specifically it considers how all efforts at interpreting and giving content to the law will be driven by the need

⁵⁶ Jacques Derrida, *The Death Penalty, Volume 1* (Peggy Kamuf tr, University of Chicago Press 2014).

⁵⁷ Costas Douzinas and Adam Geary, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart 2005) 73.

⁵⁸ Force of Law (n 52) 35.

to reinforce the legitimacy of the law, and in so doing to legitimate historical accounts that have given rise thereto. This raises the question of whether law can ever adequately respond to deep-rooted political violence. In the context of transitional justice, and of Northern Ireland, this dynamic is illustrated with reference to the Belfast (Good Friday) Agreement (The Agreement) and the centrality of the human rights provisions it contains. What is suggested is that in the transitional phase the opposition between 'security' and 'human rights' that had characterised the Troubles was gradually revealed and inverted. Whereas human rights concerns had been subordinated to security concerns during the Troubles, human rights gradually came to dominate legal and political discourse in the years following the Agreement. This Chapter suggests that the legal framework of 'transition' that has been applied to Northern Ireland is no less violent than the framework of 'emergency' that it replaced. However, 'violence' in this context refers to the metaphysical violence of the law. While the opposition between security and human rights may have been exposed, it has not been transcended. Rather, the legal discourse of transition remains trapped within an oppositional logic in which competing narratives vie for dominance. This Chapter exposes the role of law in perpetuating this oppositional approach.

The final theme to be considered is that of justice and, more specifically, the relationship between law and justice. It has been noted that scholarship in the field of transitional justice has as its underlying purpose the quest for justice. Drawing on Derrida's characterisation of the relationship between law and justice, Chapter Six builds on the discussion of legality presented in the previous chapter to explore the consequences of an approach that has tended to equate justice with law. In the context of transitional justice, the discourse of human rights and rule of law is often regarded as a means of mediating the division between law and justice. They are a means of accessing justice.⁵⁹ In this way, the theme of justice addresses the relationship between rights, law and justice that is central to transitional justice scholarship. This chapter specifically asks whether equating justice with law means that justice will also be tainted by violence. It explores the possibility of achieving justice in a context where the concepts of violence, law, and justice are interdependent. This Derridean analysis diverges from the mainstream transitional justice literature in the way in

⁵⁹ See Roberto Buonomano, 'The Economy of Violence: Derrida on Law and Justice' (1998) 11(2) *Ratio Juris* 168, 169-170.

which it characterises justice. While transitional justice scholars have tended to equate justice with law, or to view justice as something that can be achieved through law, for Derrida justice is always and necessarily ‘*to come*’.⁶⁰ To the extent that justice can be present in law and (reformed) institutions it is only as a possibility. It should not be treated as an identifiable end point such as a particular model of accountability or of governance. Justice, for Derrida, is only possible through the on-going critique of the violence of law. The pursuit of justice should not therefore be the pursuit of certainty, of closure or absolute truth. Justice must be about the incapacity of law to do justice because of the endless particularity of each case.⁶¹ The Chapter therefore looks at the reasons why law has failed to resolve outstanding political issues in the Northern Ireland transition. It considers the existence of challenges to the narrative of ‘transition’ and explores how the oppositional structure of law contributes to these challenges. In so doing, it returns to Derrida’s two-part structure of deconstruction whereby the reversal of binaries is not enough but rather deeper questioning of structures is required. It suggests that in Northern Ireland a number of binaries have been reversed, but that the underlying structures of conflict remain unaddressed. For this reason, law has been unable to facilitate a move beyond current stalemates. While not aiming to propose an alternative model, this chapter concludes by considering how justice as a possibility, rather than as a determined outcome, might look in the Northern Ireland context.

The concluding chapter presents three key reflections on the aims of the thesis. It reflects on how critical engagement can advance thinking in the field, before drawing substantive conclusions on the relationship between violence, law and justice, and the extent to which justice is possible in transitional contexts. While Derrida remained sceptical about the possibility of achieving justice, this does not mean that he eschews the possibility of law as a means of improving lives, and this should be borne in mind when critiquing the capacity of law to deliver justice in transition.⁶² The concluding Chapter therefore outlines and assesses the significance of Derrida’s view that, just because law is not the perfect solution to any given problem, it should not be disregarded altogether. Ultimately the thesis proposes that any temptation to act in an

⁶⁰ Force of Law (n 52)

⁶¹ *ibid* 17.

⁶² See *ibid*.

unquestioning manner must be resisted - for this, no matter how progressively intended, can also result in injustice.⁶³ The value of this critical engagement therefore lies in the way in which it reveals, and thereby challenges, the way in which law defines transition and in so doing sets limits on the possibility of justice.

⁶³ *ibid* 28 (referring to the idea of justice being appropriated for the most perverse calculation). See also John P McCormick, 'Derrida on Law: or, Post-structuralism Gets Serious' (2001) 29 *Political Theory* 395.

CHAPTER 2: TRANSITIONAL JUSTICE: THE CONSTITUTION OF THE FIELD

Transitional justice as a field has come a long way in the past 25 years. A term virtually unheard of before 1990, it is now widely accepted both in scholarship and practice as a ‘field’ of inquiry in its own right, as a ‘self-conscious field of practice and study.’¹ While there are a number of different accounts of the origin and aims of transitional justice,² there is now broad consensus that as a field of inquiry the term refers to the ‘conception of justice in periods of political transition.’³ Since its inception, transitional justice has expanded well beyond its original modest aims.⁴ It has been applied in divergent geographical and political contexts and has expanded to include a range of different means and ends.⁵ While this has brought a number of different disciplinary perspectives to the question of how states deal with a legacy of violence and trauma, there has, until relatively recently, been remarkably little deeper questioning of the basic premise of transitional justice or the foundations upon which it is constructed.⁶ This is consistent with the development of any field, where advocacy is consolidated by doctrinal consolidation, which is then followed by reflection on practice. In the case of transitional justice lawyers have adopted a doctrinal approach that has provided normative standards for justice in transition.⁷ Political scientists have adopted an empirical approach that seeks to measure the extent to which the normative standards set by the lawyers have been achieved.⁸ This literature has focused on the ability to provide quantitative measurements of the

¹ Christine Bell ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’ (2009) 3 *International Journal of Transitional Justice* 5, 8.

² Ruti Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Law Journal* 69; Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321; Bell, *ibid.*

³ Bell (n 1) 8.

⁴ Thomas Obel Hansen, ‘The Time and Space of Transitional Justice’ in Susanne Buckley-Zistel and others (eds) *Transitional Justice Theories* (Routledge 2014) 105.

⁵ See, for example, the mandate of the UN Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. United Nations, ‘Mandate of the UN Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence’ (UN Doc A/HRC/RES/18.7, United Nations 2011).

⁶ See Kieran McEvoy ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34 *Journal of Law and Society* 411 on the dominance of legalism and the need to ask bigger questions.

⁷ On the success of this project see Jelena Subotić, ‘The Transformation of International Transitional Justice Advocacy’ (2012) 6 *International Journal of Transitional Justice* 106.

⁸ Geoff Dancy, ‘Impact Assessment, not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice’ (2010) 4 *International Journal of Transitional Justice* 355.

impact of transitional justice, thus demonstrating ‘real world’ impact to substantiate some of the foundational claims of transitional justice.⁹ Seen in this light, transitional justice has become a field of practice subject to normative benchmarks and impact assessment that has come to dominate the post-conflict environment. The centrality of law to the definition of transitional justice is therefore the underpinning foundation of the analysis presented in this thesis. However, in focusing on law and normative approaches to transitional justice, the thesis does not seek to deny that alternative disciplinary approaches to transitional justice exist. These alternative approaches have provided valuable critical contributions to the field, as outlined in Section Three of this Chapter. It is suggested, however, that among the competing voices of transitional justice scholarship and practice it is law that has shouted the loudest,¹⁰ with the result that it is law that now dominates the policy landscape in respect of transitional justice. What has been largely absent is any deeper philosophical questioning of what transitional justice is for.¹¹

The purpose of this literature review is to explore the way in which transitional justice has evolved from being just one among many different options for dealing with the past to being the dominant language in which the move from war to peace is discussed in the early twenty-first century.¹² In so doing, it reveals some of the key underlying assumptions on which the field is founded. The Chapter is divided into three sections. Section One outlines the way in which law has come to dominate transitional justice literature and discourse. It highlights the increasing trend towards formulaic approaches to transition that include the production of toolkits and expert guides to transition. This approach to transitional justice, it is argued, allows for the setting of normative benchmarks, the existence of which then facilitates evaluation of the ‘impact’ or otherwise of transitional justice mechanisms. Section Two considers the effect of this dominance of law in terms of how transitional justice is conceived both in theory and practice. It outlines the way in which this model has instilled a

⁹ See Tricia D Olsen, Leigh Payne and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace 2010) as an example of this type of scholarship, much more common in the US academy than in Europe.

¹⁰ See McEvoy (n 6) for a detailed analysis of how loud law has shouted. In a way, it could also be argued that it is inevitable that law will come to dominate, given its disciplinary preference for drawing normative conclusions, which can be contrasted with, for example, the approach of anthropologists who resist the push to make judgment on what they observe.

¹¹ *ibid* 433.

¹² Bell (n 1).

binary approach to questions of justice in transition and the effect that this way of thinking has on our ability to adequately assess the value of transitional justice. Finally, Section Three provides an overview of where critique of transitional justice has emerged in the literature. This section outlines the ways in which critical scholars have sought to highlight the blind spots created by the legal frameworks of transition and the limitations of foundational goals such as truth and reconciliation. It therefore provides a concise overview of the state of the field of transitional justice, its advocates and its discontents. A brief survey of this literature provides both a context and a starting point for the deconstruction of transitional justice that is presented in the rest of the thesis.

1. ESTABLISHING THE 'FIELD'

Transitional justice as a concept was unheard of in international law prior to the end of the Cold War. While retrospective claims are often made about the genesis of transitional justice in the trials at Nuremberg, the term itself was not applied until the 1990s.¹³ Efforts at achieving what is now termed transitional justice during the 1970s and 1980s had been subject to political wrangling, subject to whatever concession on human rights could be secured politically, rather than rooted in a normative (let alone international) obligation to pursue a particular course of action.¹⁴ The field itself was constituted in practice, borne of political compromises such as the need to balance justice with political stability that characterised the early transitions of the Southern Cone; to embed the principles of individual rights and the rule of law, as was the case in many post-communist transitions; or to balance retribution with reconciliation as occurred in South Africa. All of these compromises, made in diverse political and geographical contexts, were made as a result of very practical constraints on the pursuit of justice in times of political upheaval, and all contributed to the emergence of the 'field' of transitional justice as we understand it today.

¹³ Arthur (n 2).

¹⁴ 'Genealogy' (n 2).

a. The Law and Politics of Transition

The nature of the origins of transitional justice is exemplified in the case of the Latin American transitions from which the concept of transitional justice arose. The cases of Chile and Argentina demonstrate the practical difficulties associated with pursuing justice in societies where powerful elites remain in a position of relative influence. The cases share the basic facts that both were emerging from periods of military dictatorship and in both cases allegations of gross violations of human rights were widespread. These cases raised the question of how the successor governments would chose to deal with these abuses.

The discourse of transitional justice arose in Argentina from the transition from military dictatorship to civilian rule in the early nineteen eighties. The military dictatorship lasted from 1976 when the military seized power in a coup until 1983 when power was handed to a civilian government. This period is referred to as the ‘dirty war’ because of the tactics used by the ruling military junta to counter what it characterised as the subversive threat to the state posed by left wing guerrillas.¹⁵ The ‘dirty war’ was characterised by widespread human rights abuses, including disappearances and extra-judicial killings as the military sought to crush left wing opposition.¹⁶ Following Argentina’s defeat in the Falklands/*Las Malvinas* in 1982 the military came under pressure to hold democratic elections. In preparation for the inevitable transition the military drafted an amnesty law that would shield all members of the military from prosecution for events occurring during their period of rule.¹⁷ This was a blanket amnesty that shielded the military from prosecution for acts committed countering terrorist and subversive activities. This law was passed in September 1983, just before the elections, and notwithstanding opposition from human rights groups.¹⁸ Following the elections the successor regime was faced with establishing a transitional regime that balanced the need to ensure justice for victims, as a means of distancing the successor government from the military regime, with ensuring that democracy could take root in Argentina. In December 1983 the amnesty

¹⁵ For discussion see Louise Mallinder, ‘Global Comparison of Amnesty Laws’ in M Cherif Bassiouni (ed) *The Pursuit of International Justice: A World Study on Conflicts, Victimisation and Post-Conflict Justice* (Intersentia, 2010).

¹⁶ The details of this period are covered in the report of the National Commission of the Disappeared (CONADEP), published under the name *Nunca Más*.

¹⁷ Ley de Pacificación Nacional (Law of National Pacification) Law No. 22.924 (1983) (Arg.).

¹⁸ Mallinder (n 15) 40.

law was repealed, and trials of the military leaders began. However compromise was reached whereby prosecutions for human rights violations would be limited to those who had had decision-making power within the military, or those who had exceeded their orders.¹⁹ At the same time the government established a fact-finding commission, known as the National Commission on the Disappeared (CONADEP).²⁰ The role of the Commission was to investigate disappearances that had occurred during the dictatorship, to uncover facts about these cases, and to help locate bodies.²¹ This Commission completed its work in 1984. Its report established the fact and the probable extent of the occurrence of these human rights violations and recommended prosecution of those responsible.²² The first convictions for human rights violations were secured in 1985. However by 1986 unrest was growing among the military as investigations intensified.²³ In this context, the justice claims of victims, and those who engaged in advocacy on their behalf, had to be balanced against the need to ensure stability and prevent another military coup.²⁴ Therefore in 1986 the 'Full Stop' law was passed,²⁵ setting a six-month time limit for bringing new cases. The aim of this law was to restore stability by setting a definite end point to investigations. But this was insufficient to calm unrest within the military. The fear of a coup led to the passing in 1987 of the 'Due Obedience' law,²⁶ providing a defence of superior authority to those charged with human rights violations. This balancing between the need for justice on one hand and the need to ensure stability and an effective transition on the other gave rise to the 'peace versus justice' dichotomy that characterised early debates in this field.²⁷ 'Justice' in this context was negotiated in

¹⁹ For discussion see Mallinder (n 15).

²⁰ Decree No. 187/83 December 15, 1983 (Decreto 187, 15 diciembre 1983), reprinted in *Anales de Legislación Argentina* (1984), Tomo XLIV-A, LA LEY, 137-138.

²¹ For more detailed discussion see Priscilla Hayner, 'Fifteen Truth Commissions – 1974-1994: A Comparative Study' (1994) 16 *Human Rights Quarterly* 597.

²² *Nunca Más* (n 16).

²³ See Mallinder (n 15).

²⁴ For a general overview see Carlos H Acuña and Catalina Smulovitz, 'Guarding the Guardians in Argentina: Some lessons about the risks and benefits of empowering the courts' in A. James McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame, 1997) 93.

²⁵ Law 23.492, Full Stop, 24 December 1986. This law imposed a six month time limit on bringing cases against members of the military.

²⁶ Law 23.521, Due Obedience, 8 June 1987. This law provided a defence to international crimes.

²⁷ This dichotomy heavily influenced the early development of the field of international criminal law. The paradigmatic debate in this regard remains that between Orentlicher who argued for a normative 'duty to prosecute' and an Anonymous contributor who suggested that the pursuit of justice undermined peace and prolonged war. See Orentlicher, D 'Settling Accounts: The Duty to Prosecute

light of the practical constraints arising from the need to ensure the success of the transition to democracy.²⁸

A similar balancing was also seen in the Chilean case. Power had been seized by the military, under General Pinochet, in 1973. This led to seventeen years of increasingly repressive rule under 'protected' democracy.²⁹ The dictatorship was characterised by widespread human rights abuses, most notably the disappearance and torture of political dissidents,³⁰ as well as the legal suppression of political rivals of the regime. However throughout the dictatorship human rights organisations had documented violations and used legal means to counter the actions of the regime.³¹ This use of legal strategies to put pressure on the regime led to the passing, in 1978, of an amnesty law designed to confer impunity on members of the armed forces for criminal offences committed during the period of the dictatorship.³² This law subsequently framed attempts at accountability during the transitional period. The Constitution of Chile provided that in 1988 a plebiscite would be held to determine whether or not General Pinochet should serve eight more years in power. The result of this plebiscite was 'no', triggering the transition from dictatorship to democracy. However because the transition had been foreseen Pinochet was able to set the terms on which the transition would occur. The amnesty law was coupled with a built in right-wing majority in both the legislature and the Supreme Court,³³ meaning that it would be difficult to pursue a robust policy of prosecutions and accountability for past abuses. This was recognised by the incoming President, who adopted a policy of 'justice – insofar as is possible'.³⁴ The emphasis in Chile therefore rested more heavily on truth, and the recovery of information about the past than on a policy of prosecutions. In both Argentina and Chile the difficulty in pursuing retributive justice

Human Rights Violations of a Prior Regime' in Neil Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP, 1995) 375 and Anonymous, 'Human Rights in Peace Negotiations' (1996) 18 Human Rights Quarterly 249.

²⁸ See David Pion-Berlin, 'To Prosecute or Pardon? Human Rights Decisions in the Latin American Southern Cone' in Neil Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP, 1995) 82.

²⁹ Discussed in Cath Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (Pennsylvania State Press, 2010).

³⁰ These are documented in the Report of the National Chilean Commission on Truth and Reconciliation (Berryman trans.) (1993).

³¹ Discussed in Collins (n 29).

³² Decree Law 2.191 of April 1978.

³³ This was achieved through the legal architecture of the dictatorship. See Collins (n 29) 72.

³⁴ Collins (n 29) 73.

led the new governments to establish Commissions to investigate human rights violations and to report their findings. The cases of Chile and Argentina were also symbolic of broader trends in Latin America at the time whereby amnesties were used to shield members of outgoing military regimes from prosecution for human rights violations.³⁵ The model of Commissions came to be used in other Latin American states as a means of investigating human rights abuses and establishing the truth about wrongdoing.³⁶ These cases demonstrate how justice in these contexts is constrained by what is politically possible.³⁷

It was this negotiation between the ideal of justice and the reality of political compromise that gave rise to the first sustained engagement with the concept of transitional justice. In documenting the realities faced by successor regimes in these cases academics and policy makers attempted to grasp the significance of practice for the question of how justice could be ensured.³⁸ Work in the field in the early years consisted primarily of the documentation of efforts that were already being made by states to deal with abusive governments. Dancy describes this phase as the ‘cataloguing of those structural realities within political transitions that harness the possibilities for victims’ justice’.³⁹ This work of documenting the experience of the States of the Southern Cone, while descriptive, also gave rise to broader debates over the relationship between domestic choices and international law.⁴⁰ It was therefore these cases that gave rise to the ‘internationalisation’ of transitional justice debates.⁴¹ In particular it gave rise to sustained analysis of how the requirements of justice could be ensured, including the relationship between peace and justice,⁴² and the question of

³⁵ Mallinder (n 15) 38, outlining the trend in South America for the use of amnesties in transitions from military dictatorships. Details of the abuses committed under these dictatorships were revealed as a result of investigations into the US led Operation Condor against subversive left wing activities on the continent.

³⁶ Such commissions were established in Bolivia, Argentina and Uruguay, as well as in a number of African states. See Hayner (n 21).

³⁷ See Pion-Berlin (n 28).

³⁸ See Ruti Teitel, ‘How are the New Democracies of the Southern Cone Dealing with the Legacy of Post Human Rights Abuses?’ in Neil Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP, 1995) 146.

³⁹ Dancy (n 8) 357.

⁴⁰ See Orentlicher (n 27).

⁴¹ Arthur (n 2).

⁴² See for example Carlos Niño, *Radical Evil on Trial* (Yale University Press, 1996).

why perpetrators of human rights abuses should be punished.⁴³ This involved drawing on principles of both domestic and international law.

With the end of the Cold War and the apparent triumph of liberalism a newly found confidence allowed normative conclusions to begin to be drawn from this documentary work and those conclusions to be drawn internationally as a means for dealing with human rights abuse. This famously gave rise to the assertion that there could be an international law 'duty' to prosecute member of a former regime which laid the foundation for a new normative model of transitional justice.⁴⁴ It also presented clear normative standards against which domestic efforts could be judged.⁴⁵ It was in the immediate post-Cold War period that a distinctive normative concept began to emerge. Transitional justice emerged from the desire of successor regimes to provide justice for violations of human rights committed by prior regimes while also ensuring a move away from authoritarianism. Promoting justice was a means of demonstrating a break with the past and establishing the democratic legitimacy of the successor regime,⁴⁶ - a means of ensuring accountability for the past. Trials, in this context, arose from an understanding of 'justice' as 'criminal justice'.⁴⁷ Transitional 'justice', in the form of prosecution for past human rights abuse, was one among many divergent tools that could be used to move a state from conflict to peace. It was also seen as distinct from peace. Gradually, however, the scope of transitional justice expanded. What had initially been seen as mutually incompatible courses of action, such as pursuing peace at the expense of justice or vice versa, gradually became subsumed into a broader framework of justice.⁴⁸ Criminal prosecutions came to be seen as a means to address more broadly defined ideas of political and social transformation.⁴⁹ This also meant that where the pursuit of retributive justice would undermine the possibility of reconciliation that it could be modified in light of those

⁴³ Jaime Malamud-Goti, 'Transitional Governments in the Breach: Why Punish State Criminals?' (1990) 12 Human Rights Quarterly 1.

⁴⁴ Orentlicher (n 27).

⁴⁵ See John Dugard, 'Retrospective Justice: International Law and the South African Model' in A. James McAdam (ed) *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame, 1997) 269.

⁴⁶ Arthur identifies the twin pillars of facilitating an exit from authoritarianism and providing some measure of justice for victims as underpinning these moves. Arthur (n 2).

⁴⁷ Orentlicher (n 27).

⁴⁸ See Bronwyn Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 Human Rights Quarterly 95.

⁴⁹ Payam Akhavan, 'Justice in The Hague, Peace in the former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (1998) 20 Human Rights Quarterly 737.

practical constraints. This was seen in the case of the post-communist transitions in Eastern Europe.

The cases of the post-communist transitions in Eastern Europe demonstrate the ways in which calls for accountability for the past were tempered by the need to ensure the protection of individual rights and the rule of law in the future. The Eastern European transitions therefore contributed two features to the emerging 'field' of the transitional justice. The first was that they marked the emergence of the idea that institutional reform, achieved through the 'lustration' of members of the former regime from public office, could contribute to transition.⁵⁰ The second, related, feature, was the acknowledgement that in some cases demands for 'revenge' for past events, including calls for prosecutions, would need to be tempered by law in order to assert the value of the rule of law.⁵¹ These transitions therefore embody the 'backward and forward looking' elements of transition. Central to these transitions was the use of constitutional adjudication to deal with the legacy of the past. In particular constitutional adjudication was used as a central strategy of re-asserting legality, and of balancing competing constitutional principles. This was evidenced particularly clearly in respect of the so-called 'anti-communist laws'.⁵² In the immediate aftermath of the transitions there were widespread calls for laws that would allow for the prosecution of former members of the communist party or for their disqualification from public office.⁵³ Constitutional courts in states including Hungary, Poland and the Czech Republic were all called upon to adjudicate on the legality of these laws. The decisions demonstrate how the courts sought to strike a balance between calls for retributive justice and the need to assert the importance of the protection of individual rights and the rule of law, highlighting the need for the constitution to respond to the past and transform prior understandings of law.⁵⁴ For example in Hungary, just over a year in to its first term, the new Parliament published a law that would extend the statute of limitations for crimes committed during the Communist era, allowing for the prosecution of crimes committed under the

⁵⁰ For a detailed overview see Herman Schwartz, 'Lustration in Eastern Europe' in Neil Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP, 1992) 461.

⁵¹ For a good general discussion see Ruti Teitel, 'Post Communist Constitutionalism: A Transitional Perspective' (1994-1995) 26 *Columbia Human Rights Law Review* 167.

⁵² *Ibid.*

⁵³ *ibid* 179.

⁵⁴ *ibid.*

Communist regime that would otherwise be statute barred. This law was referred to the constitutional court, and the court held that it was unconstitutional on the basis of the principle of non-retroactivity.⁵⁵ Two further attempts to extend the Statute of Limitations were also struck down by the court.⁵⁶ However the court did allow legislation providing for prosecutions where the crimes were deemed to be crimes under international law. This distinction allowed for some international crimes of the past to be prosecuted while at the same time upholding the domestic law principle of non-retroactivity.⁵⁷ In addition to restricting attempts to extend the Statute of Limitations to allow for prosecutions, the Court also moderated legislation that would have allowed for information on spies and informers to be made public. While the Court accepted that there was a public interest in this move, it also introduced procedural protection whereby the scope of the information released was limited in scope to those whose activities were of public relevance.⁵⁸ Ultimately the court ensured proportionality in measures to deal with the past, including upholding the rule against retroactivity of the law, ensuring selectivity in prosecutions and information release, and limiting the scope of prosecutions to those required (or possible) under international law.⁵⁹ Rather than allowing an unchecked policy of prosecutions the court carved out a space whereby historical cases could be addressed while at the same time ensuring strict adherence to the principles of the rule of law and thereby marking a break from the compromised legality of the Communist era. Review of so-called anti-communist laws also occurred in other post-communist states. In the Czech Republic the Court modified a law to exclude provision for the lustration of 'potential' collaborators.⁶⁰ And in Bulgaria the Court balanced anti-communist laws against individual rights, including in respect of employment and pensions,⁶¹ thus mitigating potentially harsh consequences of a blanket anti-community law by reference to the need to protect individual rights.

⁵⁵ Gabór Halmai and Kim Lane Scheppele, ' in A James McAdams (ed) *Transitional Justice and the Rule of law in New Democracies* (University of Notre Dame Press, 1997)155, 157.

⁵⁶ *ibid*164-165.

⁵⁷ *ibid*.

⁵⁸ *ibid* 172.

⁵⁹ *ibid*.

⁶⁰ Teitel (n) 180.

⁶¹ *ibid* 181.

One of the reasons for pursuing ‘justice’ in a transitional period is to establish democracy and the rule of law. In each of these cases the need to embed the rule of law led to a compromise on strictly retributive approaches to justice in favour of an approach that would promote a new politics rooted in the rule of law.⁶² The Eastern European transitions addressed the specificity of the communist regimes by using constitutional and administrative law to strike a balance in addressing the past.⁶³ This focus on securing the future and marking a definite legal break from the past was central to the evolution of the field of transitional justice.

A further consequence of the practical constraints on delivering retributive justice in transitional societies can be seen in the emergence of the idea that information, or ‘truth’ can contribute to the pursuit of justice. Commissions to establish the truth of past events had been used in Chile and Argentina where prosecutions were politically difficult to achieve. However they were seen as alternatives to justice, as investigative mechanisms that could be used for information recovery in contexts where trials were not politically possible.⁶⁴ However it was not until the South African Truth and Reconciliation Commission (TRC) that the pursuit of truth, and of reconciliation, came to be regarded as contributing to justice rather than as a compromise where justice was not possible.

In the early 1990s post-apartheid South Africa was faced with the dilemma of how to deal with its abusive past. Following years of political violence that had intensified in the years prior to the elections in 1994, the new government was faced with meeting demands for far reaching social and economic reform in circumstances where the powerful groups within the State remained loyal to the old order.⁶⁵ This required careful negotiation in order to ensure that both sides could work with whatever transitional justice mechanisms were established. Compromise was therefore built

⁶² Ultimately this led to the halting of trials because of the risk to the new order of a ‘transitional justice’ approach seen to be based on victor’s justice. See Stephen Holmes, ‘The End of Decommunization’ in Neil Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP, 1995) 116.

⁶³ S Terry, ‘Thing[ing] [sic] About Post Communist Transitions: How Different Are They?’ (1993) 52 *Slavic Review* 333.

⁶⁴ For an overview of contemporaneous concerns about the role of truth commissions see Jamal Benomar, ‘Justice After Transitions’ in Neil Kritz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP, 1995) 32.

⁶⁵ See Kader Asmal, ‘Truth, Reconciliation and Justice: The South African Experience in Perspective’ (2000) 63 *Modern Law Review* 1.

into the South African model from the outset. For example blanket amnesties for members of the security forces were rejected, but limited amnesties in exchange for truth were available.⁶⁶ The South African TRC famously promoted truth telling, acknowledgement and forgiveness, even where this meant that punishment would be avoided. The balancing the needs for truth and for justice that was necessary to promote reconciliation in South Africa gave rise to a central tension in transitional justice, namely whether amnesty can ever legitimately be granted for widespread human rights violations.⁶⁷ It also represented a shift away from a purely retributive conception of justice towards a restorative model that prioritised the acknowledgement of past injustice and re-dressing structural inequalities. This in itself was a political compromise designed to avoid either impunity or revenge and to ensure meaningful change could occur.⁶⁸ It was a self-conscious choice to prioritise reparative and restorative justice over retribution as a means of promoting social reconciliation rather than division.

Gradually, largely due to the international prominence of the South African case, the pursuit of 'truth' also came to be conceptualised as a means of pursuing justice in transition. As Leebaw highlights, 'where truth commissions and trials were once viewed as advancing distinctive and conflicting agendas, they were now seen as promoting complementarity and mutually reinforcing goals.'⁶⁹ As with the Latin American experience, broader conceptual (and normative) conclusions began to be drawn from practice. What had been seen as mutually incompatible courses of action, such as pursuing peace at the expense of justice or vice versa, gradually became subsumed into a broader framework of justice.

While these cases demonstrate the way in which justice in transition has been negotiated in the light of practical and political constraints, law has not been absent from this debate. Indeed the political science literature from which the field emerged was not solely concerned with the negotiation of the transition, but with how justice,

⁶⁶ Ibid.

⁶⁷ See Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart, 2008).

⁶⁸ Mahmood Mamdani, 'Amnesty or Impunity? A preliminary critique of the Report of the Truth and Reconciliation Commission of South Africa' (2002) 32 *Diacritics* 32.

⁶⁹ Leebaw (n 48) 105.

in the form of accountability for human rights abuses, could be ensured.⁷⁰ Indeed the aim of prosecution (justice) was often juxtaposed with the need to ensure democratic stability and the rule of law (peace). Law, along with human rights and comparative political science, was therefore present from the outset these debates.⁷¹ Further, international law emerged as a key overarching possibility. Each case raised the question of how international law could be used to advance justice in these political contexts, and whether international law provided legally binding obligations that could be relied upon to strengthen the position of those who called for justice.⁷² It was these debates that laid the groundwork for the conceptualisation of a distinct role for law in transition that could ‘relate the factual and conceptual challenges of transitional situation...’ and move debates beyond traditional understandings of the rule of law.⁷³ It also laid the foundations for the constitution of a distinct model of ‘transitional justice.’

With each new step the field of transitional justice expanded to incorporate a broader range of objectives, held together by the goal of achieving reconciliation. The interplay of the seemingly oppositional concepts of peace and justice exposed the way in which the boundaries of transitional justice were subject to on-going and contested interpretation. As seemingly peripheral concepts such as truth and reconciliation jostled for position and were re-interpreted as integral to justice rather than opposed to it, the parameters for inclusion within the definition of transitional justice expanded. Transitional justice also began to encompass many of the political elements it had previously worked alongside. Gradually these mechanisms began to represent not a compromise approach borne of practical constraints on the pursuit of justice, but came to be seen as legitimate approaches in their own right. This helped to establish a field of practice that provided the empirical data from which conceptual and normative claims could be deduced. As Arthur suggests, ‘acceptance of the phrase ‘transitional justice’ is itself a response to a set of new problems and a means of legitimating the

⁷⁰ Teitel (n 7).

⁷¹ Arthur (n 2) 333.

⁷² For a detailed discussion of the interplay between international law and domestic trials in Argentina see Natalia Luterstein ‘A Historical Approach to International Law Through the Lens of Domestic Prosecutions: Judging Massive Human Rights Violations in Argentina’ in M Bergsmo et al (eds) *Historical Origins of International Criminal Law* (Torkhel Opshal Academic EPublisher, 2015).

⁷³ Asmal (n 65).

practices used to respond to those problems.⁷⁴ In this way they became subsumed into a much broader narrative of transition increasingly regulated by law. This broadened (international) mandate was confirmed in the 2004 Report of the Secretary General on Transitional Justice and the Rule of Law in Conflict and Post Conflict Societies, in which the goals of transitional justice were explicitly linked with those of peace and democracy and, in particular, with the consolidation of the rule of law. Adopting a more broadly defined purpose and *modus operandi* was central to the evolution of the model of transitional justice.

b. Transitional Justice and the Rule of Law

In 2000, Ruti Teitel published her seminal text *Transitional Justice*, in which she outlined what she saw as an emerging conception of the field and its core underlying assumptions.⁷⁵ In this work, Teitel brought together discussion of previously disparate mechanisms for dealing with the past - including trials, truth commissions, lustration and constitutional reform, each of which had their own distinct aims and objectives - and discussed them within the new conceptual framework of transitional justice. A significant focus of this inquiry was the role that law could play in facilitating political transition. From the year 2000, transitional justice, it has been argued, has existed as a 'self conscious field of practice and study',⁷⁶ the label used to denote a general conception of justice in political transition characterised by legal responses to past injustice.⁷⁷ In particular, the shift that occurred at this time was one from viewing justice as operating alongside other political mechanisms in transition, to transitional justice as necessary to deliver successful transitions - peace through justice. In particular, Teitel's conceptualisation of the field highlights the shift in understandings of the role of law in post-conflict situations, moving away from existing and clearly defined regimes of legality to one which is more contingent and shaped by the circumstances in which it operates. The re-conception of law as fluid and capable of providing a framework for transformation laid the foundations for the domination of the field by law. Once the traditional rigidity of law and legal process had been

⁷⁴ Arthur (n 2) 329.

⁷⁵ This text is chosen as the most cited authority on the meaning and scope of transitional justice. Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000).

⁷⁶ Bell (n 1) 8.

⁷⁷ Teitel (n 75).

stripped away, almost any reform or transformative initiative could be justified using the mantle of law.

As outlined, the unifying feature of transitional justice has become the idea that law can be a means to achieve justice. The promotion of the rule of law through international human rights norms underpins the entire discourse of transitional justice.⁷⁸ It is therefore worth explaining in more detail how the role of law is characterised in transitional justice and how law is viewed as responding to the particular circumstances of post-conflict societies. Transitional justice rests on the paradox that it seeks to address past failings of the law by replacing it with law. While transitional justice may operate in contexts where law and order has irreparably broken down, in many conflicted societies what is at issue is not the existence of the law but rather its legitimacy in the eyes of the population. Legitimacy may be contested, with on-going struggle for 'ownership' of the law, leaving debates polarised between those who seek to maintain the continuity of law and those who reject the legality of the existing law and demand reform or overthrow of the system.⁷⁹ To try and mediate this dispute, the role of law (and indeed the rule of law) in transition has been vested with particular meaning whereby the stability and continuity of the 'rule of law' is maintained but the substance of the law is re-envisioned as a substantive model that encompasses clearly defined principles of justice. As Teitel states, the role of law in transitional contexts is to 'mediate the normative shift in values that characterises these extraordinary periods'.⁸⁰ Law in transition is constructed in relation to the nature of the injustice of the previous regime, deemed to be illegitimate and discredited. This, according to Teitel, provides legitimacy for legal change. What is being advanced, therefore, is not only a shift in understanding of the politics of law in the transitional phase but also a fundamental shift in understandings of the role and function of law itself. One of the core and accepted premises of transitional justice is that the role of law in transition is fundamentally different from that in ordinary or settled regimes. The operation of law in transition speaks directly to the idea that there is a need to move from one form of

⁷⁸ United Nations, 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies' (UN Doc S/2004/616, United Nations 2004).

⁷⁹ Genealogy (n 2). For discussion of this in context see Catherine Turner, 'Political Representations of Law in Northern Ireland' [2010] Public Law 451.

⁸⁰ Teitel (n 75) 11.

society to another, thus responding to the history and narrative of conflict and therefore law. Teitel highlighted three key features of law in transition. These were that law was socially constructed; that international law could transcend domestic legal understandings; and finally that the rule of law could transcend politics.

(i) Law as Socially Constructed

Central to transitional justice is the idea of a shift from one illegitimate form of government to a more democratic order. Fundamentally, it is assumed that there is a gap between the ‘law as written’ and ‘law as perceived’. The idea of law as socially constructed rests on the assumption that the legitimacy of the law depends on popular understandings of legality. Where there is civic or armed resistance to the posited law of the state, this is read as sufficient to undermine the quality of that law as legal. This gap feeds conflict, which will continue until the gap is closed and legality and popular perceptions of legitimacy are aligned. The gap between law and popular perceptions in conflict situations gives rise to some of the key antinomies of transitional justice, those between the ‘is’ and the ‘ought’ of law, as well as between procedural and substantive versions of democracy.⁸¹ These are held out as the key points of tension in repressive or conflicted societies, the points around which conflict over the legitimacy of law is most likely to arise.⁸² These distinctions are also integral to the *raison d’être* of transitional justice, in that it is precisely these gaps that transitional justice aims to close, using legal form itself to move from one form of legality to another. This is not an altogether uncontroversial claim from a legal point of view. All instances of transitional justice will give rise to conflict over the desirability of maintaining legal certainty as opposed to justifying a new and distinctive conception of law forged in response to an existing set of circumstances—one clearly rooted in history and narrativity.⁸³ To try and obviate some of this criticism, transitional justice theorists have sought to shift the locus of legal legitimacy from the domestic order to the

⁸¹ Colm Campbell and Fionnuala Ní Aoláin, ‘The Paradox of Transitions in Liberal Democracies’ (2005) 27 Human Rights Quarterly 172.

⁸² *ibid.*

⁸³ Genealogy (n 2).

international, looking particularly to international human rights law as a standard external to the parties, that can provide guidance on the necessary course of action.⁸⁴

(ii) International Law Can Transcend Domestic Concepts of Legality

International human rights law is regarded as a means of bridging the gap in understandings of the role and function of law in transition. Whereas the antinomies of positive and natural law and procedural and substantive law present dilemmas for the domestic law theorist, Teitel suggests that international law can successfully mediate this tension. She states, ‘grounded in positive law but incorporating values of justice associated with natural law, international law mediates the rule of law dilemma’.⁸⁵ This emphasis on the incorporation of the values of justice into the substance of law both highlights the link being made in transitional justice between law and justice but also the fundamental shift from established notions of legality. Where the legality, rather than the existence, of the law is called into question, the new regime speaks directly to the experience of injustice or repression, implicitly acknowledging the failure of law in the past.⁸⁶ The role of international law is simply to ease the passage of this new vision of legality, providing independent standards against which the action can be judged.⁸⁷ The importance of incorporating international law, and with it values of justice, in a transitional context is also reflected in Teitel’s third understanding of the role of law in transition—that it is capable of transcending the passing politics of the time.

(iii) International Law Can Transcend Politics

This understanding goes to the heart of transitional justice, and in particular the use of law, to achieve transitional outcomes. ‘Rule of law’ is viewed as a means of simultaneously preserving the continuity of legal form, while marking a break from the old regime and enabling normative change. Although critical of the turn to legalism, McEvoy succinctly outlines what he terms the ‘seductive qualities of

⁸⁴ Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, ‘Justice Discourses in Transition’ (2004) 13 *Social and Legal Studies* 305, 306.

⁸⁵ Teitel (n 75) 21.

⁸⁶ This also distinguishes transitions in contexts of social conflict from those in which war has caused a complete collapse of legal systems, which are comparatively rare.

⁸⁷ Bell and others (n 84) 308.

legalistic analysis'. He states, 'Claims that the rule of law speaks to values and working practices such as justice, objectivity, uniformity, rationality etc are particularly prized in times of profound social and political transition'.⁸⁸

Although Teitel and others acknowledge the politically contingent nature of law in transition, most agree that law fulfils an important symbolic function in such contexts. Campbell and Ní Aoláin see law in transition as providing the means to confront human rights abuses through the application of legal procedure to narrative forums, and providing a 'safe and stable' means to assist the journey.⁸⁹ The conception of law in the transitional justice literature is also regarded as a key source of democratic legitimacy. Rather than being held hostage to politics, the application of legal form is seen as a means of transcending existing political conflict and allowing a society to move towards a new form of governance, shielded by the formality of law and legal procedure.⁹⁰ The rule of law is represented as providing a new site of contestation, bounded by legality. In this way the interpretation of the role of law in transition ensures the on-going constitution of the field.

This understanding of the rule of law in transition demonstrates the way in which law is regarded both as a means to deliver justice for past human rights abuses and to deliver sustainable political reform in conflicted societies. Law under this conception has a role to play in telling the story of the conflict, in forging narratives of right and wrong and in responding to those charges. The application of legal form is, in and of itself, regarded as assisting with the establishment of democratic legitimacy and providing a mediated framework for political conflict. What Teitel's conceptualisation of the role of law in transition demonstrates is that law is intended to have a reflexive function, in that it can be flexible enough to respond to a past history of injustice while at the same time maintaining the stability of legal form. As the idea of transitional justice gained traction and became more widely applied in policy circles, however, this reflexive aspect of law became subordinated to the desire

⁸⁸ McEvoy (n 6) 417.

⁸⁹ Campbell and Ní Aoláin (n 81) 188.

⁹⁰ Teitel (n 75) 6; See also Leebaw (n 48) 103, suggesting that, as the role of international law and institutions in transitional justice expanded, the model itself became ostensibly less political.

of policy makers and funders for determinate goals that could be measured.⁹¹ This has led to a more rigid use of law in transition than that originally proposed by Teitel.

2. TRANSITIONAL JUSTICE: THE MARGIN AND THE MAINSTREAM

The emergence of a theorised concept of transitional justice represented the constitution of a new field, a new way of constructing meaning in relation to justice. Once a normative element was established in transitional justice literature, all efforts at peace-making became subject to evaluation according to the requirements of that framework itself. This was clearly evident in respect of the belief in the rule of law inherent in transitional justice thinking. This new international order facilitated the emergence of new normative frameworks for action and evaluation.⁹² Despite the existence of a complex web of interrelated claims to the genesis and aims of transitional justice, an overarching narrative emerged dominant. This narrative is evidenced in a convergence of opinion that certain unifying principles of justice in transition exist and that these normative principles are embodied in mechanisms such as trials, truth commissions and reparations.⁹³ Transitional justice initiatives could be evaluated on the extent to which they delivered 'justice' as defined in international law and action in transitional contexts came to be legitimated by the label of transitional justice.

a. The Emergence of the TJ Norm

From a practical perspective, the emergence of a bounded conceptual space of transitional justice is evident in the increasing volume of international law and policy that regulates transitional processes. The United Nations has published an extensive range of rule of law toolkits in relation to transitional justice, covering all aspects of transitional justice policy.⁹⁴ Specific guidance exists in the form of 'Rule of Law Tools' in respect of amnesties,⁹⁵ prosecution initiatives,⁹⁶ truth commissions,⁹⁷

⁹¹ Subotić (n 7).

⁹² Bell (n 1).

⁹³ Subotić (n 7) 120.

⁹⁴ These are all available on the UN Rule of Law website <www.unrol.org>.

⁹⁵ United Nations, 'Rule of Law Tools for Post Conflict States: Amnesties' (UN Doc HR/PUB/09/1, United Nations 2009).

reparations programmes,⁹⁸ and vetting,⁹⁹ to name but a few. Each of these toolkits is intended to fit into a ‘coherent operational perspective’ that outlines the basic principles involved in transitional justice.¹⁰⁰ These are complemented by a range of documents, such as guidance notes, that shape the institutional response to transitional justice on an international level.¹⁰¹ From toolkits to expert reports, this approach seeks to draw general conclusions from the experience in practice of transitional states, thereby committing to text the principles of the conceptual model. Transitional goals are articulated as legal imperatives, embedded in the normative framework of international law. What it attempts to frame is not so much a blueprint for action, but rather an objective set of standards, rooted in best practice, which can be said to define the requirements of justice in transition. Once clear normative guidance is in place, deadlines can be set for the implementation of frameworks for action, allowing for targets against which the achievement of transition can be measured.¹⁰² The boundaries of transitional justice are therefore determined by a system of positive laws and conventions that define its character.¹⁰³ It is clear from these guidelines what is included within the scope of transitional justice and, by implication, what is excluded. There is, inevitably, some degree of a ‘right’ and a ‘wrong’ response to conflict. Transition is constructed as a linear progression in which the problem is defined, transitional justice mechanisms are implemented and the desired outcome is achieved. The legal character of this model serves to portray this progression, and the means by which it is achieved, as ‘universally objective and uncontroversial’.¹⁰⁴

⁹⁶ United Nations, ‘Rule of Law Tools for Post Conflict States: Prosecution Initiatives’ (UN Doc HR/PUB/06/4, United Nations 2006) (hereinafter ‘Prosecution Initiatives’).

⁹⁷ United Nations, ‘Rule of Law Tools for Post Conflict States: Truth Commissions’ (UN Doc HR/PUB/06/1, United Nations 2006) (hereinafter ‘Truth Commissions’).

⁹⁸ United Nations, ‘Rule of Law Tools for Post Conflict States: Reparations Programmes’ (UN Doc HR/PUB/08/1, United Nations 2008) (hereinafter ‘Reparations Programmes’).

⁹⁹ United Nations, ‘Rule of Law Tools for Post Conflict States: Vetting: An Operational Framework’ (UN Doc HR/PUB/06/5, United Nations 2006) (hereinafter ‘Vetting’).

¹⁰⁰ Prosecution Initiatives (n 96).

¹⁰¹ See, for example, United Nations, ‘Guidance Note of the Secretary General: United Nations Approach to Transitional Justice’ (United Nations 2010); United Nations, ‘Guidance Note on Gender and Transitional Justice’ (United Nations 2010); United Nations, ‘Human Rights and Transitional Justice: Report of the United Nations High Commissioner for Human Rights’ (UN Doc A/HRC/4/87, United Nations 2006).

¹⁰² See in particular the setting of deadlines on transitional constitutional processes that are deemed to mark the end of the transition. See Catherine Turner and Ruth Houghton, ‘Constitution Making and Post-Conflict Reconstruction’ in Matthew Saul and James Sweeney (eds), *International Law and Post-Conflict Reconstruction* (Routledge 2015) 119.

¹⁰³ Subotić (n 7). This maps on to Derrida’s understanding of the nature of law, discussed in Chapter Three

¹⁰⁴ *ibid* 118.

Subotić notes how a state's choice is now 'one of which model of justice to adopt, not whether any should be adopted at all'.¹⁰⁵ Transitional justice has therefore become established as the only legitimate response to conflict. It is suggested that the effects of this dynamic are experienced at both the macro- and micro-levels. At the macro-level, the emergence of an institutionalised transitional justice norm has led to the creation of a mainstream of scholarship and advocacy that is easily translated into policy and practice and a margin that retains its critical distance but as a result remains less 'visible' in international advocacy and policy. At the micro-level, the use of the language of transition can marginalise those who do not chose to engage, for whatever reason, in 'transitional' mechanisms in local contexts.¹⁰⁶

b. Transitional Justice and Opposition

This emergence of a clearly defined model of transitional justice means that it is possible to interrogate the core assumptions upon which it has been constructed. The existence of a clear inside and outside of transitional justice reflects a broader trend in the field whereby it is characterised by opposition. In addition to the apparent existence of a 'right' and a 'wrong' way to approach justice in transition, the 'inside' of the field itself is constructed on a series of oppositions.¹⁰⁷ These are the core assumptions upon which the model rests. The most fundamental opposition is that between war and peace (war/peace). The underlying aim of transitional justice is to move from a situation where direct physical violence is replaced with the more civilised instruments of law (violence/law). Similarly operating is the distinction between victim and perpetrator that shapes the boundaries of political inclusion and exclusion in the transitional context.¹⁰⁸ The way in which conflict is narrated in transitional justice requires a distinction to be visible between right and wrong (legitimate/illegitimate). This underpins the drive for accountability that underpins transitional justice (acknowledgement/denial), which in turn contributes to the transformation of repressive societies into liberal ones. The method by which this is

¹⁰⁵ *ibid.*

¹⁰⁶ See Siphiwe Ignatius Dube, 'Transitional Justice Beyond the Normative: Towards a Literary Theory of Political Transitions' (2011) 5 *International Journal of Transitional Justice* 177.

¹⁰⁷ Campbell and Ní Aoláin (n 81) highlight these binaries as arising from the paradigmatic transitions upon which the field of transitional justice is constructed.

¹⁰⁸ Claire Moon, 'Narrating Political Reconciliation: Truth and Reconciliation in South Africa' (2006) 15 *Social and Legal Studies* 257.

achieved is by replacing volatile political contestation with legal regulation (politics/law) and embedding a thicker or more substantive version of democracy, which incorporates key principles of human rights and good governance, in place of a purely procedural version in which the legitimacy of law as posited is challenged (procedure/substance). Finally, the outcome of transition is to replace repression and injustice with justice. The divided community is reconciled; division is replaced with unity (division/reconciliation).¹⁰⁹

What has been created is a system of opposites, where transitional justice mechanisms are used to move societies from one state of being towards another. Rather than problematizing or interrogating these binaries, transitional justice scholars and practitioners have to date tended to speak of law as a means of moving from one to the other.¹¹⁰ Opposition therefore goes to the very heart of transitional justice and is the foundation upon which theorising has occurred. It is suggested that this opposition is an inherent feature of the use of law to conceptualise and implement transitional justice. However the oppositional nature of the discourse has implications for the impartiality from which the legitimacy of the model derives, as well as for its capacity to either transcend or mediate political conflict. This is particularly apparent with the application of transitional justice to ‘non-paradigmatic’ transitions where there is a higher degree of division over the causes of the conflict and how it should be resolved.¹¹¹ This applies particularly where armed violence has been brought to an end by negotiated settlement, but ‘conflict’ remains over the causes of the conflict and the nature of the state.¹¹² Just as struggle over ownership of the law can lead to conflict, and ultimately transition, the power of the label of transitional justice can lead to struggle over ownership of the transition and conflict over the scope, definition and priority to be afforded to transitional mechanisms.¹¹³ The model of transitional justice assumes a rupture with a prior regime that is discredited on

¹⁰⁹ See Harvey Weinstein, ‘Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief’ (2011) 6 *International Journal of Transitional Justice* 1 on the role of the concept of reconciliation in driving transitional justice. See also Emiliós Christodoulidis, ‘Truth and Reconciliation and Risks’ (2000) 9 *Social and Legal Studies* 179.

¹¹⁰ See e.g. Campbell and Ní Aoláin (n 81). There is also an implicit assumption that the move from one to the other is positive. See Dube (n 106) 181.

¹¹¹ In this regard, Northern Ireland, discussed in Chapters Four - Six of this thesis, is a clear example.

¹¹² This is now the dominant means by which wars are ended. See Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000).

¹¹³ See McEvoy (n 6) 420, who suggests that this tension is not in itself surprising. Rather, what is more significant is the tendency to represent law as somehow existing above this political fray.

account of a breach with public support and perceptions of legality. It also assumes that this moment of rupture, most often the physical manifestation of conflict, can be isolated from political and social dynamics that have preceded it and be addressed as an exceptional event rather than part of on-going contestation of norms. Where there are contested narratives of the conflict at play, demands for transitional justice are not necessarily value free.¹¹⁴ Applying the label of transitional justice allows one side to take control of the direction of reform in a way that simply replicates the politics and the violence of open conflict.¹¹⁵ The interpretation of the concept of transitional justice in a way that seeks to apply ostensibly neutral legal principles to mediate reform serves to replicate patterns of inclusion and exclusion on a micro-level.¹¹⁶ Adopting one narrative of conflict over another and favouring it through the application of the rhetoric of transition simply reflects the bounded nature of the transitional space and creates new sites of silence and invisibility. However, this aspect of transitional justice is one in which there is now a rich vein of critique that has sought to subject these foundational assumptions to greater scrutiny. Some of these critiques have had considerable success in exposing the limits of the model of transitional justice and, by working within the model, are themselves now considered to be becoming mainstream. Others, however, seek to question the foundations of the model and, as such, the existence of the boundaries rather than where they are drawn. These critiques are less easily translated into law and policy and thus remain at the margins of the field,¹¹⁷ certainly in terms of policy and practice at least. The remainder of this chapter seeks to map the existence of critique in transitional justice literature and to explore what it has contributed to our understanding of transitional justice.

¹¹⁴ The existence of contested narratives refers not only to competing 'sides' of the conflict, but also more broadly to a range of voices that may be silenced by a dominant transitional justice narrative. See Dube (n 106). This is discussed in detail in Chapter Six.

¹¹⁵ This trend has been noted in the Northern Ireland context by Christine Bell and Johanna Keenan, 'Lost on the Way Home? The Right to Life in Northern Ireland' (2005) 32(1) *Journal of Law and Society* 68; Campbell and Ní Aoláin (n 81).

¹¹⁶ Kirk Simpson, 'Voices Silenced, Voices Re-discovered: Victims of Violence and the Reclamation of Language in Transitional Societies' (2007) 3 *International Journal of Law in Context* 89.

¹¹⁷ Dube (n 106).

3. TRANSITIONAL JUSTICE AND CRITIQUE

Before beginning this mapping, a note on the understanding of critique that informs the exercise is useful. The categorization employed here is centred around the distinction between 'internal' and 'external' critique.¹¹⁸ Just as it has been argued that a mainstream of transitional justice has emerged, it is suggested that there is a dividing line between two types of critique visible in transitional justice literature. One seeks to challenge the mainstream by demanding inclusion therein. Termed 'internal critique', this type of critique is understood as working within the model or the language of transitional justice as a means of expanding the boundaries of the model. Therefore while the model, and in particular the outcomes that it can reasonably deliver, are subjected to robust questioning, the model itself is not subject to challenge. The reason for this may be a belief in the validity of the model, but may also be strategic, in that although imperfect, the model of transitional justice is seen as the best opportunity to deliver the change or outcomes desired, particularly for groups whose needs or demands have been stubbornly ignored in traditional politics.¹¹⁹

External critiques, on the other hand, are those concerned with revealing the deeper assumptions on which the model of transitional justice rests and, as such, subjecting the model itself to scrutiny. With this type of critique the validity of the model is not taken as a given but rather the model itself, and not simply the effectiveness of its operation, is questioned. These critiques have challenged key goals of transitional justice, such as the possibility for truth, forgiveness and reconciliation, as well as some of the ideological bases upon which it is founded. While this distinction is for the most part discernible throughout the literature, there are areas in which it becomes blurred, for example, where internal critique begins to touch on deeper questions of how we conceptualise transition. Nevertheless the distinction remains useful in thinking through how and why scholars engage in critique of transitional justice.

¹¹⁸ In using this distinction, I take inspiration from the work of Karen Engle, who uses these categories to explore the relationship between international human rights and feminism. Karen Engle, 'International Human Rights and Feminism: Where Discourses Meet' (1992) 13 *Michigan Journal of International Law* 517.

¹¹⁹ For a good discussion of this dynamic, see Christine Bell and Catherine O'Rourke, 'Does Feminism Need a Theory of Transitional Justice?' (2007) 1 *International Journal of Transitional Justice* 23.

Beginning with internal critiques, this section poses two core questions: where do we find these critiques? And what do they add to our understanding of transitional justice?

a. Internal Critique and the Boundaries of ‘Transition’

It is suggested that the primary contribution of internal critiques has been to expose the blind spots in protection offered by transitional justice and as a result to expand the parameters and goals of what is or should be included within the transitional justice model. These critiques are now firmly established in transitional justice literature and have achieved remarkable progress in ensuring that a light has been shone on the needs of traditionally vulnerable populations, consistently asking how transitional justice can be used to benefit these groups.¹²⁰ These works have advocated transitional justice as a site of critical engagement—as a useful space for opening up opportunity. The unique nature of law in transition is seen as providing sites of activism that would not otherwise be available. There are two particularly good examples of this type of critique, which exemplify the way in which critique has been employed to call for greater inclusivity in transitional justice processes. The first is the literature on the relationship between transitional justice and gender.¹²¹ The second is that on the relationship between transitional justice and social justice.

(i) Transitional Justice and Gender Justice

The feminist critique of transitional justice remains an emergent stream of critique.¹²² Drawing on a deeper vein of critique of international law that emerged in the early 1990s, it is an area that has gained significant policy traction in recent years.¹²³ As

¹²⁰ The gender critique has been so successful that it now incorporated into UN policy and practice in transitional justice. See UN Women, ‘A Window of Opportunity: Making Transitional Justice Work for Women’ (2nd edn, United Nations 2010).

¹²¹ This relationship has been explored in detail in Catherine O’Rourke, ‘Feminist Scholarship in Transitional Justice: A De-Politicising Impulse?’ (2014) 51 Women’s Studies International Forum 118. My aim here is not to replicate this analysis, but simply to provide an overview of the contribution of critical feminist scholarship to the field of transitional justice.

¹²² Sari Kuovo, ‘Review Essay: Feminism, Gender and International (Criminal) Law: From Asking the “Woman Question” in Law to Moving Beyond Law’ (2014) 16 International Feminist Journal of Politics 669. There are nevertheless a number of ‘overview’ pieces that are useful in mapping feminist engagement in transitional justice. See for example, Bell and O’Rourke (n 119); Fionnuala íííí, ‘Advancing Feminist Positioning in the Field of Transitional Justice’ (2012) 6 International Journal of Transitional Justice 205; O’Rourke (n 121).

¹²³ UN Women (n 120).

such, it is a good example of the way in which critique can expand not only scholarly understanding of transitional justice but also have an impact in practice. Here I identify the successes of feminist scholarship in making women visible to law in transition; in redefining what we understand ‘harm’ to mean in the transitional context; and in exposing the limits of key organizing binaries of transitional justice, such as public/private and war and peace. I also discuss the limitations of the feminist critique to date and highlight calls from feminist scholars for a more radical or transformative approach to transitional justice that would take feminist critique beyond the existing boundaries of the field.

As noted in Section One, transitional justice is rooted largely in international legal scholarship. It is therefore inevitable that internal critiques of the field will engage with the question of law and how it is constructed. Feminist engagement in the field of transitional justice emerged from broader engagement with international law.¹²⁴ Drawing on an emergent strand of critique that highlighted the gendered nature of international law, the origins of the gender critique in transitional justice lie with the international legal regulation of conflict.¹²⁵ Kuovo describes how in the 1990s, ‘[f]eminist scholars and activists turned to international law ... because of the potential it *might* have for women’.¹²⁶ Feminist interventions highlighted the absence of gendered approaches to international law and policy and called for both the participation of women in international decision making, as well as the mainstreaming of gender in international policy.¹²⁷ Where this approach intersects with transitional justice is in the increasing demands for harms committed against women during conflict to be recognized in transitional justice mechanisms. The evolution of the feminist critique of transitional justice is therefore integrally bound up with that of international criminal law.¹²⁸ Early feminist successes in having women included

¹²⁴ While international law has been the main locus of this engagement, interesting intersections with domestic law and politics are also a key feature of this scholarship. See Catherine O’Rourke, *Gender Politics in Transitional Justice* (Routledge 2013).

¹²⁵ At this time, feminist scholarship was interrogating both the gendered nature of international law, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000); and the relationship between human rights and women’s rights, Niamh Reilly, *Women’s Human Rights: Seeking Gender Justice in a Globalising Age* (Polity 2009).

¹²⁶ Kuovo (n 122) 666. Emphasis in original.

¹²⁷ Beijing Declaration and Platform for Action (1995).

¹²⁸ For an overview of this, see Catherine O’Rourke, ‘International Law and Domestic Gender Justice, or Why Case Studies Matter’ in Martha Fineman and Estelle Zinsstag (eds), *Feminist Perspectives on*

within transitional mechanisms lay in the recognition of sexual violence as a war crime for which accountability could be sought in the aftermath of conflict.¹²⁹

And yet it became clear that this was not enough. As Kuovo suggests, the result of this approach, sometimes referred to as the ‘add women’ approach,¹³⁰ was that women’s lived experiences were ‘moulded to the realities of international law, politics and institutions, adapting to what is possible rather than what is necessary’.¹³¹ While prosecuting sexual violence against women at least made women visible in transitional justice, an exclusive focus on sexual violence simply applied existing male-centric conceptions of ‘harm’ to women and in so doing perpetuated the exclusion of the majority of women from these fora.¹³² If the ‘harm’ experienced did not map onto existing understandings of ‘violations of human rights’, most notably violations of bodily integrity resulting in death, then it remained invisible to the law.¹³³ International criminal law was not concerned with the experience of harm per se, but simply how it could be used to prove a case against an accused.¹³⁴ Feminist scholarship highlighted this blind spot. In this way, however, feminists, by demanding the inclusion of women, were not expanding the parameters of transitional justice, nor remedying the exclusion of women. They were simply demanding that women be accommodated within the existing limited parameters. While the trend emerged with trials, the ostensibly more flexible mechanism of the truth commission also suffered from the same limitation. Feminist scholarship highlighted how, despite the claims for flexibility in the terms of reference of truth commissions, often they were constrained

Transitional Justice: From International and Criminal to Alternative Forms of Justice (Intersentia 2013) 11.

¹²⁹ Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’ (1994) 5 *European Journal of International Law* 326; O’Rourke (n 128).

¹³⁰ Kuovo (n 122).

¹³¹ Ibid 666.

¹³² See for example Fiona Ross’s searing analysis of the role of the testimony of women before the South African Truth and Reconciliation Commission. Fiona Ross *Bearing Witness: Women in the Truth and Reconciliation Commission in South Africa* (Pluto 2003). See also Vasuki Nesiah, ‘Missionary Zeal for a Secular Mission: Bringing Gender to Transitional Justice and Redemption to Feminism’ in Sari Kuovo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart 2011) 137. Nesiah is critical of the limitations of sexual violence as the ‘privileged frame narratives for women’s subjectivity’.

¹³³ For discussion of this in the Chilean context see Fionnuala Ní Aoláin and Catherine Turner, ‘Gender, Truth and Transition’ (2007) 16 *UCLA Women’s Law Journal* 229.

¹³⁴ There is also a very compelling critique of the impact that the need to fit the story of violation into an existing narrative of conflict and transition had on women’s testimony before transitional justice bodies. See in particular Ross (n 132); For a more recent analysis of this trend that extends beyond the feminist critique see Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press 2015).

by the same legal formality that constrained trials.¹³⁵ Central to feminist strategy, therefore, was revealing how law constrains what is or is not considered to be worthy of consideration in the transitional phase.

Having succeeded in expanding the definition of the crimes of concern in transitional justice to include those committed against women, feminist critique moved on to expand the definition of harm that underpinned calls for accountability, and in so doing expanded the definition of 'justice' in transition.¹³⁶ Feminist scholarship highlighted the gendered ways in which women experience conflict and, in particular, the disproportionate effect of violations of social and economic rights, which remained invisible to the law that framed intervention in the transitional phase.¹³⁷ By doing this, it has attempted to articulate a specifically gendered account of harm, rooted in women's lived experience, that extends well beyond the traditional legal definitions. This incorporates what O'Rourke describes as the 'web of harms' that encapsulates a number of different ways in which women experience violence.¹³⁸ By using this concept of harm, feminist scholarship has highlighted the ways in which transitional justice has prioritized public violations of civil and political rights over those committed in the private sphere. It has also exposed the prioritization of accountability for violations of discrete and individual violations at the expense of questioning the deeper patterns of structural violence that underpin conflict and that often affect women disproportionately. This prioritization of public harms, it has been suggested, serves to 'neatly separate the harms in women's lives from the concerns (and obligations) of the state, and to consign women to an apolitical space'.¹³⁹ The effect of this is not only to deny accountability for the effects of structural violence, but also to deny women agency in conflict. It also exposes the myth that there can be one unitary account of conflict. Exposing the ways in which women experience conflict exposes the multi-layered nature of conflict and the many divergent accounts that compete for priority in the quest for 'truth' in the transitional phase.¹⁴⁰ The way

¹³⁵ Ní Aoláin and Turner (n 133).

¹³⁶ *ibid.*

¹³⁷ On the failure of law to capture these experiences of conflict see Colm Campbell and Catherine Turner, 'Utopia and the Doubters: Truth, Transition and the Law' (2008) 23 *Legal Studies* 374.

¹³⁸ Catherine O'Rourke, *Gender Politics in Transitional Justice* (Routledge 2013).

¹³⁹ O'Rourke (n 121).

¹⁴⁰ See Eilish Rooney, 'Intersectionality: A Feminist Theory for Transitional Justice' in Martha Fineman and Estelle Zinsstag (eds), *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* (Intersentia 2013) 89.

in which conflict is narrated often obscures many different sites of intersection of identity and experience, and feminist scholarship has sought to highlight this.

A further aspect of this problematic public/private divide highlighted by feminist scholarship is the artificial division between conflict (or violence) and peace as experienced by women. Whereas transitional justice assumes a move away from violent conflict towards legally regulated peace, this does not correspond with the lived reality for many women. Feminist scholarship has used the concept of the continuum of violence to highlight how violence against women that occurs during times of conflict cannot be neatly separated from violence that occurs during 'peace' time.¹⁴¹ In particular, it has drawn attention to the ways in which violence against women alters in form rather than prevalence post-transition, but that this violence, occurring in the private rather than the public sphere, remains invisible to transitional justice.¹⁴² Therefore the linear model of transitional justice, from war to peace, as well as the definition of peace itself, is called into question.

Feminist scholarship has therefore contributed significantly to expanding the parameters of transitional justice scholarship and policy. However, scholars themselves acknowledge that there are limitations to the approach that has been adopted to date. Kuovo characterizes the feminist approach to international law that also underpins feminist scholarship on transitional justice as between resistance and compliance.¹⁴³ It is a project of resistance in that it calls into question established models of theory and practice and demands the inclusion of gender in those models. And yet it does not seek to destroy the model altogether. It has to date worked within the existing parameters of the field to affect change. In this way it is compliant. According to Kuovo, this is a necessary strategy. To seek to deconstruct the model altogether would remove its potential to affect change, or in Kuovo's words, undo its 'potential as a feminist tool'.¹⁴⁴ Therefore feminist scholars have self-consciously engaged with transitional justice strategically, aware of the compromises that were being made. O'Rourke highlights some of the difficulties that have arisen as a result

¹⁴¹ For a more detailed overview of this scholarship see O'Rourke (n 138).

¹⁴² Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 *International Journal of Transitional Justice* 253.

¹⁴³ Kuovo and Pearson 'Introduction' in Sari Kuovo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart 2011).

¹⁴⁴ Kuovo (n 122) 667.

of this strategic engagement. By working within the existing model, the emphasis of feminist intervention has remained on technical rather than transformative change.¹⁴⁵ This has meant that bigger questions have not been asked in terms of the capacity of transitional justice to accommodate conceptual challenges, such as those posed by feminist constructs of the web of harms or the continuum of violence, for example. These are questions that remain for feminist scholars to address.

Despite the progress made by feminist scholarship in expanding the boundaries of transitional justice, it is acknowledged that ‘feminist presence in transitional justice is complex, multi-layered, and still in the process of engagement’.¹⁴⁶ Indeed there are risks inherent in trying to impose order onto this critique. This is highlighted by Ní Aoláin, who cautions us to reflect on the potential drawbacks of focusing exclusively on Western liberal feminist discourse, which risks excluding other feminisms.¹⁴⁷ Nesiah goes further, suggesting that ‘[r]ather than challenge the mainstream of the transitional justice field, feminism has become mainstreamed within transitional justice’.¹⁴⁸ In particular, she advocates a feminist approach to transitional justice that goes beyond simply ‘expanding the scope of the dominant subject to be more inclusive’.¹⁴⁹ This dynamic is also reflected in O’Rourke’s concern that, to date, feminism has focused on technical reform at the expense of a genuinely transformative approach to transitional justice born of a persistent ‘reluctance to engage with the political dynamics that drive transitional justice in particular contexts’.¹⁵⁰ Nevertheless, as a site of critical engagement with transitional justice, feminist critique has added significantly to our understanding of the gendered nature of transitional justice and in particular the ways in which law shapes our understanding of harm.

¹⁴⁵ O’Rourke (n 121).

¹⁴⁶ Ní Aoláin (n 122).

¹⁴⁷ *ibid* 206. For a more detailed analysis of these intersections see Nikita Dhawan, ‘Transitions to Justice’ in Susanne Buckley-Zistel and Ruth Stanley (eds), *Gender in Transitional Justice* (Palgrave MacMillan 2011).

¹⁴⁸ Vasuki Nesiah, ‘Missionary Zeal for a Secular Mission: Bringing Gender to Transitional Justice and Redemption to Feminism’ in Sari Kuovo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart 2011) 137, 138.

¹⁴⁹ *ibid* 157.

¹⁵⁰ O’Rourke (n 121).

(ii) *Transitional Justice and Social Justice*

The second area of critique relates to the relationship between transitional justice and social and economic rights. This is an area of critique which is less established than that based on gender, notwithstanding the significant degree of overlap between the two.¹⁵¹ It is, however, an area in which there is currently a strong emergent literature, some evidence of policy traction, and one which is likely to represent a new focal point for critique. As with the literature on gender, this critique operates on a number of different levels. From the basic suggestion that the mandates of existing transitional justice mechanisms, such as trials and truth commissions, should address violations of social and economic rights, to the more conceptually-demanding idea that transitional justice as a model cannot adequately incorporate broader questions of social justice that underlie conflict, the persistent exclusion of social and economic issues from the purview of transitional justice for so long has now led to an increased interest in how the model can be adapted to remedy this particular blind spot.

As with the gender critique, scholars concerned with social and economic rights have sought to highlight the persistent silence of the field, both in theory and practice, on the question of social and economic justice.¹⁵² They have also called into question the nature of the ‘harms’ that are to be accounted for in transition.¹⁵³ There are three discernible schools of thought evident in the literature on the relationship between transitional justice and social and economic justice. The first is a straightforward analysis that suggests that there are some economic and social rights that can, and indeed have, fit within the existing legal framework of transitional justice.¹⁵⁴ Rather than viewing violations of economic and social rights as qualitatively different from those of civil and political rights, scholars have identified rights, such as forced eviction, for which accountability could be established within existing transitional

¹⁵¹ See e.g. Diana Sankey, ‘Towards the Recognition of Subsistence Harms: Reassessing Current Approaches to Socio-Economic Forms of Violence in Transitional Justice’ (2013) 8 *International Journal of Transitional Justice* 121.

¹⁵² Louise Arbour, ‘Economic and Social Justice for Societies in Transition’ (2007) 40(1) *International Law and Politics* 1.

¹⁵³ Sankey (n 151).

¹⁵⁴ See Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights* (UN Doc HR/PUB13/5, United Nations 2014) on where transitional justice mechanisms have addressed violations of economic and social rights.

justice frameworks.¹⁵⁵ This approach does not require a fundamental critique of the legalistic nature of transitional justice, nor of the role in prioritizing harms, but rather asserts that violations of an economic or social nature should be treated as direct violations for which accountability should be sought where possible.¹⁵⁶ This approach equates with that of the ‘add women’ approach discussed above, in that it does not seek to fundamentally challenge the model or goals of transitional justice, but simply seeks to expand its parameters to include new categories of legal rights. The need for such expansion relates to the second school of thought—that which identifies the tendency of legal transitional justice mechanisms to prioritise civil and political rights at the expense of economic and social rights. These rights, it is argued, are seen as less justiciable, and less achievable, and are therefore marginalised in transitional justice.¹⁵⁷ Miller refers to the tendency of transitional justice mechanisms to ‘background’ economic and social violations, treating them simply as the historical or social context in which the ‘more serious’ violations of civil and political rights occur.¹⁵⁸ In these cases, the violation of economic and social rights are narrated, often in truth commission reports, as the incidental effects of the violation of rights—such as the right to life and the prohibition of torture.¹⁵⁹ Rather than being viewed as direct violations themselves, for which accountability could be sought, they are mentioned, then dismissed. As Miller powerfully highlights, this approach ‘temporarily mak[es] visible what was hidden, without substantively addressing it. The utterance might appear as a remedy, when, in fact, it further backgrounds the problem’.¹⁶⁰

What these two schools of thought demonstrate is the problematic absence of accountability for economic and social rights in transitional justice. Where the critique becomes really interesting, however, is in the competing approaches to how this absence should be addressed. While some advocate expanding the legal parameters of transitional justice to include these violations, there is a much stronger push in the literature to use the absence of economic and social rights within

¹⁵⁵ Arbour (n 152)

¹⁵⁶ Ibid 16. This may also include using legal fora beyond criminal tribunals, such as human rights or constitutional courts, to give effect to these rights.

¹⁵⁷ Arthur (n 2).

¹⁵⁸ Zinaida Miller, ‘Effects of Invisibility: In Search of the “Economic” in Transitional Justice’ (2008) 2 *International Journal of Transitional Justice* 266.

¹⁵⁹ Ní Aoláin and Turner (n 133).

¹⁶⁰ Miller (n 158).

transitional justice discourse and practice as an opportunity to challenge the concept of justice that underpins the field. The third school of thought is therefore a much bigger and more ambitious project, concerned with expanding the conceptual boundaries of 'justice' to include social justice and address structural inequality. While this school of thought has been criticized for a lack of conceptual clarity,¹⁶¹ the use of the language of economic and social rights has nevertheless allowed scholars to highlight the invisibility of broader questions of economic inequality and social injustice within transitional justice. As such it raises interesting questions of where the dividing line between (legal) economic and social rights, and social justice lies.

Central to this school of thought is an understanding of economic and social injustice as root causes of conflict. Mani identifies practices such as systematic discrimination, exclusion and marginalisation of groups as underlying conflict. Yet the extent of victimisation caused by such practices poses very real difficulties for any attempt to incorporate these types of harms into existing transitional justice models.¹⁶² Existing mechanisms, including truth commissions and reparations, that are premised on the identification of a specific harm, caused to a named victim by a named perpetrator, will be simply unable to expand their mandates to encompass this range of harms. And yet it is increasingly asserted that failure to adequately address structural inequalities and systemic violence will undermine the chances of a successful transition.¹⁶³ Therefore, addressing this injustice is a necessary element of delivering sustainable peace and reconciliation. However, in order to do this a re-evaluation of the priorities of transitional justice is called for. Scholars highlight the preference for market-friendly liberal democracy that underpins transitional justice at the expense of redistributive justice and equality.¹⁶⁴ They highlight the invisibility of economic questions and the ways in which a narrative of transitional justice constructed on stories of civil and political violations renders invisible a background of structural

¹⁶¹ Evelyne Schmid and Aoife Nolan, 'Do No Harm? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 *International Journal of Transitional Justice* 362.

¹⁶² Mani (n 142).

¹⁶³ Ismael Muvungi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) 3 *International Journal of Transitional Justice* 163.

¹⁶⁴ Ibid; Lisa Laplante, 'Transitional Justice and Peacebuilding: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 *International Journal of Transitional Justice* 331.

violence and its contribution to conflict.¹⁶⁵ The invisibility of this violence then absolves transitional justice of the responsibility for addressing it.

To address this gap, a more holistic approach to transitional justice is called for—one which recognizes the underlying importance of structural violence to any project of transition. As with feminist scholarship, adopting a more holistic approach that addresses economic and social injustice would also ‘situate violence on a continuum that spans interpersonal and structural violence rather than simply focusing on acts of political violence’.¹⁶⁶ Fundamentally, however, this school of thought argues not that social justice as a construct should somehow replace transitional justice, but that how we conceptualise ‘justice’ in transition needs to expand to incorporate social justice.¹⁶⁷ In this way it is also a strategic engagement with transitional justice. It draws on the potential of the unique role of law in transition to advocate a more holistic approach that will address a much broader range of harms. Rather than abandoning the concept altogether, scholarship in this field calls for a radical engagement with transitional justice to ensure that questions of inequality and structural violence are brought to the forefront.

It can be seen both from the feminist critique, and from work seeking to expand the definition of justice in transition to include social justice, that the field of transitional justice has been seen as a site of critical engagement. These critiques draw on key themes of silence and invisibility to expose the blind spots and the limitations of the field as constructed, and to call for a more inclusive approach to justice in transition.

b. External Critiques and the Meaning of ‘Transition’: Truth and Reconciliation

The critiques discussed so far have focused on exploring the silences of transitional justice and, in so doing, revealing its blind spots. However, this has been done in a strategic manner, with the aim of expanding the definition of ‘justice’ in transition and thereby the range of people, groups and harms included within its operation. In

¹⁶⁵ Millar (n 158).

¹⁶⁶ Paul Gready and Simon Robbins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’ (2014) 8 *International Journal of Transitional Justice* 344.

¹⁶⁷ See Laplante (n 164).

revealing the exclusion of certain groups from the reach of transitional justice, this scholarship has made demands for inclusion. In this way, it does not question the inevitability of transitional justice in a sustained manner, but rather concentrates on providing a multi-layered engagement with the aim of achieving transformative change. The next set of critiques considered are also concerned with the themes of silence and invisibility. However these critiques express much greater scepticism about the stated goals of transitional justice. In particular, the possibility of truth, and that of reconciliation, are questioned. These critiques present a much greater conceptual challenge to transitional justice, in that they seek to reveal fundamental limitations of the model and the assumptions upon which it is premised. What these critiques ultimately call into question is the temporality of transitional justice—the extent to which we can ever speak of a before and an after of transition and the ways in which past, present and future intersect in the transitional context.

Remaining with the theme of silence, the next site of critical engagement is that relating to the possibility of truth in transitional justice. As research and practice in transitional justice began to expand beyond its origins as a criminal justice response to past human rights abuses, the idea of truth began to emerge as a site of engagement. In 1994, the South African Truth and Reconciliation Commission captured the imagination of the world. Rooted in theological concepts such as forgiveness and reconciliation, the Commission appeared as a direct challenge to the imperatives of transitional justice, not least because of its model of exchanging amnesty for truth. However, what was most significant about the TRC, and what it contributed to the conceptualisation of transitional ‘justice’, was that it introduced the idea that truth-telling (even in exchange for amnesty) could be a means of achieving justice rather than sacrificing it.¹⁶⁸ Notions such as reconciliation began to creep into the discourse of transitional justice, and the parameters of the debate shifted from the dichotomy between peace and justice to that between retributive and restorative justice.¹⁶⁹ It also

¹⁶⁸ Kader Asmal, ‘Truth, Reconciliation and Justice: The South African Experience in Perspective’ (2000) 63 *Modern Law Review* 1.

¹⁶⁹ Ibid; John Dugard, ‘Retrospective Justice: International Law and the South African Model’ in A James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press 1997); Mahmood Mamdani, ‘From Justice to Reconciliation: Making Sense of the African Experience’ in Colin Leys and Mahmood Mamdani (eds), *Crisis and Reconstruction: African Perspectives* (Nordisk Afrikainstitut 1997); Jeremy Sarkin, ‘The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of Gacaca Courts in Dealing with the Genocide’ (2001) 45 *Journal of African Law* 143.

introduced the idea that justice can be achieved by pursuing the ‘truth’ of a conflict, and indeed that it might be possible for such inquiry to achieve an agreed form of truth capable of transcending established narratives of blame. Such inquiry was represented as a necessary condition of lasting peace and the influence of this school of thought remains evident in transitional justice discourses today. Claims for transitional measures to establish the truth are often framed in the language of necessity—represented as a precondition to progress.¹⁷⁰ Since truth first emerged as a foundational concept of transitional justice, it has been linked with the idea of reconciliation. Truth, it is argued, will purge the past. It will lead to catharsis, and produce an agreed history of the conflict that will allow society to put the past behind it and look to the future.¹⁷¹

One point to note here is that although ‘truth’ has become the ‘darling of transitional justice’,¹⁷² it cannot be said that there is any clear agreement on the relationship between truth and reconciliation or between truth and justice. While the claim is often made that truth can lead to reconciliation, the opposite can equally be true.¹⁷³ Similarly with justice, there is no clear basis on which to argue that truth leads to justice or otherwise. These claims remain largely rhetorical and unfounded by empirical evidence. Nevertheless they remain influential in transitional justice scholarship and practice. Critical scholarship has questioned not only the possibility of establishing the “truth” of a conflict, but has also interrogated the broader claim that truth can contribute to reconciliation.

(i) *Truth*

The first aspect is relatively straightforward. Scholars have sought to highlight the limits of ‘truth’ as a goal of transitional justice and, in particular, the difficulty in

¹⁷⁰ See eg Louis Bickford and others, *Documenting Truth* (International Centre for Transitional Justice 2009); Consultative Group on the Past, ‘Report of the Consultative Group on the Past’ <http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf> (accessed 17 November 2015).

¹⁷¹ See Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2010).

¹⁷² Jeremy Sarkin and Erin Daly, ‘Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies’ (2004) 35(3) *Columbia Human Rights Law Review* 101.

¹⁷³ See Campbell and Turner (n 137). See also Weinstein (n 109).

establishing truth.¹⁷⁴ This critique can be as simple as highlighting the institutional constraints faced by truth commissions, such as distilling a conflict down into achievable terms of reference.¹⁷⁵ It can also relate to some of the dilemmas inherent in seeking truth, such as the truth versus amnesty debate that characterized the South African case, or the political difficulties associated with establishing authority, helping victims and making recommendations for reform.¹⁷⁶ Truth commissions bear a heavy weight of expectation and the first step in a critique of the value of truth will necessarily be to highlight the practical limitations of the model. These critiques assume that there is intrinsic value to truth-seeking in transition and that the model should address these limitations. However there is another strand of critique that goes beyond these limitations to question the concept of truth itself, and its application in the transitional context.

Central to the claims for truth in transitional justice is the idea that it will encourage acknowledgement of past abuses, and break down barriers caused by denial. The assumption upon which this claim is based is that there is an objective truth that exists and must be discovered. For critical scholars the difficulty lies in the element of acknowledgement and denial and the oppositional logic that it creates. Where the history of the conflict remains contested, framing truth as something to be acknowledged, rather than a multi-layered and complex discursive process, becomes problematic. Truth-seeking in an institutionalized format, undertaken by a body charged with producing a final report and recommendations for reform, encourages the imposition of rigid binaries of right and wrong which will allow for the apportionment of blame and the allocation of reparations. This approach, however, ignores the grey zones that inevitably arise in deep-rooted social conflict.¹⁷⁷ In the aftermath of conflict, as Daly highlights, most people will be able to agree on the facts of what has happened during that conflict. It is their interpretation of the moral significance of events that will vary.¹⁷⁸ Truth-seeking therefore becomes a new site of conflict. It requires the designation of the distinct categories of victim and perpetrator,

¹⁷⁴ For a more detailed discussion of these critiques see Ni Aoláin and Turner (n 133).

¹⁷⁵ Campbell and Turner (n 137).

¹⁷⁶ Erin Daly, 'Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition' (2008) 2 *International Journal of Transitional Justice* 23.

¹⁷⁷ Bronwyn Leebaw, *Judging State Sponsored Violence, Imagining Political Change* (Cambridge University Press 2011).

¹⁷⁸ Daly (n 176).

those ‘authorised to speak the truth about the past’.¹⁷⁹ Both sides jostle to establish a monopoly of victimhood, using truth seeking as a mechanism to legitimate their superior claim to suffering. The concept of truth itself becomes politicized, becomes contested. Silence assumes meaning. For example, the unwillingness of some groups to take part in truth seeking initiatives is read as a form of denial, as an unwillingness to acknowledge responsibility for conflict.¹⁸⁰

This reading of silence has the dual effect not only of politicizing truth but also of excluding those who are unwilling to engage in a process where they feel that the rules have been set in such a way that their own story will not be heard.¹⁸¹ Stauffer sums this up well when she speaks of ethical loneliness.¹⁸² By this she refers to the element of truth seeking whereby, on a metaphysical level, whether testimony is heard or not depends on whether or not it supports the narrative being sought. This applies in the context of trials when victim testimony is selected or not on the basis of its contribution to the case against an accused, but also operates much more subtly in the context of truth commissions where the interpretation of testimony will depend on the narrative that underpins the work of the commission. Put neatly, Stauffer claims that ‘Some truths get heard more loudly than others...’¹⁸³ This is due to factors such as power, institutional bias and receptiveness of the audience.¹⁸⁴ It occurs where the pursuit of truth involves locating particular occurrences of violence within a much longer history of domination or conflict,¹⁸⁵ for example, or where harms are prioritized to fit institutional terms of reference,¹⁸⁶ as discussed above. Far from achieving catharsis or reconciliation, the effect of not having one’s story heard, or of

¹⁷⁹ Moon (n 108) 261.

¹⁸⁰ Cheryl Lawther, *Truth, Denial and Transition: Northern Ireland and the Contested Past* (Routledge 2014); Jelena Obradovich-Wochnik, ‘The “Silent Dilemma” of Transitional Justice: Silencing and Coming to Terms with the Past in Serbia’ (2013) 7 *International Journal of Transitional Justice* 328.

¹⁸¹ For a good example of this, see Simpson on the attitude of the Unionist community towards dealing with the past in Northern Ireland. Kirk Simpson, *Unionist Voices and the Politics of Remembering the Past in Northern Ireland* (Palgrave 2009). See also Tshepo Madlingozi, ‘Good Victim, Bad Victim: Apartheid’s Beneficiaries, Victims and the Struggle for Social Justice’ in Wessel Le Roux and Karin Van Marle (eds), *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (Pretoria University Law Press 2007) 107 on the South African context.

¹⁸² Stauffer (n 134).

¹⁸³ Jill Stauffer, ‘Speaking Truth to Reconciliation: Political Transition, Recovery and the Work of Time’ (2013) 4 *Humanity* 27, 36.

¹⁸⁴ *ibid.*

¹⁸⁵ See Moon (n 108).

¹⁸⁶ Ross (n 132).

having one's story interpreted in a manner other than how it was intended, claims Stauffer, is to compound the feeling of isolation and violation.¹⁸⁷

Therefore it is truth that is the contested concept. These critiques reject the idea of one objective version of truth and highlight the potentially divisive nature of truth-seeking in transition.¹⁸⁸ Where the quest for truth is a quest for a unified narrative of the causes of conflict, it will inevitably perpetuate division, setting new boundaries of inclusion and exclusion,¹⁸⁹ denying victimhood to those whose story does not 'fit',¹⁹⁰ and eliding alternative histories.¹⁹¹ Truth-seeking, when seen through a critical lens, risks perpetuating hierarchies of victimhood by using the designations of victim and perpetrator, making an institutional statement of who has the right to call themselves a victim. By doing this, it determines who can legitimately claim to have been wronged and thereby seek justice. The performative element of truth-seeking in transition, whereby truth is 'produced' by a commission, conceals a complex web of reasons people may have for supporting or rejecting the narrative of a truth commission.¹⁹² This applies not only across the macro-axis of conflict, such as state versus non state actors, for example, but also engages the critique of the rigidity of law in framing violations, and denying the victimhood of those who suffer violations outside the traditional purview of civil and political rights, as discussed above. Wilson's ethnographic approach to the exploration of truth in the South African context, for example, revealed a number of different axes around which attitudes to the TRC could be organized, an approach which stands in contrast to the unified version of history put forward by the Commission.¹⁹³

However it has been suggested that the element of righting wrong that underpins the quest for truth as transitional justice can also be read as an alternative to retributive justice because of the way in which it encourages forgiveness. Atria suggests that balance can be restored between victim and perpetrator either through the punishment

¹⁸⁷ Stauffer (n 134).

¹⁸⁸ See Panu Minkinen, 'Ressentiment as Suffering: On Transitional Justice and the Impossibility of Forgiveness' (2007) 19 Law and Literature 513, 529.

¹⁸⁹ Moon (n 108); Madlingozi (n 181).

¹⁹⁰ Campbell and Turner (n 137) 377.

¹⁹¹ Moon (n 108) 260.

¹⁹² Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimising the Post-Apartheid State* (Cambridge University Press 2001).

¹⁹³ Wilson (n 192).

of a perpetrator, or through the forgiveness by the victim of the perpetrator.¹⁹⁴ The problem of truth is therefore linked to a bigger issue—that of forgiveness.

(ii) *Forgiveness*

Because of the theological influence that guided the South African TRC, forgiveness has become a constituent element of transitional scholarship.¹⁹⁵ The idea of forgiveness is linked to that of acknowledgement—a linear progression in which the perpetrator of a human rights abuse admits their crime, acknowledges the hurt it caused, and seeks the forgiveness of the victim.¹⁹⁶ The victim, having heard the acknowledgement and apology, is expected to forgive, so that reconciliation can be achieved. Moon characterizes this bargain as contractual, whereby victims are expected to forgive, and thereby to ‘give up the right to perpetuate old grievances’ in exchange for the perpetrator being ‘bound not to repeat violations and constructively to make amends’.¹⁹⁷

However, critical scholarship has sought to destabilize this neat progression by demonstrating the limits of forgiveness in transitional contexts. Foremost of these critiques is that provided by Jacques Derrida in his work *On Cosmopolitanism and Forgiveness*.¹⁹⁸ Addressing the contractual nature of the forgiveness transaction that takes place in a truth commission, Derrida explores the tension between conditional and unconditional forgiveness. The exchange of forgiveness for apology that characterized the approach of the South African TRC speaks directly to the acknowledgement and denial binary that has been identified as problematic in respect of truth-seeking. For Derrida, forgiveness in its true form is unconditional, in that it is given even in the absence of apology. However, under the TRC model, forgiveness is conditional, in that it is ‘proportionate to the recognition of the fault’, meaning that repentance of the sinner, the perpetrator, is a condition of forgiveness. Forgiveness in

¹⁹⁴ Fernando Atria, ‘Reconciliation and Reconstruction’ in Scott Veitch (ed), *Law and the Politics of Reconciliation* (Ashgate 2007) 42.

¹⁹⁵ Claire Moon, ‘Prelapsarian State: Forgiveness and Reconciliation in Transitional Justice’ (2004) 17 *International Journal for the Semiotics of Law* 185, 186–87. See also Atria (n 194) on the transposition of the theological concept into politics.

¹⁹⁶ Moon (n 195).

¹⁹⁷ *Ibid* 190.

¹⁹⁸ Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes tr, Routledge 2001).

this context makes sense not as an unconditional and gracious act, but only when seen as an element of, or move towards, the broader goal of reconciliation or atonement.¹⁹⁹ For Derrida this means that forgiveness is reduced to a calculated transaction, a strategic calculation, which, in the worst cases, is deprived of all meaning.²⁰⁰ The tendency of the truth commission is to replace unconditional forgiveness with juridical concepts such as amnesty, which can be administered according to technical criteria,²⁰¹ allowing a story of forgiveness and reconciliation to be told. If the goal of forgiveness is to promote national reconciliation, however, then the strategic or instrumental use of the concept is meaningless where there is no shared understanding of its significance, particularly on the part of victims. Thus forgiveness risks being reduced to no more than a rhetorical device behind which governments can hide the absence of meaningful change.²⁰²

However while an instrumentalised use of forgiveness presents both a challenge and an opportunity to the perpetrator, it also presents challenges to victims. Critical literature recognizes that there are some victims who are simply not willing to forgive, and that that is their right.²⁰³ Indeed it has been suggested that the focus on forgiveness could be profoundly damaging for victims, particularly where they feel under pressure to forgive as the price of peace.²⁰⁴ The effect of the truth commission, in reconstructing the narrative of the past, is to perpetuate the exclusion of the victim who finds themselves unwilling to forgive, and therefore to take part in the version of the present propagated by the truth commission.²⁰⁵ As Minkinen claims, ‘there is no objective truth to claim, no common history to recognize, but only the subjective moral truth of a victim who will persistently refuse to forgive.’²⁰⁶ Therefore any transitional justice mechanism that refuses to recognize this right of the victim not to forgive will be limited in its potential, because ‘in the theory of transitional justice, the possibility of forgiveness becomes dependent on how theory confronts the

¹⁹⁹ Ibid 36.

²⁰⁰ Ibid 39.

²⁰¹ Minkinen (n 188) 528.

²⁰² See also Sarkin and Daly (n 172).

²⁰³ Minkinen (n 188) 519. See also Stauffer (n 183).

²⁰⁴ Rebecca Saunders, ‘Questionable Associations: The Role of Forgiveness in Transitional Justice’ (2011) 5 *International Journal of Transitional Justice* 119.

²⁰⁵ Minkinen (n 188) 523

²⁰⁶ Ibid 526.

suffering of the victim.²⁰⁷ If transitional justice mechanisms do not have the capacity to recognize the unreconciled victim, effectively compounding their feeling of violation,²⁰⁸ then their value is open to question.

What critical scholarship reveals is that the use of the concepts of both truth and forgiveness in transitional justice discourse are potentially problematic on one level because of the way in which they can become instrumentalised as a way of achieving set political goals. But these critiques go further than simply providing a critique of how these concepts are applied, to question their utility in transitional justice—in particular their use as determined goals of transition.

The final goal that has been critiqued is that of reconciliation. A concept transposed from the religious to the political sphere, this is an area where critical inquiry poses a direct challenge to transitional justice scholarship in particular.

(iii) Reconciliation

Resistance to the idea of truth can also be read as an inevitable consequence of the linking of truth and reconciliation in transitional justice discourse. While truth, and to a lesser extent forgiveness, have become central elements of transitional justice scholarship and practice, they are not often seen as end goals in themselves. Rather they are seen as constituent elements in the much broader process of achieving reconciliation.²⁰⁹ Critical scholars have explored how reconciliation, a concept rooted in theology, has been framed as both a political and a juridical concept in transitional justice discourse.²¹⁰ While the concept of reconciliation holds much promise, particularly as an alternative to potentially divisive retributive justice strategies, critical scholarship has identified the way in which law, and particularly the legal

²⁰⁷ *ibid* 527.

²⁰⁸ See Stauffer (n 134).

²⁰⁹ See Joanna Quinn (ed), *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill-Queen's University Press 2009).

²¹⁰ See Andrew Schapp, 'The Time of Reconciliation and the Space of Politics' in Scott Veitch (ed), *Law and the Politics of Reconciliation* (Ashgate 2007) 10; Christodoulidis (n 109).

institutional form adopted by truth commissions, has shaped our understanding of reconciliation in transitional contexts.²¹¹

The etymology of ‘re-conciliation’ suggests the recreation of an existing bond, the restoration of unity in a community that has become fractured.²¹² The role of law in transition is therefore foundational, facilitating the re-constitution of society through transitional justice processes.²¹³ In so doing, it attempts to construct an authoritative narrative of the conflict that reconciles different accounts of conflict into an agreed narrative that creates the unity necessary for a new society, thereby transcending former political enmity.²¹⁴ What law does in transition, therefore, is to set parameters within which conflict must be resolved. In this way it plays a useful function in that it requires the settlement of dispute through legal means rather than through violence. It seeks to restore a fractured community by creating a shared narrative on the past that will frame shared norms in the present and future. However the other, and to some inevitable, side of this function is that in setting parameters, law forecloses further debate on political issues. The limits of what can and cannot be challenged are set by law, leaving no further space for dissensus.²¹⁵ The goal of reconciliation is to re-create reconciled subjects of liberal democratic nations, thus linking it to a much broader project of nation-building.²¹⁶ There remains no legitimate space for challenging the narrative of transition or of reconciliation. In short, seen through this lens, law shuts down the possibility of politics.

The difficulties associated with defining, let alone achieving, truth and forgiveness, either on practical or metaphysical levels, have led critical scholars to question whether reconciliation is an appropriate concept to apply to transitional contexts.²¹⁷ If reconciliation requires a shared understanding of the causes of conflict, as well as a clearly defined ‘victim’ who is willing to forgive a ‘perpetrator’, then the critiques

²¹¹ In particular the question of the extent to which ideas of reconciliation between individuals can usefully be applied in a communal context is explored. See Atria (n 194). For a discussion of this dynamic in context see Catherine Turner, ‘The Art(s) of Dealing with the Past’ (RightsNI, 1 April 2015) <<http://rightsni.org/2015/04/the-arts-of-dealing-with-the-past/>> accessed 19 October 2015.

²¹² For more detailed discussion see Campbell and Turner (n 32).

²¹³ Christodoulidis (n 109).

²¹⁴ For a detailed critique of this dynamic see Schapp (n 210).

²¹⁵ See *ibid.*

²¹⁶ Wilson (n 192). See also Anne Orford, ‘Commissioning the Truth’ (2006) 15 *Columbia Journal of Gender and Law* 851.

²¹⁷ Weinstein (n 109).

outlined demonstrate the difficulty with expecting reconciliation to be possible in deeply divided societies.²¹⁸ Christodoulidis explains this impulse towards a unified narrative in terms of the law's desire for certainty—certainty that can be contrasted with the openness, and therefore risk, inherent in reconciliation.²¹⁹ Law requires determination—the certainty of one agreed narrative rather than the uncertainty of a number of competing accounts of the conflict. It also, through the setting of time limits within which the work of transitional justice must be complete and naming a criteria by which the achievement of 'reconciliation' can be judged, sets a horizon on the achievement of reconciliation. 'Closure' is achieved when society is reconstituted, 'based upon democratic principles, rule of law and observance of human rights norms'.²²⁰ Reconciliation becomes a determinate outcome rather than an on-going process for managing enmity.²²¹ Critical perspectives on reconciliation in transitional justice suggest that it is simply not possible to whitewash the past. It is not possible to ignore the existence of radically divergent versions of the conflict and the identities that they produce.²²² If the outcome of transition is to be sustainable then it is necessary to leave a space for politics, where reconciliation is based on recognition of the 'other', not denial of the existence of difference.

What we see with these critiques of truth, forgiveness and reconciliation is the linear impulse of transitional justice. Truth-seeking looks to the past to establish the truth of events. The past is viewed from the vantage point of the present, but with a view to establishing a different future. This impulse is summed up in Teitel's well-known assertion that transitional justice is both backward- and forward-looking.²²³ From the standpoint of the present, the past is reinterpreted with the future in mind. The meaning of events is read in the context of an overall beginning, middle and end,²²⁴ in which injustice and violence is replaced with law and ultimately peace and justice. The desired endpoint of the transition—reconciliation—colours the interpretation of

²¹⁸ See Christodoulidis (n 109) for a particularly good discussion of the 'politics of naming' in which he addresses the labeling of right and wrong.

²¹⁹ Christodoulidis (n 109). See also Zenon Bankowski, 'The Risk of Reconciliation' in Scott Veitch (ed), *Law and the Politics of Reconciliation* (Ashgate 2007).

²²⁰ Weinstein (n 109).

²²¹ This is in distinct contrast to the view of reconciliation as a process advocated in the leading policy handbook on the issue. See International Institute for Democracy and Electoral Assistance, *Reconciliation After Violent Conflict: A Handbook* (Stockholm, 2003).

²²² Christodoulidis (n 109).

²²³ Teitel (n 75).

²²⁴ See Moon (n 195) 268.

the past and the way the story of the conflict will be told. As Moon states, 'Reconciliation as the prefigured closure of transition thus shapes the new official history *from its very beginning*.'²²⁵ Each of these critiques has sought to destabilise this neat progression, and to challenge the idea that a teleological reading of the past can accurately reflect the political dynamics of conflict. Ultimately critical scholarship has highlighted the impossibility of reaching one unified account of conflict and transition, and advocated the protection of a political space in which difference can exist.

The final critique to be considered, the 'ideology critique', moves beyond deconstruction of individual elements of transitional justice discourse and focuses more broadly on the dominant understanding of transition. In particular it reveals and interrogates the embeddedness of the discourse of transition within the liberal democratic paradigm.

c. Transitional Justice and the Ideology Critique

While transitional justice as a field has expanded well beyond its origins, it can be argued that it remains stubbornly rooted in a particular ideological tradition. Mutua characterizes transitional justice as an enterprise whose 'normative seeds are in the garden of liberal theory'.²²⁶ Transitional justice, from its inception, has been deeply rooted in liberalism. Both in terms of its goals and its methods, it is very much a product of the resurgence of ideas of a liberal peace that accompanied the end of the Cold War.²²⁷ This embeddedness in Western liberal theory has given rise in critical literature to a number of challenges in respect of *inter alia* the claims to universality of transitional justice, the dominance of civil and political rights as the frame of reference for justice in transition, and the individual versus collective rights dichotomy.²²⁸ However, while all of these critiques ask important questions of

²²⁵ Ibid 271. Emphasis in original.

²²⁶ Makau Matua, 'What is the Future of Transitional Justice?' (2015) 9 International Journal of Transitional Justice 1.

²²⁷ For detailed discussion of this see Catherine Turner, 'Delivering Lasting Peace, Democracy and Human Rights in Transition: The Role of International Law' (2008) 2 International Journal of Transitional Justice 126.

²²⁸ Matua (n 226).

transitional justice, there is also a body of literature that seeks to highlight further the ideological embeddedness that underpins theory and practice in transitional justice.²²⁹ The value of separating critique of the operation within a particular ideology, and interrogating the role of ideology in constructing the field, lies in the potential of the critical scholar to expose on a macro-level the political dynamics that shape our understanding of the meaning and goals of transition *per se* and how these impact the effectiveness or otherwise of transitional justice.²³⁰ Or, put more simply, what we need to consider is not just how existing transitional justice mechanisms might be adapted to fix divergent contexts, but how divergent contexts can shape our understanding of transitional justice. From this perspective, Third World and post-colonial critiques offer new insights into the operation of a field whose evolution has been driven by European and North American scholars and policymakers. For example, post-colonial critiques of transitional justice identify the way in which it operates within the framework of law and society created by colonialism, without taking into account differing political priorities and models of social organization that might make these frameworks inappropriate.²³¹ As Dawan highlights, ‘colonial relations still inform how problems are perceived and what solutions are offered’.²³² This is evident in the teleological approach to transition outlined above, in which endpoints of the reconstituted society are represented by human rights and democratic governance, for example, or the association of justice in transition with Western notions of accountability and legal institutional reform.²³³ Similarly Nesiah characterizes transitional justice as ‘incorporated into a North-South trajectory’ in which the global North ‘tilt[s] the field’.²³⁴ She therefore challenges feminist scholars to resist becoming mainstream within the field and rather to counter the hegemonic project.

²²⁹ See, in particular, the work of Wilson (n 192) on truth as a project of nation-building.

²³⁰ See Abdullahi An Na'im, 'Editorial Note: From the Neo-colonial 'Transitional' to Indigenous Formations of Justice' (2013) 7 International Journal of Transitional Justice 197.

²³¹ See for example Khanyisela Moyo, 'Mimicry, Transitional Justice and the Land Question in Racially Divided Former Settler Colonies' (2015) 9 International Journal of Transitional Justice 70.

²³² Dhawan (n 147) 264.

²³³ Dustin Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition' (2014) 9 International Journal of Transitional Justice 150.

²³⁴ Nesiah (n 148) 156.

Ideology critiques challenge us to ask important questions—such as for whose benefit does transitional justice exist?²³⁵ They also ask explicitly that which is only hinted at by other critiques, namely, what are we transitioning from, and what are we transitioning to? How do we strike the balance between liberty and equality?²³⁶ These are fundamental questions that relate to the organization of society, the answers to which are simply taken for granted in transitional justice discourse, but which may nevertheless be the subject of considerable political division within affected states.²³⁷ The liberal framework assumes the impartiality of law as between competing conceptions of law and state, presenting itself as a depoliticized framework that transcends political division, and yet in transitional contexts it may be unable to play the neutral role it assumes.²³⁸ So it is perhaps from an ideological perspective that critique is most required. Robbins highlights how ‘transitional justice appears to have become ossified in an incantation that is directly linked to the transitions of the post-Cold War era and the hubris of the end of history’.²³⁹ As such it has been unable or unwilling to adapt to the changed contexts in which it is now applied.²⁴⁰

4. CONCLUSION

The purpose of this literature review was to explore the way in which transitional justice has evolved to become the dominant language in which the move from war and peace is discussed.²⁴¹ By tracing the progression from the articulation of a ‘concept’ of transitional justice and its institution in law and policy the review has demonstrated how law and legal form has come to dominate how transitional justice is understood.²⁴² The review suggests that the effect of the institution of transitional justice into law and policy has been to create a ‘theatrical space’ within which efforts

²³⁵ See Rosemary Nagy’s critique, ‘Transitional Justice as Global Project: Critical Reflections’ (2008) 29 *Third World Quarterly* 275.

²³⁶ *ibid.*

²³⁷ See e.g. Catherine Turner, ‘Transitional Constitutionalism and the Case of the Arab Spring’ (2015) 64 *International and Comparative Law Quarterly* 267.

²³⁸ *ibid.*

²³⁹ Simon Robbins, ‘Mapping a Future for Transitional Justice by Learning from its Past’ (2015) 9 *International Journal of Transitional Justice* 181.

²⁴⁰ See for example Reem Abou-El-Fadl ‘Beyond Conventional Transitional Justice: Egypt’s 2011 Revolution and the Absence of Political Will’ (2012) 6 *International Journal of Transitional Justice* 318; Turner (n 237).

²⁴¹ Bell (n 1)

²⁴² McEvoy (n 6)

at peace making must play out.²⁴³ The effect of the creation of this ‘theatrical space’ has been to create a mainstream and a margin in transitional justice research. The critical approaches outlined have all sought to expose the existence of this dynamic. All of the critiques discussed have shared the concern that transitional justice attempts to neatly package complex dynamics into a progressive narrative of war and peace. In this narrative, conflict is categorised as rupture, as an aberration that interrupts normal life, but that can be addressed by properly designed (legal) institutions. The proper design and implementation of these largely legal solutions has the effect of fitting the conflict into a neat linear account of historical factors that caused the conflict, and that can then be isolated as a means of addressing that conflict and preventing its recurrence. This requires the acceptance of the possibility of a unified and progressive narrative in which the past can be separated from the present, and indeed from the future. Each of the critiques discussed has demonstrated how the separation of past, present and future, and the presentation of a progressive temporality, obscures the deeper dynamics of transition. Although the model of transitional justice, both in theory and practice, has been subjected to increasingly rigorous critique, which has begun to question the very existence of the field, there is little sense from this literature that there is no role for the idea of ‘transitional justice’.²⁴⁴ This is a remarkable testimony to the resilience of the *idea* of transitional justice - to the idea that there should be an exceptional space carved out of everyday politics in which questions of truth, justice and reconciliation are addressed. Rather than a dismissal of the idea of transitional justice altogether, what emerges both from the internal and the external critiques is the idea that transitional justice has both determinate and reflexive aspects. As the model currently operates, it has tended to focus on a set of narrowly defined priorities, which has effectively precluded the transformative potential of the model itself. The vast majority of these critiques are an appeal to rethink the way in which transitional justice is conceptualized to leave open the transformative potential of transition, so that it can achieve its potential.

This thesis suggests that to ensure that transitional justice acts as a transformative force a broader view needs to be taken of its aims and its operation. The thesis does

²⁴³ On Cosmopolitanism and Forgiveness (n 198) 29

²⁴⁴ On a note of caution, however, these are the critiques that engage with and are themselves visible to transitional justice. This claim does not take account of those silences borne of an unwillingness to participate in the discourse and thereby legitimate its application.

not aim to replicate the critical analysis outlined. Nor does it intend to critique any particular mechanism of transitional justice. Rather the aim is to ascertain how critical engagement can contribute to our understanding of transitional justice. To this end it explores in greater detail the operation of the *model* of transitional justice, and the effect that the emergence of a 'theatrical space' of transition has had on the way we think about conflict resolution. By taking a step back and working at a slightly higher level of abstraction, it aims to join the dots between each of the separate critiques presented. Rather than exploring discrete sites of silence and invisibility it seeks to ask the bigger question of *why* some voices and some experiences are excluded from transitional justice discourse. In so doing it proposes a coherent theoretical framework within which these disparate critiques can be understood. This is achieved by highlighting the relationship between violence, law and justice in constructing understandings of conflict and transition. The following chapter explores how deconstructive analysis can provide useful insights into the way in which the meaning of justice is constructed. It therefore casts new light on the reasons that some groups resist participating in transitional justice, highlighting points of convergence between apparently distinct sites of resistance and considering the macro-structure of contestation over the meaning and purpose of transition. By reflecting on the overarching concept rather than the individual mechanisms of justice, the thesis asks whether silence and exclusion are immanent to transitional justice as we currently understand it.

CHAPTER 3: METHODOLOGY (ON WHY DECONSTRUCTION IS NOT A METHOD)

Transitional justice as a field of inquiry has, until recently, been relatively under-theorised. This can be seen as a logical consequence of its recent emergence, and the fact that a field must become established before it can be robustly critiqued.¹ However, as the previous chapter has demonstrated, transitional justice is now subject to increasingly critical interrogation, from disciplines ranging from anthropology to theology. These critical perspectives that have been brought to bear on transitional justice have highlighted its blind spots, and the ways in which the model of transitional justice itself has set the boundaries of inclusion and exclusion in the transitional space. Building on the critiques of transitional justice outlined in the previous chapter, this chapter now seeks to expound at a theoretical level the points of convergence between these critiques. In so doing it explores how critical engagement can contribute to our understanding of transitional justice. The purpose of this exercise is to move the critique beyond simply asking ‘who’ or ‘what’ is excluded from transitional justice, but also ‘how’ and ‘why’ this exclusion occurs. Drawing on the work of Jacques Derrida, and in particular on the approach of deconstruction, this chapter builds on the analysis presented in Chapter Two by examining in more depth the way in which our understanding of transitional justice is premised on a series of oppositions. The aim of this approach is to ascertain the significance of an oppositional structure for the possibility of resolving conflict. At this point it should be noted that the thesis is first and foremost a thesis about transitional justice. There are critical scholars who focus more closely on the specific texts of Derrida’s drawn upon in this work.² The contribution of this thesis is to apply the deconstructive premise of Derrida’s reading of law, politics, ethics and justice to the relatively newly constituted field of transitional justice. It therefore proposes a new reading of transitional justice that uses deconstruction as a means of exploring both the promise and the pitfalls of the field.

¹ Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’ (2009) 3 *International Journal of Transitional Justice* 5 on the establishment of the field and how critique is beginning to emerge.

² See, for example, Richard Beardsworth, *Derrida and the Political* (Routledge 1996); Peter Goodrich and others, ‘Introduction: A Philosophy of Legal Enigmas’ in Goodrich and others (eds), *Derrida and Legal Philosophy* (Palgrave Macmillan 2008); Jacques De Ville, ‘Sovereignty Without Sovereignty: Derrida’s Declarations of Independence’ (2008) 19 *Law and Critique* 87.

This Chapter is divided into three sections. Section One explores the origin and development of the term ‘deconstruction’ in the context of linguistics and the power of language to shape meaning. It discusses its application to institutions and systems of thought and analyses the emergence of the concept of ‘*différance*’ that is central to deconstruction. Section Two outlines the understanding of deconstruction that informs the thesis. In particular it distinguishes between deconstruction and other methodological approaches to transitional justice. Section Three builds on this analysis by considering the application of the idea of deconstruction to the law. It explores Derrida’s work on the nature of law, and on the relationship between law and justice that makes law essentially deconstructible. In this way the Chapter progresses with Derrida’s own work, beginning with the philosophical origins of his deconstructive approach, and culminating in its logical engagement with the question of violence and transition. The Chapter suggests that by its very nature deconstruction provides a valuable tool for interrogating the underlying assumptions not only of the subject with which it is immediately concerned, but also of broader structures of philosophical thought and method that underlie our systems of meaning. It is therefore a highly transferable approach for the critical mind, and one that can make a significant contribution to our understanding of transitional justice. And yet it is not an approach that has yet been taken to the study of transitional justice. The use of post-structural theory to question the foundations of transitional justice is only beginning to emerge. This thesis aims to contribute to an emerging critical engagement with the model of transitional justice.

1. WHAT IS DECONSTRUCTION?

‘Deconstruction’ is a word that evokes competing conceptions of the value of critical thought. For some, deconstruction can be criticized for failing to engage with important questions of justice and ethics.³ For others, it is a necessary means of exposing the absence of secure foundation, of revealing the contingent nature of accepted values and beliefs. Deconstruction therefore means different things to

³ Jacques Derrida, ‘Force of Law: The Mystical Foundation of Authority’ in Drucilla Cornell and others (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992) 1,7 (hereinafter ‘Force of Law’). Derrida acknowledges how his texts can *seem* not to foreground these issues. See also Goodrich and others (n 2) 1.

different people.⁴ By its very nature it defies institutionalization in an authoritative definition. Derrida first outlined his concept of deconstruction in the context of language and linguistics,⁵ exploring the interplay between language and the construction of meaning. From this early work, and later works in which he has attempted to explain deconstruction to others,⁶ it is possible to provide a basic explanation of what deconstruction is commonly understood to mean.⁷ Three key features emerge from Derrida's work as making deconstruction possible. These are, first, the inherent desire to have a centre, or focal point, to structure understanding (logocentrism); second, the reduction of meaning to set definitions that are committed to writing (nothing beyond the text); and, finally, how the reduction of meaning to writing captures opposition within that concept itself (*différance*). These three features found the possibility of deconstruction as an on-going process of questioning the accepted basis of meaning. Each will be explained in turn.

a. Logocentrism

Deconstruction is commonly associated with the identification and inversion of binaries, and revealing the way in which some groups, or some ideas, become subordinated to others. While this is a simplified, and incomplete, way of characterizing deconstruction,⁸ it is nevertheless a useful starting point from which to explore Derrida's understanding of the way in which meaning is constructed. Derrida takes as his starting point the assertion that modern Western philosophy is characterized by and constructed around an inherent desire to place meaning at the centre of presence. Put simply, what this means is that philosophy is driven by a

⁴ Michael Rosenfeld, 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism' in Drucilla Cornell and others (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992) 152.

⁵ Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, John Hopkins University Press 1976).

⁶ Jacques Derrida, 'Letter to a Japanese Friend' in Peggy Kamuf and Elizabeth G Rottenberg (eds), *Psyche: Interventions of the Other Volume III* (Stanford University Press 2008) 1 (hereinafter 'Letter'); Jacques Derrida and John D Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (Fordham 1997) (hereinafter 'Villanova Roundtable').

⁷ However such explanation should be undertaken with caution, as Derrida himself was uneasy with applying a label to deconstruction. Simon Critchley, 'An Ethos of Reading' (2005) 129 *Radical Philosophy* 26. To apply a label is to risk belittling its complexities. Beardsworth (n 2) xv. As Ramshaw notes, 'One may be obliged to employ such words when describing deconstruction, but the spectre of this warning necessarily haunts each use'. Sara Ramshaw, 'Deconstructing Jazz Improvisation: Derrida and the Law of the Singular Event' (2006) 2 *Critical Studies in Improvisation* 1, footnote 13.

⁸ Jacques Derrida, *Positions* (The Athlone Press 1981) 59 (hereinafter 'Positions').

desire for the certainty associated with the existence of an absolute truth, or an objective meaning that makes sense of our place in the world. The clearest example of this dynamic occurs in religious thought. The Bible states that in the beginning there was The Word, and that the Word was God.⁹ This statement confirms to the believer the existence of a higher authority that can, through the study of religious teaching, be discovered. The pursuit of 'The Word' therefore shapes the meaning of life for the religious believer. Termed 'logocentrism' by Derrida, when seen in broader terms this dynamic results in one particular term or concept being placed at the centre of all efforts at theorizing or interrogating meaning. The term becomes the core around which meaning is constructed - the reference point that determines all subsequent knowledge. In this way it becomes the foundational concept for the whole system.¹⁰

In the context of transitional justice, the reference point is 'justice'. The field depends for its existence on an abstract idea of justice that provides both the basis for its institution in law and policy and the standard against which efforts are judged. Without the existence of this abstract idea of justice, the field would be meaningless. Instead of a coherent field of activity, held together by a common claim to legitimacy,¹¹ transitional justice would exist simply as a fragmented series of initiatives, not held together by any common conceptual thread, but simply a range of different approaches driven by diverse motivations and judged according to different criteria. Justice is therefore the *logos*. Teitel's conceptualization of the field of transitional justice, as discussed in Chapter Two illustrates in practice how logocentrism works and how it shapes the ways in which transitional justice is given meaning in the present, in that it demonstrates the way in which one unifying concept, that of justice, can be used to narrate a coherent approach to transition.¹²

Having highlighted the existence of this trend towards logocentrism, Derrida explores the origin of the *logos*, and the way in which it becomes instituted into tangible form.¹³ His work highlights how logocentrism assumes the existence of set and stable

⁹ *The Holy Bible, King James Version* (Cambridge University Press 1611).

¹⁰ Derrida (n 5) 49. Derrida terms this dynamic within philosophy as a metaphysics of presence—as an acceptance of the existence of an external referent. This referent is the 'transcendental signified'—that which is to be captured in writing.

¹¹ Bell (n 1) 7.

¹² For detailed discussion of this see Chapter 2.1.b

¹³ Derrida (n 5).

meanings that exist to be discovered.¹⁴ The way in which this term—the *logos*—is made known is language, the translation into words of a concept or a way of thinking. Derrida describes this as the ‘metaphysics of presence’¹⁵—the way in which we make present the objects of our thought. The *logos* represents nature, which is something different from the instituted form embodied in language or in text.¹⁶ Crucial therefore is the idea of a rigid separation of the origin of meaning (the abstract idea of justice, for example) and the institutionalization of that meaning in ‘writing’.¹⁷ Traditional philosophy relies on being able to maintain this distinction between nature and convention.¹⁸ The written form - for example the Secretary General’s Report on the Rule of Law and Transitional Justice in Conflict and Post Conflict States,¹⁹ widely cited as the most authoritative statement of the meaning of transitional justice - is preceded by the originary ‘truth’ which is external to it. The Report simply reflects the truth of the demands of justice in transition. Therefore what is important is that under traditional rules of philosophy the act of writing does not create meaning, but rather is simply the institution of a meaning that already exists, that precedes its capture in written form.²⁰ Consequently, and to further reinforce the significance of this separation, the authority of writing is secured by the fact that it can appeal to this exterior force, this higher meaning, such as justice.²¹ This is seen in Teitel’s assertion that law in transition embodies principles of justice that are absent from domestic law.²² The principles of justice - the *logos* - are what generate legitimacy for a reconceptualised model of law in transition precisely because they exist independently of that law.

¹⁴ *ibid* 47. Derrida describes logocentrism and the metaphysics of presence as the exigent, powerful, systematic and irrepressible desire for a transcendental signified, such as truth.

¹⁵ *ibid* 49.

¹⁶ *ibid* 13.

¹⁷ For Derrida, ‘writing’ refers to ‘the disruption of the presence in the mark’ and not the written form *per se*. Jacques Derrida, ‘Signature, Event, Context’ in Alan Bass (tr), *Margins of Philosophy* (The Harvester Press 1982) 307 (hereinafter ‘Signature, Event, Context’). However, in the context of this thesis, I use written form to illustrate this relationship between nature and its institution.

¹⁸ Derrida (n 5) 13 ‘Metaphysical roots require the separation of signifier and signified.’

¹⁹ United Nations, ‘Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies’ (UN Doc S/2004/616, United Nations 2004).

²⁰ Derrida (n 5) 15 describes this as the text being secondary, preceded by truth, or a meaning already constituted and within the element of the *logos*.

²¹ *ibid* 15. The privilege of *logos* founds the literal meaning then given to writing.

²² See Chapter 2.1.b.ii

b. Nothing Beyond the Text

However, for Derrida, it is this logocentrism, and the idea of the exteriority of meaning, that opens up the possibility of deconstruction. Derrida examines how the natural ‘origin’ of meaning and its ‘institution’ in writing cannot be so easily separated. Rather than nature and institution existing independently of each other, what is being suggested is that nature itself is constructed only with reference to the institution.²³ They therefore depend on each other for their existence. This is a rejection of the rigid separation between the two that makes the quest for certainty possible. It destabilizes the basic philosophical premise that institution simply reflects a prior natural origin. The origin is not something that is external to the institution, but is created at the moment of institution.

For Derrida, nature and institution exist in a relationship of oppositional hierarchy.²⁴ What this means is that rather than nature preceding the institution, and simply being reflected or enshrined in writing, the act of writing itself - of institutionalization - subordinates nature to the institution. What Derrida suggests is that the process of institution itself, the process of writing, helps to shape meaning. By reading text or writing as reflecting or embodying a natural origin, what is ignored or concealed are all the other possible interpretations of nature that are not embodied or encapsulated in that text. In this way writing defines nature, as well as reflecting it. It subordinates nature to the interpretation captured in the institution, which itself becomes the dominant meaning. The process of institutionalization therefore enshrines meaning by its privileging of one particular interpretation of nature, an interpretation which was not possible except for its existence in writing.²⁵ The point at which this particular interpretation is enshrined is the moment of origin of meaning. So to return to the case of transitional justice, despite the existence of a complex web of interrelated claims to the genesis and aims of transitional justice,²⁶ one overarching narrative has emerged dominant—that instituted in the Secretary General’s Report, which casts ‘justice’ in transition as existing as a set of ‘normative principles embodied in mechanisms such

²³ Derrida (n 5) 46.

²⁴ *ibid* 13, 41-45. See also *Positions* (n 8) 41.

²⁵ Derrida (n 5) 109.

²⁶ Catherine Turner, ‘Deconstructing Transitional Justice’ (2013) 24 *Law and Critique* 193.

as trials, truth commissions and reparations'.²⁷ The encapsulation of this particular interpretation of justice in the written and extensively cited Report of the Secretary General shapes our understanding of what justice means, but excludes alternative interpretations through the privileging of one at the expense of the others.

For Derrida the absence of another here and now, of another transcendental present or of another origin of meaning that also presents itself as natural, reveals the arbitrariness both of the way in which meaning comes to be instituted and, as a result, of the supposed opposition between nature and institution.²⁸ The idea of deconstruction is therefore concerned with countering the idea of a transcendental origin or natural referent.²⁹ It refutes the notion that it is possible to transgress the institution in order to discover something beyond - the existence of an independent origin such as a historical or a metaphysical reality that justifies the institution. This idea is famously encapsulated in the phrase 'There is nothing outside of the text',³⁰ which is often used to summarise Derrida's work. While a pithy sound bite, the phrase embodies the spirit of deconstruction as a process that rejects the idea of a transcendental origin of meaning that exists independently of the way in which we translate that meaning and give it form. Rather it requires deeper interrogation of the interplay between the origin and the institution, and recognition of the ways in which the two are mutually constituted, each relying on the other for its meaning. This opposition opens up new possibilities for understanding meaning. Rather than relying on rigid distinctions and trying to work within the opposition, Derrida suggests that the relationship between the origin and the institution should be seen 'as an operation and not as a state, as active movement and not a given structure'.³¹ The difference between nature and the institution can only exist if there is a 'condition outside', if one is regarded as being external to the other. It is this separation that Derrida critiques, and that deconstruction explicitly addresses. What is being deconstructed is

²⁷ Jelena Subotic, 'The Transformation of International Transitional Justice Advocacy' (2012) 6 International Journal of Transitional Justice 106, 120.

²⁸ Derrida (n 5) 47.

²⁹ 'Transcendental' in this context is used to signify a standard that exists above the law.

³⁰ Derrida (n 5) 158. The French original of this phrase is '*il n'y a pas de hors-texte*'. Derrida suggests that this would be better translated as 'There is no outside text', removing the temptation to misinterpret the phrase as privileging writing, and emphasizing the internal dynamics of the construction of meaning to which Derrida refers. It could also be noted that this debate illustrates very well Derrida's point about writing coming to determine meaning, rather than simply reflecting it.

³¹ *ibid* 51.

the idea that the origin of meaning and its institution exist as separate beings. In the context of transitional justice, this means questioning the way in which appeals to justice serve to legitimate claims in respect of the role of law in transition.

c. '*Différance*'

Derrida's approach takes as its starting point the existence of an oppositional structure to thought, in which two concepts, such as war and peace, are cast as different. However, rather than simply inverting the hierarchy or seeking to reverse the position of each of the concepts, what deconstruction does is to recognize that the difference between the two concepts, and the interplay between them, is crucial to determining meaning.³² What this confirms is that for Derrida the origin does not exist independently of its institution, but exists only 'through its functioning within a classification and therefore within a system of differences...'³³ Derrida terms this phenomenon '*différance*', and it is this idea that forms the basis of deconstruction.³⁴

Différance refers to the fact that meaning cannot be regarded as fixed or static, but is constantly evolving. Rather than pursuing the truth of a natural origin, what deconstruction requires is the interrogation of the 'web of interdependent contingent interpretations' that combine to produce individual legal and philosophical positions.³⁵ The act of institution - or writing - itself captures this constant competition between the differing possible interpretations of meaning within the institution. The effect of the translation of thought into language is therefore to inscribe *différance* into the structure of meaning. It simultaneously embodies the desired meaning as intended by the author, and the constraints placed on that meaning through the act of interpretation of the text.³⁶ In this regard, meaning is defined equally by what is included in the institution and what is not. At any one time, one concept will be dominant over the other, thus excluding the other. However while the idea of exclusion suggest the absence of any presence of that which is excluded, in

³² *ibid* 63.

³³ *ibid* 109.

³⁴ The term *différance* itself is an invention of Derrida's, intended to encapsulate the dual meaning of difference and deferral that combine to create difference. See Geoffrey Bennington and Jacques Derrida, *Jacques Derrida* (Geoffrey Bennington tr, University of Chicago Press 1993) 71.

³⁵ Ben Matthews, 'Why Deconstruction is Beneficial' (2000) 4 *Flinders Journal of Law Reform* 105, 110.

³⁶ Rosenfeld (n 4).

fact that which is instituted depends for its existence on what has been excluded. The two exist in a relationship of hierarchy.³⁷

To return to the example of transitional justice, certain mechanisms, such as trials and truth commissions, are deemed legitimate by virtue of the fact that they are regarded as embodying principles of justice, as instituted in law and policy relating to transition. Other mechanisms, such as amnesties, are deemed illegitimate as they are regarded as conflicting with these policies, as embodying impunity, and by extension as being incompatible with the principles of justice. The determination of what is deemed legitimate and illegitimate represents the interplay of ideas in which legitimacy is defined both in terms of what it includes but also what it excludes. Legal mechanisms for accountability are deemed an appropriate response to conflict precisely because they combat impunity. Therefore our understanding of transitional justice is conditioned not only on our understanding of the ways in which accountability in the form of trials or truth commissions embody the *logos* of justice, but also how impunity contradicts it. Both accountability and impunity are integral elements of our understanding of 'justice'. It is the on-going process of negotiation over where the boundary between the two lies that gives rise to the instability of meaning.³⁸ This interplay also confirms the artificiality of the distinction between the origin and its institution. It is the interplay between the seemingly oppositional concepts of accountability and impunity that conditions our interpretation of justice, rather than a fixed meaning of justice that allows us to assess the relationship between accountability and justice, or impunity and justice. When seen in these terms the oppositional structure of meaning is accepted, but what it suggested is that this opposition is something immanent to meaning, something productive rather than a state of affairs to be redressed. It is this interplay that Derrida terms *différance*.

Davies, in her commentary on deconstruction, highlights the twofold nature of the idea of *différance*, made up of the distinct ideas of differing and deferring. She first emphasizes that the idea of difference inherent in the term speaks to the fact that any system of meaning cannot be regarded as fixed, static or unchanging. This is a logical

³⁷ Positions (n 8).

³⁸ See, for example, early debates on whether truth, as instituted in the South African TRC embodied or denied justice. Discussed in Chapter 2

consequence of the rejection of the idea of a ‘natural’ origin that precedes the institution. If the idea of nature itself is rejected, it is no longer possible to rely on the existence of an idea in nature that can be simply instituted in writing. Rather than meaning being based upon an existing and stable set of criteria, for Derrida it is created by an on-going and dynamic process of production through continual exclusion and setting up of differences. It is a process of constant negotiation of meaning, in which different opinions and interpretations of how the origin should be translated jostle for position. The second element of *différance* follows on from the first. Given that it is not possible to identify one true origin or meaning, and that it is constituted through an on-going process of negotiation, it cannot be said that meaning can be determined in the present. This point speaks directly to Derrida’s identification of a metaphysics of presence whereby we make present, in the here and now, the objects of our thought. If the construction of meaning is a constant process of negotiation between the origin and the institution, then it will be impossible to ascribe fixed characteristics to meaning, as it is constantly changing in light of the shifting nature of the process. Meaning will always be constructed with reference either to what has preceded it, or what is yet to come.³⁹ It will be interpreted and re-interpreted in light of shifting events and understandings, making it inherently unstable in form. Text has no inherent meaning, no one true meaning that exists to be discovered. Therefore there is no ‘outcome’ to deconstruction, but rather an on-going process of destabilization through which systems of meaning are revealed. The aim of writing in these circumstances may be to attempt to reconcile difference, to reach an agreed version of the ‘origin’,⁴⁰ however this is never wholly achievable. This approach explicitly rejects a progressive, or genealogical,⁴¹ reading of philosophy in which one arrives at true meaning at the end of a process of evolution. It therefore expressly engages with the dominant genealogical reading of transitional justice in which the current (legal) model is juxtaposed with earlier, failed, models tainted by claims of

³⁹ Margaret Davies ‘Derrida and Law: Legitimate Fictions’ in Tom Cohen (ed), *Jacques Derrida and the Humanities: A Critical Reader* (Cambridge University Press 2002) 213. This means that how we understand a particular concept is determined not only by the past that gave rise to it, but also by how it is interpreted in the future. This is discussed in more detail in Chapter 5.

⁴⁰ Rosenfeld (n 4) 159, arguing that history is replete with examples of texts intended to reflect a ‘concrete vision of the desired reconciliation between self and other...’

⁴¹ The term ‘genealogical’ is used here in reference to Teitel’s famous ‘Transitional Justice Genealogy’ in which the origins of the field are traced from a historical and progressive perspective. Ruti Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Law Journal* 69 (hereinafter ‘Genealogy’).

victor's justice, for example, or requiring political negotiation and compromise.⁴² Traces of each of these earlier examples continue to be present within the current model, and it is the interplay between them that shapes our understanding of transitional justice rather than the location of current trends at the 'end of history', and therefore embodying a self-evident *logos* of justice. Having explained the basic premise of deconstruction, and how it can advance our understanding of transitional justice, the next step is to distinguish its operation from that of alternative methods more traditionally associated with the field of transitional justice.

2. DECONSTRUCTION 'HAPPENS'

The preceding section has outlined how deconstruction is concerned not with the discovery of 'truth' or of distilling correct conclusions, but rather with the process of questioning itself. It is characterized by an uncertainty, or indeterminacy, that stands at odds with many more traditional research methods. A brief survey of the literature on transitional justice reveals two distinct methodological approaches. The first is the study of mechanisms themselves. The rationale, the design and the operation of a wide range of transitional mechanisms, from the original work on trials to more recent work on reparations, forms the subject matter of a significant body of work in the field. The concern of these studies is with the effectiveness of specific mechanisms, and they are framed as critical evaluations of the contribution of each of these to justice. The second significant approach is that of the case study. Work in this area focuses on detailed research of particular geographic case studies as a means of learning lessons for broader application to transitional justice. Whether single case studies or comparative approaches, the premise with this approach is that there are particular characteristics that can be distilled and applied in other contexts, representing a quest for objective factors that contribute to justice. While it is suggested that these approaches are driven by a desire to identify objective characteristics of justice, that does not mean that they are not critical. The engagement of feminist scholars with trials and truth commissions, for example, or post-colonial scholars on transitional justice in Africa, has produced significant critical insight into

⁴² *ibid.* See also Positions (n 8).

these particular examples.⁴³ Nevertheless what unites these approaches is the aim of assessing how transitional justice mechanisms contribute to the achievement of the underpinning *logos* of justice.⁴⁴ This can be contrasted with the approach of deconstruction adopted in this thesis. The approach taken in this work is not to critique the mechanisms of transitional justice as a way of achieving justice, but rather to explore how our understanding of justice is constructed, and in turn how this impacts on our evaluation of how it is to be achieved.

a. Deconstruction is Not a Method

The most significant feature of deconstruction is that it is not a ‘method’, and it cannot be transformed into one.⁴⁵ This may appear to be an odd assertion in the current context but it highlights an important feature that underpins the entire premise of the work. Deconstruction is not a method but rather a process. It does not consist of set rules, procedures, methods and accessible aspects.⁴⁶ One cannot ‘apply’ deconstruction to test a hypothesis or to support an argument.⁴⁷ Rather it is an on-going process of interrogation concerned with the structure of meaning itself. Deconstruction as an approach follows from the identification of a twofold structure of *différance*. Derrida highlights how at any given time ‘one of the two terms governs the other or has the upper hand’.⁴⁸ They are said to exist in a state of violent hierarchy. Therefore the first task of deconstruction is to overturn the hierarchy. This, according to Derrida, is necessary in order to highlight the ‘conflictual and subordinating structure of opposition’.⁴⁹ It emphasizes the dominance of one particular way of thinking over others, and belies the idea of fixed meaning, overturning, and therefore exposing, the existence of the binary and destabilizing previously fixed categories of understanding. However this is only the first stage. Derrida emphasizes how to remain in this phase is to remain within the oppositional structure, allowing the hierarchy to re-establish itself. If deconstruction is limited to the simple inversion of binaries, then inquiry remains trapped ‘within the closed field

⁴³ See Chapter 2.3 for discussion

⁴⁴ Derrida (n 5) 103 discusses the acceptance of the separation of the origin and institution as allowing for ‘methodology’, understood as ‘the scholar’s right to employ methodological tools whose logical value is anticipated, and in a state of precipitation with regard to the “object”, to “truth”, etc.’

⁴⁵ Letter (n 6).

⁴⁶ Force of Law (n 3) 116.

⁴⁷ Derrida (n 5) 103..

⁴⁸ Positions (n 8) 41.

⁴⁹ *ibid.*

of these oppositions'.⁵⁰ What this means is that instead of making any real change to structural conditions, what we are doing is simply swapping the positions of dominant and subordinate, allowing the same conditions to persist. When thought of in terms of conflict and transition, if the only effect of transition is to reverse the positions of abused and abuser, without addressing the structural conditions that allow abuse to happen, then no meaningful change will have been made.

In order to move beyond this dynamic, and to break open the structure itself, a second stage is necessary. This second stage is where the indeterminate element of deconstruction becomes visible. Rather than resting with the inversion of the binaries, and by extension accepting a different manifestation of fixed meaning, the second phase requires us to step outside the oppositions, to remain in search of new meanings,⁵¹ not by repeating ideas but by analyzing how ideas are framed, how arguments are made. Derrida describes this as searching for the 'tensions, the contradictions, the heterogeneity within [the] corpus'.⁵² It is only through this element of endless analysis, criticism and deconstruction that we can prevent existing structures of dominance from re-asserting themselves.⁵³

When seen in these terms it is clear that deconstruction cannot be described as a method or a methodology in the traditional sense of the word. However Derrida also distinguishes it from other approaches, such as critique.

b. Deconstruction is Not Critique

Deconstruction is neither analysis nor critique.⁵⁴ It is not done with a particular aim. It is not a search for a 'simple element' or 'indissoluble origin'.⁵⁵ The consequence of this is that its value is not linked to any subsequent reconstruction. As discussed above, it does not exist to take apart one structure to replace it with another, but exists simply to reveal the inner logic of that structure so as better to understand it. The fact

⁵⁰ *ibid.*

⁵¹ *ibid* 59-66.

⁵² Villanova Roundtable (n 6) 9.

⁵³ *ibid* 42. This is discussed in greater detail in Chapter 4

⁵⁴ Letter (n 6).

⁵⁵ *ibid.*

that it does not seek ‘strategic engagement’ such as that used by feminist scholars,⁵⁶ for example, means that it is not openly identified with advocacy and activism that pursues justice. Deconstruction differs from the other critical approaches discussed in Chapter Two in that it does not promote definite political action, nor does it propose definite substantive outcomes. This is a logical response to the central premise of deconstruction, which rejects systems of thought that require determinate presence or truth.⁵⁷ This failure to take an overtly political stance on big questions led, in the early years, to a charge that deconstruction was an inherently unethical project that was at odds with a quest for justice.⁵⁸ Derrida is clear, however, that although deconstruction is not primarily concerned with advocacy or activism, nor is it nihilistic or anarchic. It does not reject the need for law and institutions, but rather seeks to work within those structures to reveal new possibilities.⁵⁹

c. Deconstruction is Not an Act

Finally, deconstruction is not an act or an operation. Rather, it is something that happens, something that takes place.⁶⁰ It takes place everywhere. It does not require deliberation or consciousness, but rather its potential exists within our structures of meaning. It is interested in exploring and revealing the internal logic of ideas and meaning. It is concerned with opening up these structures and revealing the way in which our understanding of foundational concepts is constructed. This is internal to meaning itself, and not dependent on external factors.⁶¹ What this suggests is that the possibility of deconstruction exists within the structure of meaning itself, within the structure of *differánce*, and is not something to be found and applied from the outside. Therefore to attempt to reduce deconstruction, which is concerned with the deeper interrogation of meaning, to a formalistic method would be to reduce its possibility.⁶² It is primarily concerned with understanding ideas, not with their application.

⁵⁶ Sari Kuovo, ‘Review Essay: Feminism, Gender and International (Criminal) Law: From Asking the “Woman Question” in Law to Moving Beyond Law’ (2014) 16 International Feminist Journal of Politics 669.

⁵⁷ The idea of strategic engagement is discussed in Chapter 2.3.a.i

⁵⁸ Rosenfeld argues that ‘the ontological and ethical constraints imposed by deconstruction do not usually dictate a single determinate meaning.’ Rosenfeld (n 4)165.

⁵⁹ Goodrich (n 2) 9.

⁶⁰ Villanova Roundtable (n 6) 6.

⁶¹ Letter (n 6); Villanova Roundtable (n 6) 9.

⁶² For more detailed discussion see section one.

⁶³ Letter (n 6).

Deconstruction does not aim to provide answers. It does not seek to prove an objective truth, or to support any one particular claim to justice over another. For this reason deconstruction itself is indeterminate, and therefore distinguishable from traditional ‘methods’ that apply a particular set of rules to test a hypothesis from which definite conclusions can be drawn. Derrida concedes that deconstruction is ‘impossible’.⁶³ The ‘happening’ of deconstruction is not going to lead to a determinate outcome. It will not reveal the ‘right’ way to do transitional justice. It will not provide us with a definitive definition of the meaning of justice in transition that can be codified in a new UN toolkit. Rather, deconstruction requires first and foremost the relentless pursuit of the impossible. What is ‘happening’ is not the pursuit of an answer which marks the end of the inquiry, but rather the on-going questioning that keeps our minds open to the idea that there may be alternative views and understandings of the meaning of justice in transition. When seen in these terms, it is not a method but simply a way of reading, writing, thinking and acting.⁶⁴ Rather than seeking an endpoint or a solid conclusion, the means cannot be distinguished from the end.⁶⁵ The on-going process of questioning is the end in itself. It is about negotiating the impossible and the undecideable and, in so doing, remaining open to the possibility of justice.⁶⁶

d. Deconstructing Transitional Justice

Herein lies the value of deconstruction for a project on transitional justice. Its possibility lies in the very fact that it does not seek to privilege one truth over the other, nor does it admit the possibility of a unitary truth. Rather, it works between irreconcilable positions to keep open the possibility of a new approach. To reduce it to a ‘method’ with set technical criteria and means would be to diminish the possibilities. To deconstruct the model of transitional justice is not an attempt to undermine or destroy the model. Deconstruction is not destructive, but rather an

⁶³ Force of Law (n 3) 116. ‘Impossible’ in this context does not refer to the opposite of ‘possible’. See Jacques Derrida, *Monolingualism of the Other: or, The Prosthesis of Origin* (Patrick Mensah tr, Stanford University Press 1998). Rather, for Derrida, the structure of *différance* and the on-going process of negotiation that it entails create the conditions for the possible. See Beardsworth (n 2) 26.

⁶⁴ Villanova Roundtable (n 6) 32.

⁶⁵ Gehring describes Derrida as balancing on the border between form and content, regarding deconstruction as procedure. Petra Gehring ‘The Jurisprudence of the “Force of Law”’ in Peter Goodrich et al (eds), *Derrida and Legal Philosophy* (Palgrave Macmillan 2008) 55.

⁶⁶ This is discussed in more detail in Chapter 6.

affirmative force.⁶⁷ It does not simply oppose institutions, such as the model of transitional justice, but nor does it simply repeat (or perpetuate) the given assumptions upon which the model is premised. This means that rather than accepting the established normativity or character of the field and replicating that logic, deconstructing transitional justice opens the model up to questioning, and so reveals new possibilities within the model.⁶⁸ It therefore works between the model as it currently exists and the future possibilities of the model. For Derrida, deconstruction consists of dismantling not institutions themselves, but rather ‘structures within institutions that have become too rigid, or are dogmatic or which work as an obstacle to future research’.⁶⁹ Deconstruction therefore opens up possibilities that have been suppressed by virtue of the dominance of one particular way of conceptualizing transitional justice. The aim is not to destroy the model of transitional justice, but rather to rethink its philosophical foundations in such a way as to open up new possibilities.⁷⁰ Therefore, for the purposes of this thesis, propose a simple statement of the understanding of deconstruction is proposed. Deconstruction is not about answers, it is about questions. It is about recognition of the ongoing process of negotiation between concepts. By requiring the interrogation of the structure of meaning, it provides a useful vehicle for exploring dominant discourses and ways of thinking. And in requiring a more self-reflective approach to the construction of meaning, deconstruction encourages a more open approach to questions of justice.

Derrida considered deconstruction to be a ‘problematization of the foundation of law, morality and politics’.⁷¹ It was therefore both ‘foreseeable and desirable that studies of deconstructive style should culminate in the problematic of law and justice’.⁷² Law, although not perfect, becomes the means by which justice is pursued.⁷³ Therefore, although Derrida came rather late to the idea of deconstructing law, and indeed to justice, his work raises significant questions in relation to law and legal practice. The question of law is addressed in a number of key texts in which he speaks to questions

⁶⁷ Villanova Roundtable (n 6).

⁶⁸ *ibid* 5-6.

⁶⁹ *ibid* 8.

⁷⁰ *ibid* 12.

⁷¹ Force of Law (n 3) 8.

⁷² *ibid* 7.

⁷³ John McCormick, ‘Derrida on Law: or, Post-structuralism Gets Serious’ (2001) 29 *Political Theory* 395.

of the self-definition or limitation of the field of law,⁷⁴ its purported authority,⁷⁵ and its character as an independent body of rules.⁷⁶

3. LAW AND DECONSTRUCTION

One of the core claims made in support of the rule of law is that law can be clearly distinguished from other fields of endeavour, notably those of politics, ethics or morality. This is equally true in respect of the role of law in transition as in a settled domestic regime.⁷⁷ A defining feature of law is that while it may at times internalize political or ethical values, it must remain separate from them.⁷⁸ It is this separateness that inscribes law with its authority, stemming both from the way in which law is created and the way in which it is maintained through the processes of interpretation and enforcement. It is also this element of separability that gives law its ‘essentially deconstructible’ character.⁷⁹

Central to understanding Derrida’s deconstruction of law is an appreciation of law as a closed system of rules. The character of law rests on a number of what Derrida terms ‘axiomatic propositions’ as to its nature.⁸⁰ These are underlying assumptions that are made about the nature of law, without which law could not function as a normative system of rules. Acceptance (even implicit) of these propositions is a necessary part of law’s authority. These propositions are outlined by Derrida in ‘Before the Law’ and form the basis for his first explicit engagement with law itself. This section outlines common positivist understandings of law’s authority, and explains how deconstruction provides an alternative lens through which to view law.

a. Axiomatic Propositions of Law

⁷⁴ Jacques Derrida, ‘Devant La Loi’ in Alan Udof (ed), *Kafka and the Contemporary Critical Performance* (Indiana University Press 1987) 128 (hereinafter ‘Before the Law’).

⁷⁵ Force of Law (n 3).

⁷⁶ Jacques Derrida, ‘Declarations of Independence’ in Elizabeth Rottenberg (ed), *Negotiations: Interventions and Interviews, 1971-2001* (Stanford University Press 2002) 46 (hereinafter ‘Declarations of Independence’).

⁷⁷ See Teitel’s assertion that law can transcend politics. Ruti Teitel, *Transitional Justice* (Oxford University Press 2000). Discussed in Chapter 2

⁷⁸ Rosenfeld (n 4) 170.

⁷⁹ Force of Law (n 3).

⁸⁰ Before the Law (n 74).

One of the core claims made by positivists, and indeed a claim central to law's continued existence, is that law can be clearly distinguished from other fields of endeavour, notably those of politics, ethics and morality. Although Derrida does not limit his study of law to the more formal or institutionalised form of law,⁸¹ when he does turn his attention to 'law' as commonly understood, he chooses to focus on the positivist claims made in respect of law and its character.⁸² This thesis examines positivist theories of law because of the increasing trend towards the codification of transitional justice in the 'toolkit' approach discussed in Chapter Two. While it is acknowledged that there are alternative views of the role of law and how it is framed, and indeed that law in transition is intended to address the rigidity of traditional legalism,⁸³ it is also suggested that conventional legalism is a dominant feature of current transitional justice law and policy.⁸⁴ This dominance justifies the characterization of the 'rule of law' as a positivist enterprise and transitional justice as a legal institution. Law in transition, it has been suggested, provides a positive framework for the implementation of rights and enshrining principles of justice.⁸⁵

The origin of the doctrine of rule of law, and of the objectivity of law, can be traced back to the legal positivism of the late 19th and early 20th centuries. By this time, earlier ideas of natural law and natural rights had fallen from favour, replaced by an emphasis on legal rules whose authority derived not from their content but from their source.⁸⁶ Under such a conception, law and legal rules can be regarded as descriptive, in that they describe objectively identifiable rules, rather than providing subjectively influenced prescriptions. Central to this school of thought, and underpinning the entire structure of positivism, is the belief that law (objective, descriptive) can be separated from politics or morality (subjective, prescriptive). For Hart, even where the content of legal rules and moral injunctions overlapped, they were not to be regarded as the same thing.⁸⁷ The purported objectivity of law ensures that law can provide justifiable

⁸¹ In *Before the Law*, he considers also the laws of literature and of psychoanalysis. *ibid.*

⁸² Davies (n 39) 214.

⁸³ See discussion of Teitel. Chapter 2.1.b

⁸⁴ Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 *Journal of Law and Society* 411.

⁸⁵ Teitel (n 77) 21.

⁸⁶ See Nicola Lacey, 'Modern Positivism: H.L.A. Hart and Analytical Jurisprudence' in James Penner and others (eds), *Jurisprudence and Legal Theory* (Oxford University Press 2005) 143, 157.

⁸⁷ *ibid* 157.

solutions to normative problems.⁸⁸ Further, these solutions can be reached in a legally determined way, independent of political or moral considerations.⁸⁹ In this way legal formalism serves to legitimate claims of objectivity and neutrality in legal decision-making.⁹⁰

It is this separateness of law - the fact that it can be regarded as independent of politics or morality - that ensures law's authority.⁹¹ This separation of law and morality in particular is central to the positivist school of thought. Raz, for example, states that the separation of law and morality means that 'the validity of positive legal norms does not depend on their conformity with the moral order'.⁹² The question of what determines the validity, and thus the authority, of law therefore rests solely on the source of the law and whether it has been posited in accordance with generally recognised rules, and does not depend on any calculation of value or justification.⁹³ In the positivist tradition this dynamic is clearly visible. The law is judged on its own terms and without recourse to any external validating standard such as justice.⁹⁴ Law is characterised as inward looking, without any need to have recourse to external considerations.⁹⁵ This approach, has, however, been subjected to critique. Even positivists acknowledge that there are times when the law as written will be inadequate to reach a clear decision. These so-called 'hard cases' present a challenge to law's authority, and to the assumption that a justifiable solution can be found from within the law itself. This is a challenge that has been raised most prominently by Ronald Dworkin, when he suggests that these hard cases expose the limits of positivism.⁹⁶ In such cases, there will be need, according to Dworkin, to have recourse

⁸⁸ Martii Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005).

⁸⁹ *ibid* 24.

⁹⁰ It should be noted, however, that positivism is not synonymous with formalism. See HLA Hart, 'Legal Positivism', *Encyclopaedia of Philosophy* (1967) vol 4, 419.

⁹¹ Scholars have long sought to provide an adequate explanation for the authority of law. These range from Austin's Command Theory, through Hart's rules of recognition, to Kelsen's Pure Theory of Law. Modern jurisprudence has, however, sought to interrogate these claims rather than to attempt to provide a justification with modern resonance. See, e.g., Costas Douzinas and Adam Geary, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart 2005).

⁹² Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 133.

⁹³ *ibid* 150.

⁹⁴ While law may still be judged against standards of morality, this is not the same as allowing morality to determine the content of law.

⁹⁵ See, e.g., Raz (n 92) 53, stating that the content and existence of law is determined by reference to social facts and without relying on moral considerations.

⁹⁶ Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057.

to considerations that cannot be said to derive their authority from a clearly defined and identifiable legal source.⁹⁷ This challenge, and the threat it poses to objectivity, is met by the doctrine of relative indeterminacy. Positivists, including Hart, acknowledge that at times there will be need for judicial discretion in decision-making. However, to maintain the integrity of the positivist philosophy, such discretion must be presented as being exercised within the existing law.⁹⁸ This can be explained as simply the need to ‘render vague standards determinate’.⁹⁹ This approach, in attempting to maintain the integrity of law, moves closer to an interpretivist approach, whereby a broader range of sources are brought within the scope of law and legal decision-making.¹⁰⁰ As such, this approach still seeks to provide a picture of a self-contained system of decision-making that does not need to make recourse to external considerations to justify a decision.¹⁰¹

This need to put flesh on the bones of vague legal standards has particular resonance in the field of transitional justice. In many cases, the international standards being relied upon provide no more than vague exhortations, which are subject to interpretation by a number of differing bodies. And yet these standards provide a legal framework within which decisions can be made. They provide positive, written obligations that can be relied upon without the need for recourse to more abstract (or politically contentious) concepts of right or justice to justify actions. The fact that law in transition is regarded as incorporating certain standards of justice neatly avoids the challenge that decision-making is rooted in political preference or on subjective assessments of the situation. The existence of an instituted model of transitional justice provides the objective standards necessary for a depoliticized process of reform. This reliance on written standards (as embodied in reports and toolkits, for example) brings transitional justice and rule of law reform within the parameters of positivist (or at the very least interpretivist) theories of law. The ability to rely on law, and to point to legal obligation rather than political preference or ethical necessity, has the effect of buttressing the legitimacy of the chosen course of action and

⁹⁷ Lacey (n 86) 169.

⁹⁸ Koskeniemi (n 88) 34, referring to the use of the concept of equity *infra legem*.

⁹⁹ Hart (n 90) 132.

¹⁰⁰ For an explanation of this approach to international human rights law, see Catherine Turner, ‘Human Rights and the Empire of (International) Law’ (2011) 29 *Law and Inequality* 313.

¹⁰¹ See in particular Ronald Dworkin, *Law’s Empire* (Fontana 1986) on the manner in which principles and policies may legitimately influence legal decision-making.

excluding alternative options. The challenge for law is that while it may at times internalise political or ethical values, it must remain separate from them.¹⁰² It is this separateness that inscribes law with its unquestionable authority,¹⁰³ stemming both from the way in which law is created and the way in which it is maintained through the processes of interpretation and enforcement. In 'Before the Law', Derrida identifies a number of axiomatic presuppositions, which are central to belief in a system of law. The first of these, and the one most clearly identified with legal positivism, is the necessary recognition that the text of the law has its own 'identity, uniqueness and unity'.¹⁰⁴ The legal personality of the text is established by the system of positive laws and conventions, which set the boundaries of the character and operation of law.¹⁰⁵ What is contained within the law and what remains outside the law must be clearly visible. This occurs when law is posited in accordance with agreed and legitimate law-making processes. This limitedness in turn provides the basis for the acceptance of the authority of law - the acceptance of the idea of law as objectively identifiable and neutral in its operation.¹⁰⁶

Following on from his analysis that law must have its own uniqueness, unity and identity is Derrida's second axiomatic proposition—that law can be separated from its author. This relates to what Derrida terms the 'fictive narrativity' of law, the idea that law can - and indeed must - be separable from its author, that once it assumes the form of law that it transcends its origins.¹⁰⁷ This ability to separate the content of law from its author is crucial in any democratic system, where the identity of the party proposing the law ceases to be relevant once the law is passed in accordance with the recognized procedures. Once the law has been passed all that remains is the law itself, divorced from its history and its author. Distinction is therefore drawn between the substantive content of law and the rules and conventions that exist to guarantee its existence as law - the form rather than the substance. This phenomenon is what Derrida identifies as the third axiomatic proposition of law. Once the law has been brought into existence, the ability to present itself as a unified and unique system of rules, guaranteed by prior conventions and narratives, is central to its ability to shield

¹⁰² Rosenfeld (n 4) 170.

¹⁰³ Davies (n 39) 219.

¹⁰⁴ Before the Law (n 74) 129.

¹⁰⁵ *ibid* 130.

¹⁰⁶ Davies (n 39) 222.

¹⁰⁷ Declarations of Independence (n 76).

itself from challenge. This, for Derrida, is the narration of law. The embeddedness of law within existing narratives of the character of law ensures its recognition as law. It is therefore this narration that allows us to see and identify law as law. Even where these assumptions are not clear or evident, they nevertheless influence our perception of law and legal acts. The nature of law itself is bound up with a narrative about the creation and being law of law that helps to perpetuate our understanding of what law is and what it does. The existence of this narrative of law is therefore a 'conceptually prior condition of law, the limit of law which polices the boundary between law and non law'.¹⁰⁸ It is what enables us to distance the legal from the non-legal.

The nature of law, once established, is described by Derrida as 'intangible'. By this he means that it exists as sacrosanct—it is forbidden to change or disfigure it. In this way its form 'presents and performs itself as a kind of personal identity entitled to absolute respect'.¹⁰⁹ Once law has been named as law, that title 'names and guarantees' its identity.¹¹⁰ This is Derrida's fourth axiomatic proposition—that title guarantees the character of law. It is this title, external to the law, that locates the law within the prior narrative of the being law of law. The title itself precedes the law and simply vests it with its character. The process of designation as law is not tied up with the story of the law but rather is objectively determinable on the basis of existing conventional law. Put simply, where law exists it should be able to be recognized and named as such. This does not depend on the substance of the law, but rather on our understanding of what law is and how it comes into being. This is an objective determination.

Each of these axiomatic propositions combine to create the framework within which law can operate as a self-contained system of rules whose authority derives from the closed nature of that system. What is critical, however, is the identification of law as exclusionary, as existing as something distinct from other factors. Having outlined his understanding of how law works, Derrida then demonstrates how a deconstructive reading of law helps us to better understand these processes. In so doing he reveals some of the uncertainties that remain within law.

¹⁰⁸ Davies (n 39) 220.

¹⁰⁹ *Before the Law* (n 74) 145.

¹¹⁰ *ibid.*

b. The 'Essentially Deconstructible' Nature of Law

From the foregoing analysis of the nature of law, we see the dynamic emerge whereby law is defined partially with reference to what it is not. The existence of law, its meaning and its authority, depend on law being able to be distinguished from social and historical context, and from external values such as politics and morality. Law is law because it is not politics, because it is not simply morality. Law must possess its own unique characteristics in order to justify its normative claims. These characteristics are traditionally defined in opposition to the characteristics of politics or morality. The act of naming law as law serves to define its boundaries;¹¹¹ therefore he or she who is vested with the power of legal decision-making also exercises the power of definition of the very boundaries of law itself. His or her charge is to determine what falls within the definition, and what remains without. Where this power is questioned it is most commonly done from the perspective of whether external factors have unduly influenced a decision that should be based on pure legal reasoning and uncontaminated by external considerations.¹¹² This approach reinforces the accepted boundaries of the law and the idea that law is in fact separable from politics and morality. The way in which a Derridean interpretation of law differs from these more traditional explanations is in the way it highlights the traces of politics and morality that are inherent in the definition of law itself and which serve to construct our understanding of what law is through our appreciation of what it is not.¹¹³ The idea of separability returns us to Derrida's challenge to the idea of exteriority discussed in Section One. The 'legal' nature of law depends on its being able to be distinguished from external forces, such as politics and morality. These forces are deemed to exist outside of law, to be separate from law. Yet deconstruction of law reveals the relationship of mutual dependence between the two by demonstrating the on-going negotiation between law and politics that shapes our understanding of the nature of law itself. Derrida sums this approach up in 'Before the Law' when he states that 'What remains concealed and invisible in each law is thus presumably the law itself, that which makes laws of these laws, the being-law of these laws'.¹¹⁴ It is this characteristic that makes law inherently deconstructible. As law is founded on this

¹¹¹ *ibid* 132.

¹¹² See, e.g., JAG Griffiths, *The Politics of the Judiciary* (Manchester University Press 1977).

¹¹³ Douzinas and Geary (n 91).

¹¹⁴ *Before the Law* (n 74) 134.

distinction between legal and non-legal (or illegal), it is eminently suited to deconstruction.¹¹⁵

This power to set the boundaries of the definition of law also raises significant questions over who decides, and according to what criteria, the content or narrative of the law? Who sets the priorities? And what effect does this have on competing narratives? This critique is evident in Derrida's analysis of Kant's quest for morality within law.¹¹⁶ If one accepts the premise of the positivist tradition, that law does in fact have its own identity and is separable from other forms of meaning, this by its very nature precludes further examination or questioning of the origin of the law or of its foundational authority. Derrida claims in 'Before the Law' that to be invested with its categorical imperative,¹¹⁷ 'the law should be without history, genesis or any possible derivation'.¹¹⁸ Yet to introduce the idea of a quest for morality into the operation of the law necessarily introduces both historicity and empirical narrativity.¹¹⁹ Whether or not one is convinced by this apparent absence of historical origin, Derrida argues that the very act of accepting the command of the law - 'You must' or 'You must not' - requires the denial of historical origin,¹²⁰ regardless of what that origin may be.¹²¹ It denies the subordination of politics and morality to the law at the moment in which law is created. There is therefore a tension that emerges between the ideal type of law whose authority exists independently of history or empirical narrative, and law as it actually exists and operates within society. One of the key questions to emerge from 'Before the Law' is whether or not it is possible to separate law from historical origin or from the narrative that has driven its creation. If one accepts that historical narrative will always drive the impulse for progress, to strive towards moral imperatives, will history then always be present within the law?

¹¹⁵ Davies (n 39) 228.

¹¹⁶ In *Before the Law*, Derrida discusses the way in which Kant appears to introduce morality into law. Kant speaks in particular of the maxim 'act as if the maxim of your action were by your will to turn into a universal law of nature'. Derrida argues that the use of 'as if' in this maxim allows Kant's idea of practical reason to be reconciled with a teleology of history, and with the possibility of unlimited progress. However, in order to be invested with its categorical imperative, law should have 'no history, genesis or possible derivation'. In this way, Derrida critiques the internal contradiction of Kant's categorical imperative. See *Before the Law* (n 74) 133-34.

¹¹⁷ A nod to the language used by Kant himself. See Immanuel Kant, *To Perpetual Peace* (1795).

¹¹⁸ *Before the Law* (n 74) 134.

¹¹⁹ *ibid.* See also Davies (n 39) 219.

¹²⁰ *Before the Law* (n 74).

¹²¹ *ibid.* 138.

Deconstruction of the apparent separability of law reveals the oppositional structure of meaning that underlies our understanding of the relationship between law and politics. In order for law to be law it must suppress its history, the politics that gave rise to the need for law, and the morality that drove competing positions in respect of law. Put simply, it must deny the existence of competing forces that were integral to its creation. These competing forces exist in a relationship of violent hierarchy, in which non-legal elements are subordinated to law, leaving an inside and an outside of law - the legal and the non-legal. Our understanding of law, and our ability to recognize it as such, depends on this subordination. And yet when the relationship between the two is deconstructed, what is revealed is not the absolute separateness of the two, but rather the continual negotiation that sets and re-sets the boundaries. The two therefore depend on each other for their existence. Where this becomes significant is where claims for the authority of law are made with reference to the underlying *logos* of justice.

c. Law as the Means to Justice (or why deconstruction is a valuable approach to transitional justice)

Law and justice are closely related in the popular imagination. When seen through the lens of traditional philosophy, justice is the natural origin that precedes law. Law is the instituted version of that natural origin. It embodies the principles of justice that drive law and legal reasoning. However in the process of codification, in the writing of law, the law privileges its own version of justice over others that may exist in the realm of politics, ethics or morality. As such it stands in a relationship of violent hierarchy to these excluded versions. Yet, to be able to justify its authority, it must be seen to stand in a natural relationship to justice. The legal approach to transitional justice discussed in above demonstrates the reliance on the form of positive law to avoid difficult and contested issues of politics and morality. It also ostensibly avoids any reliance on external standards of natural law or justice to ground the authority of law. And yet it is clear from the content of instituted standards that transitional justice is regarded as having a purpose beyond law - that it is regarded as being concerned with justice and as something that must be achieved. This in itself presents a tension - in that central to the very nature of positive law is the idea that it contains no trace of a 'beyond' to law, no question of there being a transcendental standard of right to

which law must speak. Rather, the *logos* of justice is regarded as being embodied in the law.

Where a rule exists, questions of justice can be avoided through reliance on the rule,¹²² and indeed its representation *as* justice. In this way transitional justice displays many of the key features of the positivist concept of the rule of law that are deemed to give law its distinctive quality that sets it apart from other disciplines. For example, the reduction of the requirements of transitional justice to writing, in reports and toolkits, increases certainty in what ‘justice’ is. The form and content of justice is no longer the subject of philosophical speculation. Justice is quantified in international instruments. The boundaries of the law are defined by criteria established by positive law and convention. As a result, law should be capable of providing justifiable solutions to the problem of transition. Courts can engage in interpretation of the precise scope and requirements of transitional justice.¹²³ In this way clarity and stability is ensured. Justice is no longer subject to political horse trading or instrumental trade-offs, but is the subject of clearly defined legal obligations. Adjudication can be undertaken on the basis of a legally determined rule, independent of political influence. Finally, the separation of legal arguments from moral arguments is a way of overcoming disagreement.¹²⁴ Where there is a clash of competing conceptions of justice, that which is enshrined in law will prevail. Where balancing is required, this can be undertaken within the parameters of law itself, under the doctrine of relative indeterminacy. The simple fact of having to balance rights should no undermine the objectivity of the law *per se*. Law in transition is intended to transcend politics, fulfilling an important symbolic function.¹²⁵ Precisely because of the inevitable disagreement over the meaning of justice in most societies, law steps in to replace justice as the basis for authoritative decisions.¹²⁶ The formality of law and legal procedure facilitates the move towards a new form of governance, providing new sites of contestation, bounded by legality rather than physical violence. Law can

¹²² See Benedict Kingsbury, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’ (2002) 13 *European Journal of International Law* 401, 421.

¹²³ See, for example, *Prosecutor v Kallon* SCSL-04-15-A

¹²⁴ Kingsbury (n 122) 421.

¹²⁵ Teitel (n 77) 19; Colm Campbell and Fionnula Ní Aoláin, ‘The Paradox of Transitions in Liberal Democracies’ (2005) 27 *Human Rights Quarterly* 172, 188.

¹²⁶ Kingsbury (n 122) 424.

also provide the means to confront injustice through the application of legal procedure to narrative forums. The apparent depoliticisation of law is a central feature of transitional justice. And yet the question remains, is it ever possible for law to transcend politics completely? Or will the new law simply replicate the patterns it aims to replace? In particular, can the rigid adherence to law maintain objectivity in the face of historical and narrative claims? After all, much of this reasoning rests on the assumption that there is an objectively identifiable end point towards which transitional societies should be progressing. Underpinning this is a suggestion that what is legal can be equated with what is just. It is this collapsing of the boundaries between law and justice that deconstruction resists.

Deconstruction reveals the artificiality of the claim of law to represent justice in these circumstances. What it reveals is the way in which law violently subordinates alternative interpretations of justice.¹²⁷ In so doing it highlights the mutual dependence of these concepts, and the way in which we understand law only with reference to what it excludes. We understand what law *is* by simultaneously understanding what it is not. Therefore the trace of all of those other influences remains bound up within the structure of law itself. It is this structure of *differance*, the interplay of law with the excluded traces of politics, ethics and morality that allows for the deconstruction of law and the questioning of its relationship to justice. In 'Force of Law', Derrida writes that 'law claims to exercise itself in the name of justice, and justice is required to establish itself in the name of law that must be enforced. Deconstruction finds itself between these two poles'.¹²⁸ Rather than viewing law as giving effect to justice through its objective implementation of rules, Derrida sees law not as justice but as calculation.¹²⁹ The application of rules and programmes may be legal, but in Derrida's view it is not just.¹³⁰ Rather than seeking a definite outcome, the achievement of justice through law, what deconstruction requires is the on-going questioning of the relationship between the two. Justice is not an endpoint, but rather exists in an *aporia* – suspended in the moment before a legal decision is made- the moment that separates law from justice.¹³¹ It exists only as a possibility, as

¹²⁷ Force of Law (n 3) 23, where he states that the founding of law buries justice.

¹²⁸ *ibid* 22.

¹²⁹ *ibid* 16.

¹³⁰ *ibid* 23.

¹³¹ *ibid* 15. This is explained in more detail in Chapter 6.

a hope, as something that will not ever be achieved in the present, but which we nevertheless continue to strive for. To say that law is not the same as justice is not to deny that law has any role to play. Rather what is important is to recognize the risk that law, when viewed as a technical process of the application of rules, becomes reduced to a static and ultimately arbitrary standard.¹³² If law is not subjected to ongoing questioning then it can lose its ability to contribute towards meaningful change, and as a result towards justice. Placing too much faith in law as a means of achieving justice facilitates the masquerade referred to by Cornell whereby violence and powerful interests are represented as the rule of law,¹³³ no longer subjected to critical engagement.

Critical engagement is the purpose of this thesis. It is suggested that the current model of transitional justice, and its application in practice, reveals the risk of stalemate inherent in a legal model that denies space for political and moral considerations. Rather than working within the existing model to try and identify elements of good or bad practice that might increase the success of transitional justice (in terms of achieving 'justice'), what deconstruction seeks to do is to interrogate the model itself to try and understand why stalemate occurs, and how we might re-think our understanding of transitional justice in a way that allows us to move beyond the oppositional hierarchies that currently dominate the field and that lead to stalemate.

4. CONCLUSION

The purpose of this chapter was to ascertain how theory can contribute to our understanding of transitional justice. The chapter has outlined the understanding of deconstruction that underpins the research. It has sought to highlight the indeterminate nature of the approach, and the fact that 'deconstructing' transitional justice involves introducing uncertainty into the model. Deconstruction does not aim to draw conclusions or make recommendations as to how we can achieve justice in transition but rather is concerned with understanding the structure of meaning. It is worth reiterating that deconstruction is an affirmative force. It does not seek to

¹³² Villanova Roundtable (n 6).

¹³³ Drucilla Cornell, 'The Violence of the Masquerade: Law Dressed Up as Justice' (1990) 11 Cardozo Law Review 1047.

undermine the idea of transitional justice, nor to dismiss the idea that justice is something for which we should strive. Deconstruction is concerned with the elements within structures and institutions that have become too rigid or dogmatic. It seeks to identify these elements so that they can be addressed. It was suggested in Chapter Two that the institution of transitional justice into law and policy has resulted in the creation of a 'theatrical space' that has set clear boundaries on the field. If this 'theatrical space' becomes rigid and unresponsive to challenge and critique then the transformative potential of transitional justice will be lost. Deconstruction seeks to introduce uncertainty into the rigid categories upon which the field is founded and in so doing to bring new insight into the origin and the consequences of the oppositional structure of meaning. The purpose of this exercise is to encourage a deeper understanding of the core assumptions upon which the field is constructed, which should in turn lead to a more nuanced engagement with resistance and critique. Therefore it is suggested that adopting a deconstructive approach is crucial to ensure the ongoing relevance of the field. Deconstructing transitional justice can help to explain why current models have resulted in stalemate and on-going division rather than in the reconciled future promised by the rhetoric.

Exploring the way in which meaning is constructed also sets the scene for a more detailed examination of the negotiation between core underpinning assumptions of transitional justice. The relationship between violence and law is central to transitional justice. Challenging the idea that the two are distinct, with a clear dividing line between them, is the necessary first step in problematizing a linear or progressive account of conflict and transition in which violence is replaced by law. This raises the important question of whether violence and law can be separated. Ultimately, understanding the relationship between violence and law is crucial if the role of law in transition is to be grasped. The following chapters will explore this relationship between violence and law. The discussion is contextualised by reference to the example of the transition in Northern Ireland. The purpose of this example is, first, to demonstrate the practical application of this theoretical approach; and second, to initiate a dialogue between the local and the global that can inform thinking in the field of transitional justice more generally.

CHAPTER 4: VIOLENCE

The first of the three key themes to be explored in this thesis is that of violence. Central to understanding the critique of transitional justice being presented is an understanding of how violence is seen as relating to both law and justice in transitional contexts. This chapter asks whether violence and law can be separated. To do this it is necessary first to clarify what is understood by the term ‘violence’ and how it is applied in the current context. While transitional justice scholarship is tied up with the study of the relationship between violence and law, this analysis relates most commonly to direct physical violence, to the violence of insurgency or revolution, or to that of overt state repression and the effect that this violence has on the law. In this way the field is concerned with the relationship *between* violence *and* law. What has been largely absent to date is any analysis of the violence *of* law itself. To interrogate more deeply the relationship between violence, law and justice in transitional contexts, and to deconstruct the opposition between war and peace upon which it is constructed, it is therefore necessary to move beyond the political critique and explore the more metaphysical concept of violence expounded by Derrida in ‘Force of Law’.

Transitional justice, it is suggested, provides an exemplary case study through which to explore these ideas. Maley highlights how Derrida’s work speaks most directly to ‘limit cases’ - those points at which the law threatens to unravel.¹ Examples of this include war crimes and genocide, where much larger and more important issues are brought to bear on the discourse of the law. These cases provide good examples of the ways in which law ‘exposes its own constitution within a history of violence and mythology’.² They are also cases that are constituent of the field of transitional justice. Violence as a concept therefore has clear resonance in transitional justice. The field itself is premised on the need to move away from violence, whether in the form of war or of state repression and insurgency, towards a more peaceful future. In this regard the violence of open conflict is juxtaposed with peace, or the absence of violence, that is to be secured by transitional justice. War and peace becomes the central organising binary around which transitional justice arguments are constructed.

¹ Will Maley, ‘Beyond the Law? The Justice of Deconstruction’ (1999) 10 *Law and Critique* 49, 50.

² *Ibid.*

Of course this desire to replace violence with law is not unique to transitional justice. It is a desire deeply embedded in all democratic legal systems, reflecting the need to replace violent clashes of interests with the more civilised instruments of law.³ However in transitional contexts violence remains raw and visible, bringing into sharp focus the need or desire to found a new system of law that can mediate the violence. It will be argued in this Chapter that the separation of the two concepts of violence and law is never as clear-cut as it first appears.

In 'Force of Law', Derrida seeks to move beyond a critique of violence which reveals the externally-influenced and ideological superstructures of law towards a deconstruction of law which focuses on the intrinsic or internal relationship between violence and law through revealing the 'mystical foundation' of law's authority.⁴ Inherent in this deconstruction is the idea that violence, far from being something separate from law, is in fact deeply implicated in law and therefore cannot fail to be implicated in any legal institution.⁵ Thus, when we speak of violence in the context of deconstruction, it does not refer simply to overt physical violence, nor simply to structural violence that exerts an external force on law and legal adjudication, but rather of a conceptual violence, which can be used to explore the very nature and internal coherence of legal systems. What is required, according to Derrida, is a 'desedimentation of the super structures of law'.⁶ Rather than seeing violence and law as separate phenomena that influence each other, violence and law are seen as integral to each other. This emphasis on the intrinsic relationship of violence to law is significant, for if the distinction between the two is revealed to be false, then the demand for the substitution of one with the other - replacing violence with law -loses its coherence. The risk that remains is that the 'rule of law' becomes no more than a mask for the rule of force.⁷ The purpose of the critique of violence is therefore not simply to reveal its existence but rather to expound its relationship to law and justice.

³ Matthias Mahlmann, 'Law and Force: 20th Century Radical Legal Philosophy, Post Modernism and the Foundations of Law' (2003) 9 Res Publica 19.

⁴ Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell and others (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992) 1, 3 (hereinafter 'Force of Law'); See also Nancy Fraser, 'The Force of Law: Metaphysical or Political?' (1991) 13 Cardozo Law Review 1325; and Maley (n 1) 53, naming the problem of telling the difference between law as force and the forces that appear to threaten law from the outside.

⁵ Fraser (n 4) 1325.

⁶ Force of Law (n 4) 13.

⁷ Mahlmann (n 3) 20. See also Drucilla Cornell 'The Violence of the Masquerade: Law Dressed Up as Justice' (1990) 11 Cardozo Law Review 1047.

Every moment of founding law will be a moment of violence. While violence is commonly understood to have a negative connotation, as something wrong or illegitimate, for Derrida, violence has no intrinsic quality. He suggests that ‘the concept of violence belongs to the symbolic order of law, politics and morals. And it is only to this extent that it can give rise to a critique’.⁸ It is suggested throughout this thesis that transitional justice also arises at the intersection of law, politics and morals, and to this extent is a particularly suitable subject through which to explore the critique of violence. Inherent in the discourse of transitional justice is the contested use of law and violence. On-going negotiation of the legitimacy, acceptability or necessity of law and of violence provides the foundation for the discourse.

This chapter is divided into three sections. Section One re-visits the concept of deconstruction outlined in Chapter Three, building on the foundational concept of *différance* to explain Derrida’s concept of violence that underpins the analysis presented in the rest of this chapter. The section thus outlines the economy of violence within which Derrida suggests law operates, and explores how each of these levels of violence is present in the context of transitional justice. In particular, it introduces the idea of the violence of reflection, by which the State is challenged. Section Two then moves on to consider in more detail the meaning of violence of reflection in this context, considering the ways in which opposition to the state is manifested, and how and where law and physical violence diverge. It explores the distinction that is drawn between legitimate and illegitimate uses of force, and how this shapes our understanding of the need for transitional justice. Finally, Section Three considers the oppositional narrative that is created by the juxtaposition of violence and law in these contexts. It suggests that rather than viewing violence and law as separate concepts, the two are integral to each other and exist in a relationship of mutual contamination.

1. THE ECONOMY OF VIOLENCE

Derrida’s deconstruction of the relationship between violence and law is best understood in the framework of what he has termed the ‘economy of violence’ within

⁸ Force of Law (n 4) 31

which law is inscribed.⁹ The term itself is taken from *Violence and Metaphysics*,¹⁰ but the structure of this economy is outlined first in *Of Grammatology*.¹¹ While the concept initially arose in the context of language and linguistics, it has been read as equally applicable to a deconstruction of law as to that of language.¹² The basic premise of the 'economy of violence' is that all meaning is constructed on a tertiary structure in which meaning (or law) is founded in a moment of violence in which one particular meaning emerges dominant (the violence of the origin); that violence is subsequently forgotten (the concealment of the origin); but excluded alternative meanings return to challenge the dominance of the law (the violence of reflection). This tertiary structure is used throughout the thesis to explore the relationship between violence and law in transition.

Chapter Three outlined the structure of *différance* that Derrida sees as underpinning meaning. Briefly, what is rejected is the existence of one fixed and objective meaning that can be discovered and translated into language or text. Derrida sees meaning as being constructed in the interplay between seemingly opposing concepts, such as war and peace, for example. In simple terms, this reveals the existence of a dominant meaning that by its existence excludes other forms of meaning. The effect is not simply to profess preference for one form of meaning or understanding over another in a way that acknowledges the existence and validity of competing interpretations, but rather to deny the existence of alternative forms of meaning altogether. This is the violent hierarchy in which these concepts exist.¹³ And yet while one particular form of meaning will come to dominate others, this does not mean that alternatives cease to exist. Rather they remain trapped within the concept itself, with the potential to reassert their presence and challenge the dominant order. Understanding meaning within the structure of *différance* allows its recognition as a process of negotiation rather than a fixed concept. When translated and applied to law, this dynamic can be seen in the moment in which law is made. This is the point at which one particular

⁹ *ibid* 14.

¹⁰ Jacques Derrida, 'Violence and Metaphysics' in Alan Bass (tr), *Writing and Difference* (Routledge 1978) 117.

¹¹ Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, John Hopkins University Press 1976) 112.

¹² See for example Leonard Lawlor, 'From the Trace to the Law: Derridean Politics' (1989) 15 *Philosophy and Social Criticism* 1, suggesting that it can be read as 'a movement from the philosophical to the political'.

¹³ See Chapter 3.1

course of action is chosen at the expense of others, and enshrined in law. The starting point for any exploration of law's place within an economy of violence is therefore the idea that violence founds law, and that as a result all law bears violence at its heart.

a. The Violence of the Origin

The first stage of Derrida's economy of violence is that of the originary violence of naming.¹⁴ Building on the discussion of the construction of meaning in Chapter Three, this Chapter explores the violence of the origin of law - that is, the moment at which law subordinates alternatives and establishes itself as an independent, and indeed a dominant, force. As demonstrated by Derrida's work on violence and metaphysics, every act of positing law will entail some element of exclusion. It is in this element of exclusion that the originary violence of law exists. Chapter Three outlined how positivist conceptions of the rule of law regard law's authority as deriving from its source rather than from its content.¹⁵ If the 'being law of law'¹⁶ is tied up with the source of law, then it is imperative to be able to identify the source of law, and consequently the legal obligation. What is at issue is the ability to distinguish between what is law and what is not. This leads us to the question of the origin of law from which this authority derives. As discussed in Chapter Three, Derrida rejects the idea that law somehow reflects or enshrines pre-existing principles of nature, but rather views law as something that occurs as a result of the act of the institution itself and the interplay between nature and its institution. Therefore the moment of the institution of law is a moment of metaphysical violence, as it is the moment in which one interpretation of nature (of the requirements of justice, for example) is privileged over others.¹⁷ This moment of metaphysical violence represents for Derrida the origin of law, the point at which its authority is established.¹⁸

Therefore, for Derrida, the moment of founding of law will always be a moment of force, a rupture with the existing order and the institution of a new one.¹⁹ This

¹⁴ *Of Grammatology* (n 11) 112.

¹⁵ See Chapter 3.3.

¹⁶ Jacques Derrida, 'Devant La Loi' in Alan Udof (ed), *Kafka and the Contemporary Critical Performance* (Indiana University Press 1987) 128 (Hereinafter 'Before the Law').

¹⁷ See Chapter 3.1.

¹⁸ *Force of Law* (n 4) 6.

¹⁹ *ibid.*

characterisation of the origin of law as a moment of rupture stands in direct contrast to the idea of law as reflecting a natural progression or an inevitable consequence of preceding circumstances. In the context of transitional justice, it speaks directly to the tendency to narrate transitional justice genealogically,²⁰ representing the quest for justice in a progressive reading of history in which war and injustice give way to peace and justice.²¹ When the institution of law is seen as a rupture rather than as a progression, then the violence of the origin becomes clear. Derrida highlights how even where the founding of a new law, or a new legal order, presupposes certain conditions or conventions, this does not diminish the mystical limits of authority.²² It is still not possible to point to a definite standard of justice, for example, that has simply been captured in legal form. So, for example, even where the passing of laws on transitional justice are framed with reference to international law frameworks in relation to human rights or rule of law, this does not alter the characterisation of the moment of the origin of law as being a moment of violence, a rupture from the preceding order.²³

The act of founding an institution will always imply a break, and therefore some form of performative force or violence.²⁴ In this way, violence is implied in the very concept of law.²⁵ Some opinions will be reflected in law, others will be excluded - relegated to the realms of politics, ethics or morality - not deemed to have achieved the status of 'law'. As this element of founding or originary violence is inherent in the structure of law, it cannot be transcended. What is necessary, therefore, is that rather than trying to replace violence with law, the existence of law within an economy of violence be recognised in order that it can be critiqued.²⁶ What is at issue here is not any external form of violence, such as war, revolution or insurrection, but rather a violence that is innate to law. The founding of law itself constitutes a moment of violence because at this moment boundaries are set which will determine the inside

²⁰ Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Law Journal* 69 (hereinafter 'Genealogy')

²¹ See, for example, Claire Moon, 'Narrating Political Reconciliation: Truth and Reconciliation in South Africa' (2006) 15 *Social and Legal Studies* 257 for discussion of this tendency.

²² *Force of Law* (n 4) 14.

²³ To appeal to the higher authority of international law simply defers the problem of the origin. *Force of Law* (n 4).

²⁴ *ibid* 13.

²⁵ *ibid* 14.

²⁶ *ibid* 35.

and the outside of law. Certain forms of thought and action will fall validly within the bounds of legality, and others will fall outside. This element of decision, the point at which the boundaries of meaning are set, constitute for Derrida a moment of violence in which alternative voices are subordinated in the name of the universality of law. In the context of transitional justice, the institution of a codified model of transitional justice reflects the emergence of one dominant understanding of transitional justice and its history.²⁷ The effect of this dominance is to effectively exclude and silence all competing accounts.²⁸ The ‘violence’ of metaphysics therefore exists in the exclusion of the ‘other’, reflected in the desire for objectivity. A deconstructive reading of this moment of the origin of law allows us to see the ways in which those excluded views, opinions, interpretations remain inscribed in law, and as such are fundamental to our understanding of what law is.

Turning to the example of Northern Ireland, the founding of the State by the Government of Ireland Act 1920 represented a performative act, a moment of originary violence. The establishment of the state of Northern Ireland could not be characterised as being ‘inscribed in the homogenous tissue of history’.²⁹ It was, in the clearest sense, a rupture with the existing order. Direct physical revolutionary violence, actual and threatened,³⁰ had precipitated the founding of a new legal order. The result of this legal violence was the existence of a large Catholic minority within the new state of Northern Ireland, who were physically present within the territory but who felt excluded from the dominant political community. Once the law had been passed, political objections were subordinated to the fact of the existence of a new state with law-making authority. The law enshrined the view that conflict in Ireland would be best addressed through the partition of Ireland and the creation of two separate governments on the Island. With the passing of the Act, this became the dominant narrative of the creation of the State. Competing interpretations of the

²⁷ For discussion of this dominant model see Chapter 2.1

²⁸ In this way, the existence of the current model reflects the tendency to narrate an ‘end of history’ in which current models represent the end point of a journey in which the limitations of prior models are overcome. See *Genealogy* (n 20) on this temptation in the context of transitional justice. On the narration of an ‘ideal’, see Jacques Derrida, ‘Spectres of Marx’ (1994) 15 *New Political Science* 31 (hereinafter ‘Spectres of Marx’).

²⁹ *Force of Law* (n 4) 13.

³⁰ See Chapter 1.3 for an overview of events leading to the establishment of Northern Ireland.

necessity or desirability of this course of action were, at the moment of creation of the State, subordinated to this dominant narrative.

However, deconstructive reading of this originary violence reveals not only the dynamic of exclusion at play, but also the way in which the trace of the excluded becomes inscribed in the State itself. Rather than the State effectively transcending its origins, re-modelling itself as a neutral, impartial and objective force or observer, the ‘otherness’ of the excluded becomes entrenched at its very heart.³¹ Alternative interpretations of the creation of the State did not simply disappear. Both historical and contemporary understandings of the nature of the Northern Ireland conflict are constructed not only on the dominant narrative of the partition of Ireland to avoid war, but also on the excluded interpretations of partition as a mistake, and as a political injustice.³² The interplay between these two opposing views is what constitutes our understanding of the State and its identity. There cannot therefore be a rigid distinction between what is included and what is excluded. The essentially deconstructible structure of *différance* clearly exists within the law.

This dynamic neatly illustrates the interplay between the first stage of the economy of violence—the existence of originary violence—and the second stage, the necessary concealment of that violence.³³ In most cases, notwithstanding the violence of the origin, once the State has been created, legitimacy and legality become ‘permanently installed’, and the violence of the origin is forgotten.³⁴ This will be discussed in more detail below. The creation of the state of Northern Ireland by the Government of Ireland Act 1920 set the scene for on-going contestation of the legitimacy of the State, the laws it enforced and, ultimately, the justifications used in relation to the use of force to maintain law and order. The idea of the economy of violence therefore reveals the artificial nature of claims to objectivity by demonstrating the on-going and fluid relationship between the violence of the origin and the law that it creates.

³¹ See Margaret Davies, ‘Derrida and Law: Legitimate Fictions’ in Tom Cohen (ed), *Jacques Derrida and the Humanities: A Critical Reader* (Cambridge University Press 2002) 213, 221.

³² These competing interpretations are evidenced, for example, in the Healing Through Remembering Initiative, which seeks to deal with the legacy of the ‘conflict in and about Northern Ireland’, acknowledging that there is no agreed position on the legitimacy of the State. See www.healingthroughremembering.org.

³³ Of Grammatology (n 11) 112.

³⁴ Jacques Derrida, ‘The Laws of Reflection: Nelson Mandela, In Admiration’ in Jacques Derrida and Mustafa Tlili (eds), *For Nelson Mandela* (Seaver Books 1987) 18 (hereinafter ‘Laws of Reflection’).

b. Reparatory Violence (on the obliteration of the origin)

The first stage of the economy of violence is the violence that occurs at the moment when law is founded. However, this originary violence of the founding of law is not open and acknowledged. Rather, to maintain the authority of law that has been established in the originary moment, it is necessary that this violence be concealed. Derrida refers to this as the 'effacement and obliteration' of the violence of the origin.³⁵ Once the boundaries of inclusion and exclusion have been set by the legal system, they must then be legitimated by reference to the authority of law. The violence of the origin of law will be forgotten, and law will become the means by which permissible and impermissible conduct and belief is regulated. In most settled states, basic rules of recognition ensure that even where a law is unpopular, it is still regarded as legitimate.³⁶

When read as concerned with the construction of meaning, of systems of thought or belief, the resonance of this stage of the economy of violence for law is clear. Law depends, for its existence and authority, on its having independent existence.³⁷ Principles of the rule of law require that law be objective, impartial and independent of politics, morality or other external influences. It is on this basis that the dominance of law is ensured. What this means, in simple terms, is that in order for law to establish its own authority, it must become separate from those who created it. It must be able to transcend the history and process that brought it into being, and to claim separate existence.³⁸ The violence of the origin must be concealed. Derrida subsequently explained this element of the economy of violence in terms of the law being 'bound up with the silence of its own force'.³⁹ While the originary violence of law sets up boundaries, in order to maintain its claim to authority it must transcend the empirical context that has created it.⁴⁰ The element of violence or exclusion must

³⁵ Of Grammatology (n 11) 112.

³⁶ HLA Hart, *The Concept of Law* (Clarendon Press 1961). Discussed in Catherine Turner, 'Political Representations of Law in Northern Ireland' [2010] 3 Public Law 451.

³⁷ For more detailed discussion see Chapter 3.3.

³⁸ See Before the Law (n 16); Jacques Derrida, 'Declarations of Independence' in Elizabeth Rottenberg (ed), *Negotiations: Interventions and Interviews, 1971-2001* (Stanford University Press 2002) 46.

³⁹ Force of Law (n 4).

⁴⁰ Derrida suggests that writing constitutes ideal objects by delivering them from the ties of spacio-temporal facticity. The condition of their ideality is their repetition through time and space, which

not be acknowledged. Corson suggests that the emergence of these orders is possible *because of* the denial of the originary violence of law and its constitutive ‘injuries, injustices, reductions and blind spots’.⁴¹ Therefore to focus on an opposition between violence and the law that it creates, to treat them as separate and divisible phenomena, perpetuates the myth that law has an independent existence, and does not take into account the place of law within the economy of violence. Where the violence of the origin of the law is not fully concealed, it will remain visible, undermining the law’s claim to authority. Transitional contexts often make this dynamic clearly visible. Where the founding of a state is particularly controversial, for example where it arises from war or is regarded as being founded on injustice, then it will be nearly impossible for the violence of the origin to be forgotten.⁴² Where the legitimacy of the State is contested from the outset, the violence may be too great. In these contexts, as Derrida suggests, this violence ‘cannot manage to have itself forgotten...’⁴³ Writing of the South African experience, Derrida highlights how the law will do no more than perpetuate the violence of the origin through propping up an unjust system through law and judicial pronouncement. The system breaks down where this violence of the origin is not effectively forgotten,⁴⁴ and the result will be on-going challenge to the authority of the State.

This analysis of the on-going violence of law also has clear resonance in the Northern Ireland context. From the moment that a new state was founded against the backdrop of political division and violence, it was going to be difficult for agreed authority to be established. It has been suggested that the new government of Northern Ireland could only maintain control of its territory through ‘implicit and episodically explicit coercion’.⁴⁵ How this played out in practice is discussed in more detail below. For the purposes of illustration of the economy of violence, however, brief discussion of the events that led to the establishment of the Northern Ireland Civil Right Association (NICRA) in 1968 is useful. Despite the stated commitment made to principles of

depends on their inscription on a support that transcends empirical context. Richard Beardsworth, *Derrida and the Political* (Routledge, 1996) 16.

⁴¹ Ben Corson, ‘Transcending Violence in Derrida: A Reply to John McCormick’ (2001) 29 *Political Theory* 866, 871.

⁴² *Laws of Reflection* (n 34) 18.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Graham Ellison and Greg Martin, ‘Policing, Collective Action and Social Movement Theory: the Case of the Northern Ireland Civil Rights Campaign’ (2000) 51 *British Journal of Sociology* 681, 684.

tolerance, fairness and justice ‘common throughout the British Empire’ at the time of the establishment of the Northern Ireland state,⁴⁶ an examination of the administration of the new state demonstrates what Derrida describes as the attempt to legalise the violence of its origin, through laws designed to enforce and maintain the authority of the State.⁴⁷ Given that the State was founded in response to revolutionary violence, and against a backdrop of threats of further violence, it is unsurprising that emergency legislation should have been a significant feature on the legal landscape in Northern Ireland. McEvoy and Morrison describe how ‘constitutional discourses in Northern Ireland have, since the formation of the state, been framed by the presence or threat of political violence’.⁴⁸ The Civil Authorities (Special Powers) Act (Northern Ireland) 1922, which curtailed basic civil rights such as fair trial rights, protection from arbitrary arrest, and freedom from interference with privacy and home life,⁴⁹ marked only the beginning of a series of pieces of emergency legislation, each restricting civil liberties a little further, that would cast a long shadow over the law in Northern Ireland until the present day.⁵⁰ On each occasion that a new piece of legislation was passed, it was framed with reference to the ‘emergency’ and the need to protect the State against the threat of violence.⁵¹ In addition to the direct curtailment of civil liberties by the emergency powers legislation, much more widespread allegations of discrimination were levelled against the Northern Ireland authorities. There were allegations of corrupt electoral practices that ensured Unionist domination of local councils,⁵² discrimination in the allocation of public housing that not only gave preference to Protestant applicants, but also as a result ensured that voting majorities

⁴⁶ The need to uphold and protect these principles had been a central part of the Unionist claim for partition. See Thomas Hennessy, *A History of Northern Ireland 1920-1996* (Gill & Macmillan 1997)

⁴⁷ Laws of Reflection (n 34) 18.

⁴⁸ Kieran McEvoy and John Morrison, ‘Beyond the Constitutional Moment: Law, Transition and Peacemaking in Northern Ireland’ (2003) 24 *Fordham International Law Journal* 961, 970.

⁴⁹ See Her Majesty’s Stationary Office, ‘Disturbances in Northern Ireland: Report of the Commission Appointed by the Governor of Northern Ireland’ (Belfast, 1969) 12 (hereinafter ‘Cameron Report’).

⁵⁰ Northern Ireland (Emergency Provisions) Act 1973; Northern Ireland (Emergency Provisions) (Amendment) Act 1975; Northern Ireland (Emergency Provisions) Act 1978; Prevention of Terrorism (Temporary Provisions) Act 1984; Northern Ireland (Emergency Provisions) Act 1987. The existence of this emergency legislation and its effects has been the subject of significant academic scrutiny. See for example, Kevin Boyle, Tom Hadden and Paddy Hillyard, *Ten Years on in Northern Ireland: The Legal Control of Political Violence* (The Cobden Trust 1980); Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge 2006); Dermot Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (The Cobden Trust 1983).

⁵¹ For discussion see Cheryl Lawther, ‘Securing the Past: Policing and the Contest Over Truth in Northern Ireland’ (2010) 50 *British Journal of Criminology* 455.

⁵² See Campaign for Social Justice in Northern Ireland, *Northern Ireland: The Plain Truth* (Dungannon, 1964).

were protected,⁵³ and also discrimination in the allocation of public employment.⁵⁴ These practices created a strong sense of injustice and discrimination among the minority community, who viewed the operation of legislative power as perpetuating their position of disadvantage and exclusion. In fact it was a dispute over housing allocation that is widely cited as having sparked the Civil Rights movement.⁵⁵

The fact that the Unionist government of Northern Ireland needed to establish authority against a backdrop of, at best, controversy over the origin of the State and its legitimacy highlights the point made by Derrida that where the violence of the origin of the state is not properly concealed, it will remain visible and will result in the state being unable to establish itself as a legitimate law-making authority in the eyes of the political community. In the case of Northern Ireland this led to a spiral of political violence and state response in the form of emergency legislation. Whether or not perceptions and allegations of discrimination are well-founded is irrelevant—what matters is the extent to which the law is regarded as legitimate by those subject to its authority.⁵⁶ In the case of Northern Ireland, the violence of the foundation of the state was never successfully forgotten. This gave rise to contestation and ultimately violent challenge to the legitimacy, legality and authority of the state that provided the backdrop for a new cycle of violence, both physical and conceptual.

c. The Violence of Reflection

The third and final stage of Derrida's economy of violence is the violence of reflection. For Derrida, this is the form of violence where the most commonly understood concept of violence is situated.⁵⁷ This is the level of violence that is most often associated with direct physical violence and with the legal mechanisms that provoke and accompany it. At this level, therefore, consideration of the concept of violence begins to shift away from the metaphysical violence of the law *per se*, and

⁵³ Historical literature on the consolidation of the state of Northern Ireland is replete with examples of this allegation. For an overview of these controversies and their veracity, see John Whyte, 'How Much Discrimination Was There Under the Unionist Regime 1921-1968?' in Tom Gallagher and James O'Connell (eds), *Contemporary Irish Studies* (Manchester University Press 1983).

⁵⁴ See Kieran McEvoy and Ciaran White, 'Security Vetting in Northern Ireland: Loyalty, Redress and Citizenship' (1999) 61 *Modern Law Review* 341.

⁵⁵ Cameron Report (n 49); Campaign for Social Justice (n 52).

⁵⁶ For discussion see James Dingley and Jo Morgan, 'Job Discrimination in Northern Ireland in Relation to the Theory of Ethnic Nationalism' (2005) 7 *National Identities* 51.

⁵⁷ Of Grammatology (n 11) 112.

towards direct physical violence. This violence - the violence of reflection - has been categorised as the return of that which has been excluded and repressed.⁵⁸ Discussed by Derrida in terms of 'bloodless' and 'blood letting' violence,⁵⁹ the violence of the originary founding of the state is, at least potentially, benign in its operation ('bloodless').⁶⁰ It is a necessary part of the formation of identity and meaning. With the operation of the secondary layer of violence that conceals the violence of the origin comes a quest for closure, for the impartiality and objectivity of law and authority. However where the State is perceived to be founded on injustice, and as a result the violence of the origin cannot be properly concealed, the State can provoke violent opposition through its failure to acknowledge the violence of its origin ('blood letting').⁶¹ It is at this level that the relationship between violence, law and justice begins to emerge. Whereas law has made claims to authority that remain the subject of challenge, political violence at this stage of the economy of violence will often justify itself by an appeal to justice, in a call to overthrow and re-found law in the name of justice. Appeals to justice are therefore used in opposition to law, used to legitimise claims made against the state and its law-making authority, and ultimately to justify armed political struggle where the ends are deemed to be just.⁶² In 'Laws of Reflection' Derrida speaks of the practice of reflecting law back upon itself - of reflecting back against the system the principles on which it purports to be based.⁶³ In this way, he highlights a paradox inherent in non-violent protest, whereby the law is the problem, but also the perceived solution.

By the late 1960's in Northern Ireland, a new dynamic of protest had emerged that represented itself as concerned not with the abolition of the State, but rather with reform within the existing constitutional structures of the State.⁶⁴ This led to the beginnings of non-violent protest, the playing out of which illustrates the concern of

⁵⁸ Chung-Hsuing Lai, 'On Violence, Justice and Deconstruction' (2003) 29 *Concentric: Studies in English Literature and Linguistics* 23, 25.

⁵⁹ *Force of Law* (n 4) 52.

⁶⁰ This is discussed in more detail in section B below.

⁶¹ Beardsworth (n 40) 10 sums this up as 'procedures of truth are predicated on the disavowal of inscription'.

⁶² *Force of Law* (n 4) 32.

⁶³ *Laws of Reflection* (n 34) 24.

⁶⁴ See Northern Ireland Civil Rights Association, *We Shall Overcome: The History of the Northern Ireland Civil Rights Association 1968-1978* (Belfast, 1978) (hereinafter NICRA). The claim that the civil rights movement was concerned with reform within Northern Ireland, rather than a veiled Nationalist movement aimed at destroying the border was accepted by Lord Cameron. Cameron Report (n 49) 15.

the State with maintaining its own existence. In the case of the NICRA, what was ostensibly being challenged was not the legality or the existence of the State, nor its law-making capacity, but rather the legality of the laws that were being passed and their impact on the minority.⁶⁵ In this way, in the language of justice and rights, the civil rights movement reflected back against the Northern Ireland state the principles of tolerance, fairness and justice that had been at the heart of Unionist demands for special treatment in 1920.⁶⁶ It is ultimately the way in which the State responds to this reflection that determines (or perhaps simply indicates) the extent to which the violence of the origin has been forgotten or remains an open sore. In the case of Northern Ireland, the response from the State, far from reassuring moderate Nationalist concerns, served to exacerbate the tensions surrounding the violence of the origin of the State and the legitimacy of the legal order.⁶⁷ One example serves to illustrate the dynamic of contestation that underpinned the NICRA marches. In August 1968 the Derry Housing Action Committee requested that a civil rights march be organised in the city.⁶⁸ However when organisers notified the police of the proposed route, as they were required to do under the legislation, Unionist politicians objected on the grounds that the route would be 'offensive to a great majority of the citizens residing on the route...'⁶⁹ Threats of counter-demonstrations were also made.⁷⁰ The Minister for Home Affairs consequently prohibited the protesters from marching in certain areas of the city. This decision brought the relationship between violence and the law into focus once again. The request had been made for a non-violent protest march to take place in central areas of the city of Derry. On the basis of objection from the majority community, the march had been prohibited under Public Order legislation. It was subsequently officially accepted that the effect of the prohibition of the march had been to transform the situation from one in which a small number of interest groups sought to protest against social conditions in Derry, to one where large numbers of the population felt aggrieved at the handling of the

⁶⁵ NICRA (n 64).

⁶⁶ See Chapter 1.3.

⁶⁷ A review commissioned by the Governor of Northern Ireland in 1969 presented a troublesome picture of the response of the State to the emerging civil rights movement. The Report highlights how legal powers, in the form of the Public Order Act (Northern Ireland) 1951, were used to prohibit non-violent protest, thus frustrating demands for a more inclusive Northern Ireland. Cameron Report (n 49).

⁶⁸ The route to be taken followed that used by Protestant or Loyalist marching organisations in the city. This, the organisers claimed, demonstrated the non-sectarian nature of the civil rights movement. Ibid 25.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

situation by the Minister.⁷¹ The law was revealed not as facilitating impartial adjudication of conflict, but as playing a key role in conserving the state, thus recreating the violence of the origin. This operation of the law was cited as exposing the myth of the separability of law and politics. In the introduction to their influential text on *Law and State*, Boyle, Hadden & Hillyard suggested, 'When the legality of law is attacked, when the basis of legitimacy is challenged, where there is a constitutional crisis and obligation to the law is denied, aspects of the legal order that are previously concealed become visible, the problematic nature of legal legitimacy is revealed.'⁷² However, given the competing interpretations of the legitimacy of the State it was inevitable that there would also be equally contested positions on the Civil Rights Association.⁷³ Division remains to this day over whether the NICRA simply 'reflected' the violence of the State in such a way as to highlight the grievances of the excluded, or whether the NICRA themselves caused conflict through political agitation.⁷⁴

The discussion of Derrida's economy of violence so far demonstrates that violence can be conceptualised in a tertiary structure, each stage of which combines to create our understanding of what violence is. From the originary violence that founds the state, to the concealment of that violence (or the failure to adequately conceal it), and finally, the violence of reflection in which the violence of the state is reflected back upon itself, each stage is integral to the overall 'economy' of violence. This section examined the first and second levels of this tertiary structure. The following section will explore in more detail the third level of the economy of violence, that of the violence of reflection, by considering the emergence of armed opposition to the state, the response of the state to that opposition, and ultimately the ways in which this violence shapes calls for transitional justice.

⁷¹ *ibid* 27. Thus Derrida's suggestion that the failure of law, in the form of scorn shown for citizens, can deprive the aggrieved of effective mechanisms for redress is borne out. *Laws of Reflection* (n 34) 40.

⁷² Kevin Boyle and Others, *Law and State: The Case of Northern Ireland* (University of Massachusetts Press 1975).

⁷³ There was, at the time, among some in the Northern Ireland population (and government) a suspicion that the civil rights movement was simply a cover for Republican and Nationalist movements. See Cameron Report (n 49) 25. Demands for reform within the State were therefore read as a challenge to the State itself, when seen in the context of competing political aspirations that had the potential to undermine the existence of the State *per se*.

⁷⁴ See Jennifer Curtis, *Human Rights as War By Other Means: Peace Politics in Northern Ireland* (University of Pennsylvania Press 2014) for discussion of how these competing views of the NICRA continue to underpin attitudes towards human rights today.

2. CONTESTED NARRATIVES AND THE TURN TO VIOLENCE

In *Of Grammatology*, Derrida notes that the final stage of the economy of violence, that of the violence of reflection, is the level at which the common concept of violence is situated.⁷⁵ It is at this level that we see argumentation over law and the morality of transgression that underpins transitional justice discourses. Derrida suggests that this stage is the most significant of the economy of violence for it is only with reflection that the artificiality of the boundaries created by the originary violence of law is revealed. This type of violence therefore opens up closed systems and subjects them to interrogation. It challenges notions of impartiality and objectivity and reveals the contestation inherent within our systems of understanding. In *Of Grammatology*, Derrida speaks of the ‘proper name’, which in the context of law can be translated as the ‘system’ established by the originary violence of law. This so-called ‘proper name’ is ‘perceived by the social and moral consciousness as the proper, the reassuring seal of self-identity, the secret’.⁷⁶ Roughly translated, this means that the political community accepts the ‘system’. Ordinarily the state will be regarded as the legitimate political and legal order. Its citizens will be united in their loyalty to the institution of the state, if not to a particular government. As noted, in a settled democratic state, the authority of the law is guaranteed by rules of recognition that ensure that even where a law is not popular it is still regarded as law, because the state is accepted as having legitimate law-making authority. In this way the citizens of the state are complicit in maintaining the violence of the origin of the state, through their acceptance of its legitimacy and authority.⁷⁷ However where there is challenge to the state, this violence of reflection ‘breaks the secret of the proper name and the innocent complicity’.⁷⁸ The violence of reflection challenges the acceptance of the state as the ‘proper’ order. It reveals the violence of the state and the exclusions that have been created, thereby undermining the idea of a settled political community. In this way it renders open and acknowledged the violence of the origin that the state seeks (implicitly) to conceal. This is only possible, according to Derrida, through the violence of reflection, whereby the excluded ‘other’ reveals the violence of the origin

⁷⁵ *Of Grammatology* (n 11) 112.

⁷⁶ *ibid.*

⁷⁷ For analysis of how this impacts on the possibility of transitional justice, see Bronwyn Leebaw, *Judging State Sponsored Violence, Imagining Political Change* (Cambridge University Press 2011)

⁷⁸ *Of Grammatology* (n 11) 113.

that has been concealed.⁷⁹ In transitional justice contexts, this excluded ‘other’ is most commonly a political opposition that challenges the idea of a homogenous and unified political community represented by the State by revealing the manner of their exclusion.⁸⁰ The reaction of the state to this violence of reflection will impact on whether or not this reflection remains in the realm of political and legal contestation, and therefore regarded as ‘legitimate’ within the bounds of the law, or whether it escalates into armed opposition and the type of violence deemed ‘illegitimate’.⁸¹ In Northern Ireland the events of the civil rights campaign provided a brief moment of reflection, the holding up of a mirror to the State, which was soon to be eclipsed by the direct physical violence of the IRA, and the violent response of the State, in both physical and legal terms. This would create a new cycle of violence, law and claims for justice that would eventually underpin the discourse of ‘transition’ in Northern Ireland.

a. Legitimate ‘Force’ and Illegitimate ‘Violence’

In crafting his deconstruction of violence, law and justice in ‘Force of Law’, Derrida draws heavily on Benjamin’s Critique of Violence.⁸² In this critique, Benjamin seeks to distinguish two particular forms of violence - that which founds or preserves law (mythic) - and that which seeks to destroy it (divine).⁸³ For Benjamin these two types of violence exist in opposition to each other. Indeed his critique relies on the existence of this distinction.⁸⁴ The two can be distinguished by the way in which they relate to the ends that are to be achieved by the use of violence.

For Benjamin, where a state resorts to the use of force to quell insurrection or armed opposition, this use of force will be justified by reference to the end goal of restoring law and order, and is thus ‘mythic’ violence. Similarly where physical violence is used to demand reform within the state, this violence will be mythic, for it has as its

⁷⁹ *ibid.*

⁸⁰ However the idea has broader resonance for contemporary debates on law and society, and on immigration in particular, in that Derrida characterises the other as a ‘foreigner’, meaning simply someone from outside the closed order who is thereby able to reflect the violence of the closed community back on itself. *ibid.*

⁸¹ See Laws of Reflection (n 34) 40, in which Derrida suggests that when non-violent protest is met with legal repression, the response is to meet (legal) violence with (physical) violence.

⁸² Walter Benjamin, ‘Critique of Violence’ in Edmund Jephcott (tr), *Reflections: Essays, Aphorisms, Autobiographical Writings* (Random House 1995) 277.

⁸³ This distinction is explained by Force of Law (n 4).

⁸⁴ See Maley (n 1) 61.

aim the re-establishment of law, albeit a different law.⁸⁵ This type of violence works *within* the established system and simply re-inscribes the violence of the law. Violence is used instrumentally as the necessary means to a just end, whether re-asserting the monopoly of force for the state, or opposing a repressive state. This can be contrasted with divine violence, which does not seek to re-establish law, but rather seeks to destroy the system altogether.⁸⁶ This is a form of anarchic violence in that violence is engaged for its own sake and does not depend on the justification of the end to be achieved.⁸⁷ It rejects the idea of improvement within the existing apparatus and calls for its overthrow.⁸⁸ Therefore where violence is used in protest at the actions of the state, without regard to consequences or outcome, this is a form of divine violence. It does not seek to re-establish law and so therefore breaks free from the constraints of mythic violence. In this way, Benjamin juxtaposes the mythical violence of the state and the divine violence that is used to resist it, and in so doing draws a distinction between violence and law, one being used either in support of, or opposition to, the other.

The distinction between these two forms of violence is illustrated in the early years of conflict in Northern Ireland. There are two distinct narratives in respect of the legitimacy of the use of armed opposition to the state. The first narrative, and that which was the dominant contemporaneous narrative of the Troubles, was that the IRA campaign was an illegitimate campaign of terrorist violence to which the State responded in order to defend itself.⁸⁹ Therefore any use of force on the part of the State was a legitimate response, justified by the ends of upholding law and order. This is a form of mythic violence, concerned with the maintenance of law. The opposing narrative, espoused by Republicans, is that the State itself was illegitimate, and that

⁸⁵ This approach embodies the paradox identified by Derrida whereby law is simultaneously the problem and the solution. See *Laws of Reflection* (n 34).

⁸⁶ This form of violence is variably referred to as 'divine', 'mystical' and 'messianic'. In the interests of consistency, and drawing a clear semantic distinction with 'mythical' violence, I use the term 'divine' throughout.

⁸⁷ This form of violence is also referred to as a 'violence of pure means' in that the means do not rely on the end to be achieved for their justification. See *Force of Law* (n 4) 49.

⁸⁸ For further discussion of the distinction between these forms of action see *Laws of Reflection* (n 34).

⁸⁹ For more detailed discussion of this narrative see Kevin Hearty, 'A Shared Narrative? A Case Study of the Contested Legacy of Policing in the North of Ireland' (2014) 54 *British Journal of Criminology* 1047.

physical force was the only means of effectively exposing the violence of the State.⁹⁰ This violence is a form of divine violence, in that it did not have as its aim, in the early years at least, the reconstruction of the Northern Ireland state, but rather its destruction.⁹¹ The straightforward black and white nature of this opposition is complicated by the existence of a middle ground, whereby the legitimacy of violent opposition to the state was rejected, but the actions of the State in responding to this violence were challenged using political and legal methods. This arose initially with the NICRA and their demands for equality within the State, but was also maintained throughout the Troubles in the work of constitutional Nationalist parties, human rights activists and NGO's who protested the actions of the State using legal and political means to reflect the violence of the State back on itself.⁹² This section will explore the construction of these competing narratives, using the example of Northern Ireland to explore Derrida's deconstruction of the distinction between violence and law.

b. The Mythic State and the Divine Terrorist

Any analysis of the relationship between violence and the law and Northern Ireland's Troubles must first be located within the tertiary structure of the economy of violence in which law is founded in a moment of violence, that violence is forgotten, but the excluded returns to challenge the dominant order. As discussed in Section One, the creation of the state of Northern Ireland was itself a moment of originary force (or violence). In the case of Northern Ireland, it is a well-rehearsed belief that life was good before the Troubles. People reminisce about how Protestants and Catholics used to live together peacefully, and how it was the outbreak of political violence in 1969 that created division.⁹³ This illustrates the dynamic that Derrida speaks of, whereby there is an acceptance, albeit unwitting, of the violence of the origin of the State and

⁹⁰ This attitude is reflected in Ellison and Martin's analysis of the NICRA and the State's response that where there is unwillingness to integrate excluded demands into the mainstream, campaigners will adopt a much more confrontational approach. See Ellison and Martin (n 45) 685.

⁹¹ This is referred to (but not endorsed) by Boyle, Hadden and Hillyard as the 'political solution' whereby political violence could only be addressed by moving towards the reunification of Northern Ireland with the Republic of Ireland. See Kevin Boyle and others, *Ten Years on in Northern Ireland: The Legal Control of Political Violence* (The Cobden Trust 1980) 6.

⁹² Paul Mageean and Martin O'Brien, 'From the Margins to the Mainstream: Human Rights and the Good Friday Agreement' (1998) 22 *Fordham International Law Journal* 1498. See also Kieran McEvoy, 'What Did Lawyers Do During the War? Neutrality, Conflict and the Culture of Quietism' (2011) 74 *Modern Law Review* 350.

⁹³ See Kirk Simpson, *Unionist Voices and the Politics of Remembering the Past in Northern Ireland* (Palgrave 2009)

therefore complicity in the economy of violence that it creates. This is a crucial point and one determined largely by one's position on the legitimacy of the State and its law-making authority. One's position on the State will determine how one judges the use of force, either on the part of the State or against it. Significant cleavages in public opinion on the legitimacy of the State will inevitably lead to contested narratives of law and order, and on the legitimacy of the use of political violence.⁹⁴ This is seen particularly clearly in the use of the terms 'force' and 'violence'—one denoting legitimacy, the other illegitimacy.⁹⁵

The summer of '69 was a difficult one in Northern Ireland. It marked the culmination of tensions that had been steadily mounting around the civil rights campaign and was the year in which violence exploded—serious political violence that would last for the next thirty years. This period of the 'Troubles' is the period of violence most commonly associated with Northern Ireland, and it is also the period from which it is in 'transition'. It is therefore the 'war' of the transitional justice 'war' and 'peace' binary. It is also the 'before' of the 'before and after' around which transitional justice is constructed. During this period, the struggle over law played out primarily on the terrain of criminal law, with the relationship between law and direct physical violence remaining close to the surface and visible. From the outset, the distinction between mythic and divine violence was evident in the discourse on law and order in Northern Ireland. What was at issue was legitimacy of competing uses of violent force, starkly visible in the public realm. Protest against particular acts of government and the police manifested in severe rioting in the streets across Northern Ireland.⁹⁶ This violence was met by the use of force by the police and state forces to quell the riots.⁹⁷ A direct comparison is therefore possible between attitudes towards the use of force by the state to uphold the law (mythic violence) and the use of violence to oppose that law (divine violence). A rigid opposition existed between those who supported the state's right to use 'force' to protect itself, and therefore condemned anti-state

⁹⁴ See generally Hearty (n 89); See also Leebaw (n 77) on the consequences of this.

⁹⁵ In 'Force of Law', Derrida uses the terms violence and force interchangeably. However it has been argued that the concept of 'violence' as used by Derrida should be understood as a generalized concept that includes legitimate force, coercion, power or authority. See Dominic LaCapra, 'Violence, Justice and the Force of Law' (1990) 11 *Cardozo Law Review* 1065, 1066. See also Sami Khatib, 'Towards a Politics of "Pure Means": Walter Benjamin and the Question of Violence' [2015] *Anthropological Materialism* <<http://anthropologicalmaterialism.hypotheses.org/1040>> accessed 19 October 2015.

⁹⁶ Cameron Report (n 49).

⁹⁷ *Ibid.*

‘violence’, and those who advocated the use of violence to oppose an oppressive state, and therefore condemned the use of ‘force’ on the part of the state.⁹⁸ This opposition was constructed on a distinction between law and violence - either law as opposing violence, or violence opposing law. Boyle, Hadden and Hillyard note that the legal system by definition is committed to the protection of the state. Where a conflict is revolutionary, it is ‘almost inevitable that the legal system will be seen as supporting one or other faction in the conflict’.⁹⁹ This was the case in Northern Ireland. The divisions that had been created by the creation of the state were replicated in the attitudes towards the legal system. In this phase, law was regarded as ‘belonging’ to the pro-state Unionists and as being used against, or marginalising, the Irish Nationalist population. These dynamics of contestation are not unique to Northern Ireland.¹⁰⁰ Nor is analysis of the rhetoric of state versus freedom fighter a new invention in this context.¹⁰¹ What they demonstrate, however, is the close interplay between violence and law.

During the 1970s, contestation moved gradually away from the raw and visible use of force on the part of the State that had characterised the early years,¹⁰² and moved into the realm of contesting the legal response to anti-state violence. In particular, the question of the use of force by the State became subsumed to a much greater extent into the narrative of legality and the extent to which such force could be justified within a legal framework.¹⁰³ This was reflected in the move away from a military response to violence towards the use of the ‘ordinary’ criminal law.¹⁰⁴ Therefore, while force did not cease to be a key site of contestation, it became much more

⁹⁸ See, for example, contemporaneous reports on the violence commissioned by the British government which highlighted the existence of contested views of the legitimacy of the State and the role of this contestation in causing violence. See Cameron Report, *Ibid*; Her Majesty’s Stationary Office, ‘Report of the Tribunal of Inquiry on Violence and Civil Disturbances in Northern Ireland in 1969’ (Belfast, 1972) (Scarman Report).

⁹⁹ Law and State (n 72) 2-3.

¹⁰⁰ This is also reflected in Teitel’s conceptualisation of transitional justice, in which she notes how the struggle for ownership of the law can be a key cause of conflict. See Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000) discussed in Chapter Two

¹⁰¹ See Igor Primoratz, ‘What is Terrorism?’ (1990) 7 *Journal of Applied Philosophy* 129; Jenny Teichman, ‘How to Define Terrorism’ (1989) 64 *Philosophy* 505; Conor Gearty, ‘Terrorism and Morality’ (2003) 4 *European Human Rights Law Review* 377.

¹⁰² For a general overview see Cameron Report (n 49).

¹⁰³ See Fionnuala Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Blackstaff Press 2000).

¹⁰⁴ Her Majesty’s Stationary Office, ‘Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland’ (London, 1975) (Gardiner Report).

intricately linked with law from the early 1970s. As noted, from the creation of the Northern Ireland state, constitutional discourses in Northern Ireland have been framed by the threat or use of political violence.¹⁰⁵ This led to the institution, from the early years of the State, of the legal framework of emergency powers. While these powers had existed in law since 1922, the period following the outbreak of violence was characterised by intensification in the use of emergency legislation to respond to political violence.¹⁰⁶ The way in which the cause of this violence was framed, and how blame was to be apportioned, was axiomatic to understanding the escalation of violence and the legal response thereto over the next ten years.

c. 'Emergency' as an 'Exceptional' State of Affairs

The framework of 'emergency' assumed the existence of exceptional circumstances, that justified an 'exceptional' legal regime that allowed the State the flexibility to achieve desired outcomes in terms of responding to violent challenge while remaining within the bounds of legality.¹⁰⁷ The discourse of emergency was present not only in political narratives of violence, but was also reflected in law at multiple levels. At the national level, the period between 1970 and 1987 saw no fewer than five pieces of emergency legislation responding to 'terrorism' in Northern Ireland passed by the United Kingdom parliament.¹⁰⁸ This legislation was interpreted and applied by the courts in Northern Ireland.¹⁰⁹ And on the international level, the European Court of Human Rights (ECtHR) interpreted the requirements of the European Convention on Human Rights (the Convention) in light of the existence of the 'terrorist' threat in Northern Ireland.¹¹⁰ The official use of this discourse gradually embedded the distinction between legitimate and illegitimate uses of force, thereby shaping public perceptions of the causes of the conflict and the State's response thereto, as well as

¹⁰⁵ McEvoy and Morison (n 48).

¹⁰⁶ No fewer than five pieces of emergency legislation were passed in the years between 1973 and 1987. See (n 50) above. For discussion of the impact of this emergency legislation on the legal landscape in Northern Ireland, see McEvoy (n 92).

¹⁰⁷ For detailed discussion of the nature of emergency see Gross and Ní Aoláin (n 107).

¹⁰⁸ See (n 50) above.

¹⁰⁹ See for example *Ex Parte Lynch* [1980] NI 126, in which the court confirmed that the application of the label 'terrorist' was sufficient to legitimate an otherwise unlawful procedure. What was at issue was the disapplication of the normal rules of judicial review of detention in cases where a person was detained under the Prevention of Terrorism Act on suspicion of being involved in terrorist activity.

¹¹⁰ See, for example, the reasoning in *Brogan and Others v United Kingdom* [1988] 11 EHRR 177 and in *Brannigan and McBride v United Kingdom* [1993] 17 EHRR 539, in which the Court considered the scope of Article 5 of the ECHR and the derogation provisions contained in Article 15 that allowed the State to derogate from Convention guarantees in times of war or other public emergency.

dictating the consequences of engaging in actions deemed to be unlawful or illegitimate.

This dynamic is particularly well-illustrated by the approach taken by the ECHR to cases concerning the right to life enshrined in Article 2 of the Convention and the controversial use of lethal force by the State.¹¹¹ Article 2 guarantees the right to life. Its enjoyment is, however, subject to limitations. Article 2(2) provides that the deprivation of life may be lawful if it is the result of a use of force that is no more than is 'absolutely necessary'.¹¹² Such force may be absolutely necessary where it is used in defence of any person from unlawful violence,¹¹³ for example, or where it is used to quell a riot or insurrection.¹¹⁴ These permissible limitations enshrine into law the distinction between legitimate and illegitimate uses of force. They set the boundaries of the lawful use of force, and they are the terrain on which contestation over the lawfulness and legitimacy of violence play out. During the Troubles, a number of Article 2 cases failed to progress to a hearing before the Court as a result of determinations by the Commission that the State had acted within the permissible limitations enshrined in Article 2.¹¹⁵ The first Article 2 case to reach the Court was therefore *McCann and others v United Kingdom*,¹¹⁶ which concerned the shooting dead of three IRA members. The three victims in this case were known members of the IRA who were present in Gibraltar. The army believed that they intended to carry out a car bomb attack on the territory and, as a result, the three were shot dead in disputed circumstances. What is interesting about this case for the purposes of this thesis is the fact that by the time the case reached the ECHR, there was little dispute as to the material facts. There was no ambiguity as to the status of the victims as

¹¹¹ For an overview of this particularly thorny issue, see Ní Aoláin (n 103).

¹¹² Specifically Article 2(2) provides that 'deprivation of life shall not be regarded as being inflicted in contravention of this Article when it results from the use of force that is absolutely necessary...' European Convention on Human Rights [1950] (hereinafter 'ECHR').

¹¹³ ECHR Art 2(2)(a).

¹¹⁴ ECHR Art 2 (2)(c).

¹¹⁵ See in particular *Stewart v United Kingdom* App no 10044/82 (ECHR, 1984) in which the Commission determined that soldiers had acted in a manner that was 'absolutely necessary' to quell a riot, in the course of which a young boy was shot and killed. See also *Kelly v United Kingdom* App no 17579/90 (ECHR, 4 May 2001), in which the Commission declared the case inadmissible on the grounds that soldiers who had shot and killed the driver of a stolen car, which had failed to stop at an army checkpoint, had acted within the limits of Article 2.

¹¹⁶ *McCann and Others v United Kingdom* [1995] 21 EHRR.

members of the IRA, nor of their intention to engage in violence.¹¹⁷ On the other side, there was no denial that State forces were responsible for the killing. What was at issue, therefore, was solely the *legality* of the killing by the State, when set against a backdrop of political violence. In this case the Court found that there had not been a violation of Article 2.¹¹⁸ This exposes the way in which notions of violence and law are constructed with reference to the purpose of the violence (in this case a lethal ‘use of force’ on the part of the State). What is beginning to be revealed is the way in which law maintains its own authority by suppressing alternative positions that have the potential to challenge the dominant order. As Campbell and Connolly note, ‘In a democracy, law is not “outside” the conflict; rather it provides one site on which the conflict can be conducted, and is thus partly constitutive of it’.¹¹⁹ In Northern Ireland, as in all transitional societies, the law and its constituent exclusions were integral to the conflict. The critique of the failure of law to adequately address the conflict emerged both at the domestic level, in terms of analysis of confidence in the law in Northern Ireland itself, but also touched on the limitations of international law. The ECtHR was robustly criticised for its systematic failure to address the perceived gap between law and justice that had opened up in the course of the Northern Ireland conflict.¹²⁰ The approach of the ECtHR to the Article 2 cases emanating from Northern Ireland arguably represented a particularly cautious approach, in which strict legalism was used to avoid becoming involved in political issues.¹²¹ From a legal point of view, the ‘mythic’ violence of upholding the law was prioritised over the ‘divine’ violence that opposed the law. This force was permitted in order to protect the system from violent challenge.¹²² Therefore if one accepts the legitimacy of the

¹¹⁷ The precise timing of the attack, however, was misjudged. The army had believed that the attack was imminent. However, after the shootings, it was discovered that the bomb had not yet been moved in to place. Ibid

¹¹⁸ While a finding of no violation was made, *McCann* introduced a procedural requirement to Article 2, discussed in more detail in Chapter 6.

¹¹⁹ Colm Campbell and Ita Connolly, ‘A Model for the “War Against Terrorism”? Military Intervention in Northern Ireland and the Falls Curfew’ (2003) 30 *Journal of Law and Society* 341, 348.

¹²⁰ See in particular Oren Gross and Fionnuala Ní Aoláin, ‘To Know Where We Are Going, We Need to Know Where We Are: Revisiting States of Emergency’ in Angela Hegarty and Siobhan Leonard (eds), *Human Rights: An Agenda for the Twenty First Century* (Cavendish 1998) 79 on the systemic failure of the ECHR to exercise effective oversight of the existence of public emergency and the need for derogation.

¹²¹ On this as a general strategy in relation to violence in Northern Ireland see McEvoy (n 92).

¹²² This reflects the underlying purpose of the ECHR as a legal order to maintain effective political democracy and protect human rights, itself bound up with transition from war and abusive regimes. See Michael Hamilton and Antoine Buyse, ‘Introduction’ in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights* (Cambridge University Press 2011) 1.

State as the guardian of law and order, then the use of lethal force in responding to violence that challenges the existence of the State or the security of its citizens is a perhaps regrettable, but nevertheless justified, both legally and morally, course of action. This lawfulness also colours moral perceptions of law and transgression. For the State, the use of force is a means of responding to a particular threat or attack, as well as a means of serving the broader purpose of protecting the values of the rule of law *per se*. Those who use violence to challenge the State are challenging the so-called ‘proper name’. Therefore while violence used against the state violates law, the act of killing the ‘enemy’ is a means of re-instating law.¹²³ Those who use violence to challenge law have placed themselves outside law. In taking the lives of others, their own lives are no longer guaranteed.¹²⁴ The consequence of transgressing the social order is potentially death. And this death will be legal, it will occur within the law. In this way, the character of the ‘rule of law’ is guaranteed not only on the domestic level, but also regionally through the enforcement of the ‘legal order’ created by the Convention itself. Crucial to this narrative of legitimate use of force to uphold the law is the acceptance of the State as the legitimate and lawful authority. From this perspective, the role of the security forces, including the army and the police, is not only to protect civilian life, but also to protect the State itself from violent challenge. Assessment of the ‘necessity’ of the use of force will be framed with reference to the need to protect the State.¹²⁵

While this dynamic is clearly visible in relation to the use of physical force by the State, it operates equally in respect of the force of law. In addition to the cases brought before the ECtHR under Article 2 of the Convention, a series of cases challenging the operation of emergency legislation, and in particular the provisions on detention, were also brought.¹²⁶ It is suggested that these cases are interesting in that they relate not specifically to the distinction between legitimate and illegitimate uses

¹²³ Derrida notes how state power and sovereignty are marked by the right of life and death over its citizens. Jacques Derrida, *The Death Penalty, Volume 1* (Peggy Kamuf tr, University of Chicago Press 2014) 5.

¹²⁴ *ibid* 14.

¹²⁵ This position has been altered since *McCann*, with the evolution of a strong procedural element to Article 2, whereby the State is required to conduct an effective investigation into any controversial killings as a means of establishing whether or not it was in fact absolutely necessary. See, e.g., *McKerr v United Kingdom* [2002] 34 EHRR 20.

¹²⁶ These cases were brought under Article 5 of the Convention. See *Brogan and Others v United Kingdom* [1988] 11 EHRR 177; *Brannigan and McBride v United Kingdom* [1993] 17 EHRR 539

of physical force - and therefore the distinction *between* violence *and* law - but rather they deal more specifically with the violence *of* law and how it responds to challenge. These cases also illustrate the interplay between the domestic and international jurisdictions, and the ways in which law appeals to prior conventions in order to guarantee its authority.¹²⁷ In the case of *Brogan and Others v United Kingdom*, the applicants had been arrested and detained under the Prevention of Terrorism Act. While there was no dispute that the arrest and detention were lawful under the provisions of Northern Ireland's law,¹²⁸ the applicants claimed that this lawfulness was not enough to meet the requirements of the Convention. The European Commission initially accepted the Government's reasoning that a certain degree of flexibility was required when interpreting the scope of a Convention right in order to take account of the terrorist threat, and on this basis determined that there had been no violation of the applicants' rights. However the Court rejected this reasoning. Upholding the applicants' case, the Court confirmed that whether an arrest or detention could be regarded as lawful should be determined not only with reference to domestic legislation, but also in light of both the text of the Convention and its underlying legal principles.¹²⁹ The Government had argued that the provisions were necessary to protect the community as a whole from terrorism. While the Court accepted that this could be regarded as a legitimate aim that was being pursued, they concluded that it was not on its own sufficient to ensure compliance with the specific requirements of Article 5 of the Convention.

While this decision may initially be read as a victory for justice over the law, the reaction of the Government adds a further layer of complexity to the relationship between the two at the international level. Article 15 of the Convention provides that states may derogate from their Convention obligations during a public emergency that threatens the life of the nation.¹³⁰ The language of this article, and the opt-out clause

¹²⁷ Before the Law (n 16).

¹²⁸ *Brogan* (n 126) para 49. The Prevention of Terrorism Act provided that, where a person was suspected of being involved in terrorist activity, they could be arrested. This arrest was not subject to the normal rules of judicial review of detention under the Magistrates Court (Northern Ireland) Order 1981, meaning that those detained were not subject to the rules and safeguards normally applied to those arrested. In *Ex Parte Lynch* [1980] NI 126, the court in Northern Ireland confirmed that the application of the label of 'terrorist' was sufficient to legitimate this otherwise unlawful procedure.

¹²⁹ *Brogan* (n 126) para 65.

¹³⁰ This article therefore provides for a short-term response to exceptional challenge. For critique, see Fionnuala Ní Aoláin, 'Transitional Emergency Jurisprudence: Derogation and Transition' in Antoine

that it provides, enabled the government to enter a derogation covering specifically the issue raised in *Brogan* - namely the arrest and detention of terrorist suspects. In a statement made by the Home Secretary at the time, announcing the derogation, specific reference was made to the background of the terrorist campaign and the overriding need to bring terrorists to justice.¹³¹ This derogation led to a very different decision in the subsequent case of *Brannigan and McBride v United Kingdom*.¹³² In this case the Court accepted the reasoning of the Government that the situation in Northern Ireland fell within the scope of the meaning of an emergency threatening the life of the nation under Article 15. The existence of the derogation therefore legitimated action that had been found to be a violation in *Brogan*. These cases lead us back to the essentially deconstructible nature of law, and Derrida's critique of the separation of the two concepts of violence and law that forms the basis of Benjamin's critique. It exposes the oppositional nature of the rhetoric of violence and law, whereby law, and legal amendment, was necessary to oppose political violence.

3. THE MUTUAL CONTAMINATION BETWEEN VIOLENCE AND LAW

For Derrida, wherever concepts are set up in opposition to each other, they are essentially deconstructible.¹³³ Exposing the binary system of opposition allows a deconstructive reading that reveals the interplay between the two concepts. This reveals the artificiality of the distinction drawn by Benjamin between violence and law. In 'Force of Law', Derrida highlights the mutual contamination between the foundation of law and its on-going conservation, which complicates the straightforward opposition between violence and law.¹³⁴ Returning to the economy of violence, whereas the moment of the founding of law can be regarded as a moment of originary violence, each time that law is interpreted with the aim of maintaining law and order, the violence of the origin is repeated. This in itself is a form of violence - a law conserving violence.¹³⁵ The element of mutual contamination relates not only to

Buyse and Michael Hamilton (eds), *Transitional Jurisprudence: Transitional Justice and the ECHR* (Cambridge 2011) 24.

¹³¹ As cited in *Brannigan* (n 126) para 54.

¹³² [1993] 17 EHRR 539

¹³³ A concept is 'essentially deconstructible where it is founded on interpretable textual strata, or where its ultimate foundation is by definition unfounded'. *Force of Law* (n 4) 14.

¹³⁴ *ibid* 40.

¹³⁵ *ibid*.

the direct re-assertion of the authority of law through legal decision-making (mythic violence) but also exists in the relationship between physical (divine) violence and law. Whereas Benjamin regards divine violence as existing in opposition to law, to destroy law, Derrida suggests that all violence will have as its outcome the re-establishment of law,¹³⁶ and therefore the distinction between the two forms of violence cannot be maintained. In this way, law and violence are connected in a cycle of violence whereby law is destroyed and re-founded with each legal decision. However this violence does not have any intrinsic quality. At the moment that law is founded it cannot be said to be either 'just' or 'unjust'.¹³⁷ Therefore it cannot be said at the time at which it is happening that the violence of the founding of law is either 'good' or 'bad'. It is only with the passage of time that the moment of the founding of law comes to be either accepted or rejected as a source of legitimacy. In particular, it depends on the extent to which the violence of the origin is successfully concealed.¹³⁸ Our interpretation of law therefore depends both on the past that has given rise to the law, and on the way in which that law is subsequently interpreted. Law thus relies on a *post hoc* legitimisation of its origin in order to secure its authority. It cannot be given fixed meaning in the present. Derrida sums this up when he suggested that law belongs to 'an order of right that does not yet exist'.¹³⁹ Our understanding of law and its legitimacy arises from the perpetual state of negotiation between violence, law and justice. Recognising the existence of this dynamic is an important element of the critique of violence, and therefore also of transitional justice.

In this context the Northern Ireland cases, both in the House of Lords and the ECtHR, provide a clear illustration of the immanence of violence to law. Each time the State responded to political violence with a new piece of emergency legislation, the metaphysical violence of the founding of law was repeated. However, rather than acknowledging the violence of the institution of emergency legislation, the decision-making of the courts was dressed up as legality, as the fairness and impartiality of law, in contrast to the arbitrariness of terrorist violence.¹⁴⁰ In the case of Northern Ireland, the framework of emergency became the single lens through which the

¹³⁶ *ibid* 35.

¹³⁷ *ibid* 13.

¹³⁸ See Section 1 for discussion.

¹³⁹ Force of Law (n 4) 35.

¹⁴⁰ For discussion of the difficulties of challenging this narrative, see McEvoy (n 92) 380.

conflict was refracted, underpinning the reasoning of the courts in respect of the government's response to violence. The courts, both domestic and international, adopted a broad reading of emergency powers on the basis that 'exceptions from established principles were necessary in the conflict situation in Northern Ireland'.¹⁴¹ With each decision that referred to the need to combat the terrorist threat, the originary violence of the creation of the law was repeated. Whether or not measures taken that were 'exceptions' to established principles were adjudged to be reasonable or proportionate was interpreted in light of the security context. As Livingstone suggested, 'such questions call for an examination of facts, circumstances and perceptions'.¹⁴² Where there are competing narratives over what exactly the security context is, and where the illegitimate violence emanates from, it is inevitable that at the moment of legal decision a moment of violence will occur, whereby one narrative is chosen over the other.

During the Troubles, it was an oft-cited criticism that the House of Lords, when asked to adjudicate conflict-related cases from Northern Ireland, regularly constructed the context from 'the perspective of the security forces and the dangers they face'.¹⁴³ This approach failed to take account of competing perspectives that could have provided a different way of constructing context. Through its operation, law set up exclusions and determined the boundaries of good versus bad citizens.¹⁴⁴ By accepting one narrative and reinforcing that view of the context through legal decision-making, the law effectively silenced those with competing political opinions of violence and law. In this way, the violence of the origin of the law was repeated with each decision that upheld exceptional emergency measures, reinstating the boundaries of inclusion and exclusion that had been set with the institution of that particular law.¹⁴⁵ Further, not

¹⁴¹ See Stephen Livingstone, 'The House of Lords and the Northern Ireland Conflict' (1994) 57 *Modern Law Review* 333, 344.

¹⁴² *ibid* 350.

¹⁴³ *ibid*.

¹⁴⁴ For the most authoritative account of the effect of the emergency legislation see Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Act in Britain* (Pluto Press 1993). This study demonstrates the ways that the legislation operated, not only in a narrow or technical legal manner, but how its social implications exceeded its technical aspects.

¹⁴⁵ Force of Law (n 4) 43. 'Iterability requires the origin to repeat itself ... [it] inscribes conservation in the essential structure of foundation'.

only was one narrative privileged over others, the legal character of the decision effectively eliminated the basis for any (legitimate) contestation of the law.¹⁴⁶

The extent to which the idea of an emergency, created by a terrorist threat to the existence of the state, created an interpretive framework is clearly visible. The judgments are clearly framed with reference to the need to uphold the law against violent challenge. In this way they refer back to the past that gave rise to the law - the existence of a terrorist threat, often manifested in a particular act of violence. As the excluded trace remains inscribed within law, the effect of the political violence, rather than destroying law, was to establish new law. In this way violence and law are two sides of the same coin.¹⁴⁷ Violence, far from being something separate from law, is the 'other' to which the law must respond in order to reassert its authority. The political trace - that which is excluded from the dominant narrative of emergency and security - remains bound up within the structure of the law. Similarly, each time a legal decision is made that upholds the need to protect the State and safeguard the rule of law, the law is interpreted as requiring a particular course of action. The meaning of the law, and its legitimacy, rather than having fixed meaning in the present, is constructed with reference to both its past and its future. Seen in these terms the State and its laws continue to be haunted by the violence of the origin, and by the excluded other.¹⁴⁸

Law, through legal decision-making, determines what falls within the law, and is therefore legitimate, and what falls outside the law, and is therefore illegitimate. Each time the interpretive framework of emergency was accepted and applied, it reinforced the system of legal reasoning and strengthened the validity of the framework, thereby perpetuating the violence of the origin of the law through the on-going interpretation of violence and the State's response to it. It did so not only in its attempts to delegitimise the use of political violence and any narrative of grievance that may have underpinned it, but also in suppressing alternative voices on the legitimacy or indeed morality of the State's response to this challenge. This gave rise in some quarters to an unwillingness to accept human rights arguments in respect of the operation of the

¹⁴⁶ For discussion of the role of decision making see William Sokoloff, 'Between Justice and Legality: Derrida on Decision' (2005) 58 *Political Research Quarterly* 341.

¹⁴⁷ *Force of Law* (n 4) 54.

¹⁴⁸ On the concept of 'haunting', see Derrida, 'Spectres of Marx' (n 28).

emergency legislation. This was evidenced not only in decisions of higher courts such as the House of Lords and the ECHR, but also more pervasively in political attitudes towards human rights that were infused with deep suspicion as to the motives of those making human rights arguments.¹⁴⁹ For example, pro-state constituencies regarded human rights as a challenge to the authority of the state, and being in sympathy with the (illegitimate) violence of the IRA.¹⁵⁰ As noted in Chapter Three, meaning is constructed through the interplay of seemingly oppositional concepts that exist in a state of violent hierarchy. During the period of the Troubles, the narrative of the state response to violence as an abuse of human rights was subordinated to that of the necessity of the security response. The concept of emergency, underpinned by security concerns, was the dominant narrative of the law during this time, with narratives of either political grievance or human rights concerns as the excluded trace. Thus law establishes the dominant narrative on violence. It also constructs the binary oppositions that are evident in transitional justice. For example, the operation of emergency legislation defines what is right and wrong and with it sets the category of (innocent) victim and perpetrator. This particular binary is one which continues to play out in Northern Ireland's transition and is discussed in detail in Chapter Six. What this demonstrates is that the way in which these oppositions are constructed during conflict will continue to dominate how discourse of justice in transition and its inclusions and exclusions are constructed.

4. CONCLUSION

This chapter asked whether violence and law can be separated. If the two can be separated then a progression between the two – from violence to law – is possible. However if the separation is revealed to be false then the possibility of a linear progression between violence and law becomes problematic. Derrida's economy of violence has demonstrated that every moment of founding law will be a moment of

¹⁴⁹ See famously the statement of Noble Peace Laureate David Trimble that human rights groups were complicit in murder. Giles Tremlett, 'Human Rights Groups are Complicit in Murder, Says Trimble' *The Guardian* (London, 29 January 2004) <<http://www.theguardian.com/uk/2004/jan/29/northernireland.humanrights>> accessed 19 October 2015.

¹⁵⁰ For example, Ian Paisley described the language of rights as 'fancy non-partisan jargon' and 'well-known shorthand for Republican supremacy'. Ian Paisley, 'Peace Agreement – or Last Piece in a Sellout Agreement?' (1998) 22 *Fordham International Law Journal* 1273.

metaphysical violence. However while violence is commonly understood to have a negative connotation, as something wrong or illegitimate,¹⁵¹ for Derrida it has no intrinsic quality. At the point at which violence happens it has no intrinsically good or bad quality. Judgment on its use comes only after the fact. Benjamin similarly observes that the violence that creates law does not, at the moment at which it is used, have to be 'legitimate'. It only has to be victorious.¹⁵² There is no means of establishing before the fact whether the violence used is legitimate or not. Rather this determination will depend on the subsequent legitimation, through the law, of those actions.¹⁵³ Those who engage in revolutionary violence therefore take a risk. If they succeed in their aims, the violent means used will be retrospectively legitimated in the way in which the story of the conflict is told, subsumed into a 'revolutionary philosophy committed to the infinite task of redeeming the past'.¹⁵⁴ Violent opposition will be characterised as an unfortunate but necessary response to injustice, as a struggle for social and legal transformation.¹⁵⁵ But this is only possible where violence has been victorious. In short, the means will be justified with reference to the ends. If the campaign does not succeed, however, then the use of violence will remain condemned - a violence deemed as unjust,¹⁵⁶ for any use of physical violence will be condemned in the first instance.¹⁵⁷ At the point of its occurrence, violence will be regarded as 'illegal, brutal, evil'.¹⁵⁸ It is only with victory that it will begin to be legitimised.¹⁵⁹ Because violence is justified on the basis that it aims to enact a new and more just legal order,¹⁶⁰ the struggle for the law is no less political than the use of violence that precedes it. In 'Force of Law', Derrida suggests that 'all revolutionary situations, all revolutionary discourses ... justify recourse to violence by alleging the founding, in progress or to come, of a new law'.¹⁶¹ In this way law finds its place

¹⁵¹ This reflects its status as something traditionally pushed out of public discourse.

¹⁵² Mahlmann (n 3) 22.

¹⁵³ See Elizabeth Frazer and Kimberly Hutchings, 'Remnants and Revenants: Politics and Violence in the Work of Agamben and Derrida' (2011) 13 *British Journal of Politics and International Relations* 127, 128.

¹⁵⁴ Robert Sinnerbrink, 'Deconstructive Justice and the "Critique of Violence": On Derrida and Benjamin' (2006) 16 *Social Semiotics* 485, 491.

¹⁵⁵ Costas Douzinas, 'Violence, Justice and Deconstruction' (2005) 6 *German Law Journal* 171, 175.

¹⁵⁶ *Force of Law* (n 4) 6.

¹⁵⁷ Sinnerbrink (n 154) 486 suggests that legitimate force can be used by law, and it is inextricably bound to our legal and moral sense of justice. Force without law, however, is sheer violence that we rightly condemn as unjust.

¹⁵⁸ Douzinas (n 155).

¹⁵⁹ *ibid.*

¹⁶⁰ Maley (n 1) 61.

¹⁶¹ *Force of Law* (n 4) 35.

within the cycle of justification that relies on recourse to history as a means of legitimising the past.¹⁶² Violence will be understood as necessary to achieve progress, a break from a conflicted past that can be contrasted with the new and more just order that has been founded.¹⁶³

This suggests is that although violence itself has no intrinsic quality, a value judgment is nevertheless possible on the use to which violence is put. This is particularly true in respect of state versus non-state violence. Discourses of human rights and transitional justice are founded on the position that law-conserving violence used on the part of the state is inherently wrong. Therefore the fact that a state has an interest in preserving not only its existence but also its monopoly on the use of violence within its borders is viewed as problematic. By implication, the State will be susceptible to violent opposition, as political opponents seek to engage the violence of reflection against the State, justified by the need to re-found the State. However, given that all law is founded in a moment of violence, it is not simply a matter of disaggregating the law that conserves the authority of the State from that which is used to challenge it. What is necessary is to recognise that violence forms part of a circular logic whereby protest against law has as its aim the re-founding of law, thereby perpetuating the cycle of violence. This cycle of overcoming law by simply re-establishing it demonstrates that there is something fundamentally ‘rotten’ in the law.¹⁶⁴ All attempts to challenge law depend on the articulation of a new law that simply perpetuates the circular logic.¹⁶⁵

Deconstruction of the violence of law therefore reveals the interdependence of violence and law. The two cannot be separated, but remain trapped within a cycle of violence. This raises a further question for transitional justice research. If metaphysical violence is immanent to law, can law adequately address deep-rooted political conflict? To address this question it is necessary to move beyond an oppositional conceptualisation of violence and law and to take seriously the

¹⁶² Petra Gehring, ‘The Jurisprudence of the “Force of Law”’ in Peter Goodrich et al (eds), *Derrida and Legal Philosophy* (Palgrave Macmillan 2008) 55, 61.

¹⁶³ Douzinas (n 155).

¹⁶⁴ See Force of Law (n 4) 14.

¹⁶⁵ See Frazer and Hutchings (n 153) 130.

inexorable relationship between the two.¹⁶⁶ This requires a greater acknowledgement of the dynamics that underpin legal reasoning and legal decision-making. The following chapter will explore the way in which attempts to transcend violence with law in transitional contexts operate within the economy of violence. It will demonstrate how the metaphysical violence that is immanent to the law replicates the violence of open conflict and asks whether in this context law can contribute towards justice.

¹⁶⁶ See Roberto Buonomano, 'The Economy of Violence: Derrida on Law and Justice' (1998) 11 *Ratio Juris* 168, 171.

CHAPTER 5: LAW

In 1998, following thirty years of violence on the streets of Northern Ireland, the Belfast Agreement was signed.¹ The Agreement followed years of negotiations amongst all parties to the conflict, including the British and Irish governments, local political parties and representatives of armed paramilitary groups. It was widely heralded as a new beginning for politics in Northern Ireland,² and as marking the end of the Troubles.³ It also marked the beginning of the period of ‘transition’.⁴ The previous chapter demonstrated how, during the Troubles, human rights claims were subordinated to security concerns, as the concept of ‘emergency’ established itself as the dominant force in law and politics. In recent years, however, as the language of human rights is increasingly relied upon to frame political demands in respect of dealing with the past, as well as issues such as identity, language and culture, the opposition between security and human rights that characterised the Troubles has been exposed. The increasing prominence of the concepts of human rights and transitional justice has destabilised what were previously fixed understandings of the causes of the conflict and are arguably becoming the dominant discourses in which legal and political demands are made and assessed in Northern Ireland. The language of transition is pervasive among the legal academic and policy communities who seek to influence government policies in this area.⁵ It has brought to the forefront the

¹ Belfast (Good Friday) Agreement (1998) (hereinafter ‘Agreement’)

² See *Ibid*, Declaration of Support.

³ 1998 also saw the second IRA ceasefire, followed by a similar declaration by Loyalist paramilitaries. While the Agreement did not mark the end of conflict or ‘struggle’ in Northern Ireland, it was intended to mark the beginning of a new phase in which politics would be conducted by exclusively legal means. See Gerry Adams, ‘To Cherish a Just and Lasting Peace’ (1998) 22 *Fordham International Law Journal* 1179.

⁴ In 2003, Campbell, Ní Aoláin and Harvey published an article in which they suggested that the framework of ‘transition’ was the most appropriate within which to analyse the legal changes brought about by the Agreement. This article is the first sustained engagement with the language of transition in the Northern Ireland context and the first attempt to re-conceptualise the effect of the Agreement in legal and policy terms. See Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, ‘The Frontiers of Analysis: Re-framing the Transition in Northern Ireland’ (2003) 66 *Modern Law Review* 317. This is discussed in more detail in section 2.a.

⁵ For example, see the submissions made to public consultations on dealing with the past that draw extensively on the language and conceptual architecture of transitional justice to frame recommendations. See, for example, Kieran McEvoy and others, ‘Dealing with the Past in Northern Ireland: Amnesties, Prosecutions and the Public Interest’: Written Submission to Dr Richard Haass and Dr Meaghan O’Sullivan and the Panel of Parties in the Northern Ireland Executive (Belfast, 2013) <<http://blogs.qub.ac.uk/amnesties/files/2013/11/Amnesties-Prosecutions-and-Public-Interest-Submission-to-Haass-talks.pdf>> accessed 19 October 2015. See also Northern Ireland Human Rights Commission, ‘Dealing with Northern Ireland’s Past: Towards a Transitional Justice Approach’ (Belfast, 2013).

terminology of ‘dealing with the past’ and established as a matter of legal imperative the question of accountability for past abuses.⁶ This relates not only to the high profile ‘use of force’ cases, but is also increasingly evident in legal and political discourse on economic, social and cultural rights in Northern Ireland.⁷

The period from 1998 until the present day is therefore marked not by direct physical violence, as the preceding thirty years had been, but rather by legal contestation over the status of the Agreement and the meaning to be given to its terms. While the Agreement was signed amid an atmosphere of great optimism for peace in Northern Ireland, recent years have seen divisions sharpen over key aspects of the Agreement, and indeed over key transitional justice mechanisms, such as institutional reform and dealing with the past. Of particular note is the on-going contestation over accountability for State violations of human rights, in particular, for controversial killings for which no responsibility has been accepted.⁸ However, while the involvement of the State in these controversial killings represents the sharp end of claims in respect of the past, there is also significant and growing unrest over the way in which the law is being interpreted. Central issues in the most recent round of negotiations included the flying of flags and the regulation of loyal order parades, both issues that have been subject to contested interpretation since the Agreement.⁹

The previous chapter demonstrated the interdependent relationship between violence and law. It suggested that this raised the question of whether law can adequately address deep-rooted political violence. Building on the analysis of the metaphysical violence of law presented in the previous chapter this chapter asks whether the framework of ‘transition’ is any less violent than the framework of ‘emergency’ that it replaced. The signing of the Agreement, and its passing into law - under, most notably, the Northern Ireland Act 1998 - represented a moment of originary violence. It represented a rupture from the legal order that had preceded it and the creation of a new legal order. Seen in these terms, this is the re-founding of law that follows

⁶ This is discussed in more detail in Chapter 6.

⁷ Discussed in Section 2.c.

⁸ During the course of the Troubles, State forces were responsible for 367 deaths. See David McKittrick and others, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Mainstream Publishing 1999) 1476. While there have been public inquiries held into some of these, others remain unresolved.

⁹ See Stormont House Agreement (2014).

revolutionary violence.¹⁰ However, as discussed in the previous chapter, this is only the first stage of an economy of violence within which the new law must be located. It is worth reiterating in this context that violence, in the metaphysical sense, is not necessarily negative. All violence, at the time at which it occurs, is neither inherently 'good' nor 'bad'.¹¹ That determination comes only with time. Therefore, rather than viewing the use of the term 'violence' as making negative comment on the Agreement, it should be understood in its metaphysical sense, as concerned with differential force within society.¹² Understanding it in these terms helps to locate the Agreement and the increasing resistance it faces within an economy of violence within which violence and law are co-implicated. Understanding the unrest evident in Northern Irish political life is a necessary first step to addressing the bigger question of 'why' resistance to transitional justice arises. In particular it requires deeper scrutiny of the role of law in transition and the way in which it creates and perpetuates sites of silence and exclusion.

This Chapter is divided into three sections. Section One outlines the background to the Agreement. It explores the way in which the discourse of human rights began to assert itself as the dominant language in which resistance to the State and its laws was expressed. It then locates the Agreement itself against a backdrop of political violence, and considers the terms of the Agreement and the way in which it was envisaged at the time as marking a break, and a new beginning, for Northern Ireland. In this way it reveals the originary force of the Agreement. Section Two moves on to explore the idea that has gained significant policy traction - that Northern Ireland should be regarded as being in 'transition'. It begins by exploring the origins of these claims and considering the application of the framework of 'transition' as an exceptional measure. The Section then moves on to examine in detail the way in which the Agreement has been interpreted by the courts in light of the requirements of 'transition' and the constitutional status ascribed to it. In so doing, the idea of a linear progression from past to present is problematised, and the on-going conserving violence of the law is highlighted. Finally, Section Three highlights the way in which

¹⁰ Discussed in Chapter 4.

¹¹ Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell and others (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992) 1, 13 (hereinafter 'Force of Law').

¹² *ibid* 7.

the violent hierarchy has been inverted in the case of Northern Ireland. It suggests that the Agreement is subject to the same dynamics of contestation as the emergency legislation that preceded it. It concludes by suggesting that the increasing resistance and challenge to the Agreement, and the legal framework of transition that it introduced, represents the third stage of the economy of violence - that of the violence of reflection. In this way it demonstrates the circular nature of the relationship between violence and law. The Chapter is concerned with the metaphysical violence of law. By exploring the way in which the Agreement has created a powerful legal context within which politics in Northern Ireland takes place, it demonstrates the oppositional structure within which law operates, and ultimately how this impacts on the possibility of transitional justice. Rather than moving from violence to law, or from conflict to peace, the Chapter demonstrates the circular logic of this relationship.

1. THE VIOLENCE OF THE ORIGIN

a. Shifting Means of Resistance: The Armalite and the Ballot Box

As discussed in the previous chapter, during the course of the Troubles, resistance to the State manifested in both political violence and in legal contestation. During this period the language of human rights was used to 'reflect' the way in which the emergency legislation that dominated the legal landscape in Northern Ireland had suppressed legitimate challenge to the actions of the State. The relationship between the two strategies of political violence and legal contestation is illustrative of the complex relationship between violence and law—and whether or not the two can be regarded as separate phenomena. In the early years of the Troubles, those who advocated the use of physical violence did so as an explicit rejection of law as a means of effectively challenging the state.¹³ Those who engaged in human rights advocacy and non-violent protest did so as an explicit rejection of violence as a legitimate means of doing politics. A clear distinction was therefore drawn between violence on the one hand and law on the other. However, as discussed in the previous chapter, the two cannot be so easily separated. Violence is immanent to law.

¹³ See Jacques Derrida, 'The Laws of Reflection: Nelson Mandela, In Admiration' in Jacques Derrida and Mustafa Tlili (eds), *For Nelson Mandela* (Seaver Books 1987) 18 (hereinafter 'Laws of Reflection').

For Derrida, all revolutionary violence will have as its ultimate end the re-establishment of law.¹⁴ In Northern Ireland, the Republican approach to violence and law gradually began to shift. Whereas, in the early years, violence had as its aim the destruction of the State, gradually it came to be acknowledged that legal strategies that challenged the State could also contribute to political ends.¹⁵ What was necessary was to effectively challenge the legitimacy of the framework of emergency in order to appeal to a broader constituency.¹⁶ Law therefore adopted a much more central role in Republican strategy from the mid-1980s,¹⁷ with human rights creeping into the political discourse of Sinn Féin.¹⁸ During the 1980s and 1990s, a legal strategy was adopted that sought to highlight human rights issues—such as prison conditions, controversial killings and fair trial rights—not only domestically, but also on the international front.¹⁹ The purpose of this strategy was to counter the delegitimising effect of the dominance of the emergency discourse and its condemnation of violence.²⁰ This represents the beginning of a shift towards a revolutionary violence that could be justified by the promise of a new and more just legal order.²¹ This reflected a pragmatic acceptance of ‘mythic’ (law-creating) violence in contrast to the earlier engagement of ‘divine’ (law-destroying) violence.²² It also began to shape the narrative of the causes of the conflict, which would in turn shape the Agreement and its implementation.

¹⁴ Force of Law (n 11). Discussed in Chapter 4.

¹⁵ For a comprehensive analysis of this strategy, see Kieran McEvoy, ‘Law, Struggle and Political Transformation in Northern Ireland’ (2000) 27(4) *Journal of Law and Society* 542.

¹⁶ This change in tactic was famously summed up in the statement that the IRA would use ‘the armalite and the ballot box’ to oppose British rule in Northern Ireland. *Ibid.*

¹⁷ Kieran McEvoy and John Morrison, ‘Beyond the Constitutional Moment: Law, Transition and Peacemaking in Northern Ireland’ (2003) 24 *Fordham International Law Journal* 961

¹⁸ See Sinn Féin, ‘Towards a Lasting Peace in Ireland: Sinn Féin Manifesto for the Westminster Election’ (Belfast, 1992).

¹⁹ See for example *McCann and Others v United Kingdom* [1995] 21 EHRR; *Brannigan and McBride v United Kingdom* [1993] 17 EHRR 539. See also Amnesty International, ‘United Kingdom: Killings by Security Forces in Northern Ireland’ (New York, 1986).

²⁰ See Kris Brown, ‘Rights and Victims, Martyrs and Memories: The European Court of Human Rights and Political Transition in Northern Ireland’ in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press 2011) 52.

²¹ See McEvoy (n 15) on the dual use of violence and law. While the use of law increased during this time, McEvoy is clear that this should not be read as a linear progression away from violence and towards legal contestation. The two remained linked and used simultaneously as the ‘struggle’ demanded, each influencing the other.

²² Force of Law (n 11). See Chapter 4.2.b for explanation of these terms.

It was at this time that talks began, which would eventually lead to the Agreement. Whereas in the past those who engaged in violence had been systematically excluded from negotiations, from the mid-1980s there was a change in approach. The first evidence of an official acceptance of competing narratives of the State in Northern Ireland came in 1985, with the Anglo-Irish Agreement.²³ This was followed by a series of Joint Declarations made by the British and Irish governments in which the rhetoric moved away from that of terrorism and security and towards a more conciliatory rhetoric based on human rights and shared understandings of the future of Anglo-Irish relations.²⁴ Gradually the subordinated discourse of human rights began to assert its presence against the dominant narrative of security and emergency powers. At the time, the Declarations were criticised by Unionist politicians as being taken from the lexicon of nationalism²⁵ and as being extracted by violence and the threat of violence.²⁶ This reflects the oppositional nature of contestation whereby the law was seen as belonging to one side at the expense of the other.²⁷ The rhetoric of security implicitly favoured Unionist interpretations of law and violence, representing violence as illegitimate and the security response as necessary to uphold the rule of law. Human rights claims, with their emphasis on state wrongdoing, presented a direct challenge to established narratives of law and order within the State. The shift towards the rhetoric of human rights evident in these Declarations was therefore in direct opposition to established Unionist positions and, as a result, seen as favouring Nationalist interpretations of the conflict.²⁸ This was particularly marked in the context of the provisions of the Agreement on changes to policing and security that had been some of the most contentious issues throughout the Troubles, and which were at the very heart of divisions over questions of violence, law and justice within Northern Ireland.²⁹ The language of human rights was therefore used to challenge the

²³ Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland (Cmnd.9657, 1985). This agreement dealt specifically with legacies of division, including discrimination and the relationship between the security forces and the community, in Northern Ireland.

²⁴ See The Joint Declaration by An Taoiseach Mr Albert Reynolds, TD and the British Prime Minister, The Rt Hon. John Major, MP (Cm. 2442, 1993). See further A New Framework for Agreement [1994] 34 ILM 946.

²⁵ Ian Paisley, 'Peace Agreement – or Last Piece in a Sellout Agreement?' (1998) 22 Fordham International Law Journal 1273.

²⁶ *ibid.*

²⁷ See Chapter 4

²⁸ Paisley (n 25).

²⁹ See Cheryl Lawther, 'Securing the Past: Policing and the Contest Over Truth in Northern Ireland' (2010) 50 British Journal of Criminology 455 for discussion.

dominance of the framework of emergency, and the effect of this challenge was to expose the relationship of violent hierarchy that existed between the two. The increasing prominence of human rights created a new political context within which negotiations took place. The following section will discuss how this new context was reflected in the terms of the Agreement itself.

b. Framing the Agreement

The Agreement has been celebrated for the extent to which it places human rights at its heart.³⁰ This relates not only to the human rights provisions that are enshrined into the text itself, but also in relation to the way in which the Agreement can be read as acknowledging past abuses.³¹ In the Declaration of Support that opens the Agreement, the parties acknowledge the legacy of suffering and dedicate themselves to ‘the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all’.³² In this way the document falls within the definition of ‘transitional, in that it is both forward and backward looking, speaking to the injustices of the past while attempting to articulate a more just future’.³³

Central to the Agreement is the creation of democratic institutions in Northern Ireland.³⁴ The text of the Agreement makes specific reference to the need to provide ‘safeguards to protect the rights and interests of all sides of the Community’.³⁵ Safeguards in this context are interpreted as including the incorporation of the European Convention on Human Rights (the Convention) into domestic law, the creation of a Bill of Rights for Northern Ireland and the establishment of a Human Rights Commission to oversee the new arrangements.³⁶ These terms are supplemented by the specific inclusion of rights, such as the right to free political thought and the

³⁰ For discussion see Paul Mageean and Martin O’Brien, ‘From the Margins to the Mainstream: Human Rights and the Good Friday Agreement’ (1998) 22 *Fordham International Law Journal* 1498.

³¹ *ibid.*

³² Agreement (n 1), Declaration of Support.

³³ It therefore speaks directly to Teitel’s conception of transitional justice. Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000).

³⁴ Agreement (n 1) Strand One. This point appears contradictory in light of the fact that Northern Ireland was, before the Agreement, part of a liberal democracy in which period elections did occur. However it speaks to the ‘conflicted’ nature of that democracy and the need to address perceptions of the illegitimacy of the existing structures. See Colm Campbell and Fionnuala Ní Aoláin, ‘The Paradox of Transitions in Liberal Democracies’ (2005) 27 *Human Rights Quarterly* 172.

³⁵ Agreement (n 1) Strand One, Art 1.

³⁶ *ibid* Section 5(b) Safeguards.

right to equality of opportunity in all social and economic activity.³⁷ These terms are simultaneously forward- and backward-looking. Their inclusion in the Agreement is framed with reference to the ‘recent history of communal conflict’,³⁸ but they provide a forward-looking guarantee of a more just order in which different political beliefs and traditions are given equal respect. Similarly, while not making specific reference to ‘dealing with the past’, the Agreement also contains provisions on the reform of policing and justice. These are also both backward- and forward-looking, in that in proposing reform they are framed, albeit implicitly, as responding to past failures. For example, the Agreement requires the removal of emergency powers for Northern Ireland.³⁹ Reforms arising from the Agreement have also included the transformation of the Royal Ulster Constabulary (RUC—a police ‘force’) into the Police Service of Northern Ireland (PSNI—a ‘police service’) under the auspices of the Patten Report;⁴⁰ the establishment of a Northern Ireland Human Rights Commission and the presentation of a draft Bill of Rights to Westminster;⁴¹ and the appointment of numerous statutory bodies, including the Equality Commission⁴² and more notably the Parades Commission - established to decide on the legality and re-routing of mainly Loyalist parades.⁴³ All of these changes have been part of a radical package that has ostensibly set about examining the operation of law in Northern Ireland.⁴⁴ Each of these bodies has its origin in the Agreement and each frames its activities with reference to the need to give effect to its terms and mark a break from the past.⁴⁵ Each also provides an ostensibly non-political body tasked with making impartial decisions on contentious political issues.⁴⁶ These types of reform are not unique to

³⁷ *ibid* Strand One.

³⁸ *ibid* Art 1.

³⁹ *ibid* Strand One, ‘Rights, Safeguards and Equality of Opportunity’ ‘Security’ Art 2 (iii).

⁴⁰ Independent Commission on Policing for Northern Ireland, ‘A New Beginning: Policing in Northern Ireland’ (Belfast, 1999). In this report, the Commission explicitly locates its work in the context of giving effect to the Agreement. The recommendations of the report were given statutory footing in the Police (Northern Ireland) Act 2000.

⁴¹ ‘A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland’ (Belfast, 2003) <<http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>> accessed 19 October 2015.

⁴² Established under the Northern Ireland Act (1998).

⁴³ Formally established by the Public Processions (Northern Ireland) Act 1998.

⁴⁴ For discussion, see Catherine Turner, ‘Political Representations of Law in Northern Ireland’ [2010] 3 Public Law 451.

⁴⁵ Gordon Anthony and Paul Mageean, ‘Habits of Mind and “Truth Telling”: Article 2 ECHR in Post-Conflict Northern Ireland’ in McEvoy et al (eds), *Judges, Transition and Human Rights* (OUP 2007) 181, 187.

⁴⁶ *ibid*, identifying these reforms as being at ‘the heart of the practical process of transition in post-conflict Northern Ireland that was thought would characterize the bedding down of the Agreement’.

Northern Ireland, but increasingly represent the type of ‘rule of law’ reform that will be required of any transitional society, as the requirements of transitional justice have in recent years crept further towards systemic constitutional reform as a means of addressing legacies of injustice.⁴⁷ In this way Northern Ireland is an early, but by no means unique, example of reforms that seek to institutionalize political debates.⁴⁸

The Agreement, however, while including strong human rights provisions, makes no specific reference to what we now understand as typical transitional justice mechanisms. There is no requirement that an institution, whether criminal or civil, be established to ensure accountability for the past.⁴⁹ Nor is the language of truth or reparation evident in the text. While reconciliation is included as something to which the parties strive, it does not ground the Agreement nor provide a framing reference point.⁵⁰ At the time that the Agreement was signed, the compromises it included were the result of political negotiation, framed by international law and best practice. It was not dictated by a normative framework of ‘transition’.⁵¹ However the language of human rights did provide a shared vocabulary. For Nationalists, the inclusion of guarantees of safeguards could be read as an acknowledgement of the failings of the Stormont government and an acceptance of their human rights claims, particularly in respect of discrimination.⁵² They also pointed to international law as the standard to which the Agreement should aspire in terms of human rights compliance.⁵³ Unionists were also able to locate the Agreement within a broader national and international context. At the time the Agreement was being negotiated, moves were underway

⁴⁷ See Catherine Turner and Ruth Houghton, ‘Constitution Making and Post Conflict Reconstruction’ in Matthew Saul and James Sweeney (eds) *International Law and Post Conflict Reconstruction* (Routledge, 2015).

⁴⁸ See Jelena Subotić, ‘The Transformation of International Transitional Justice Advocacy’ (2012) 6 *International Journal of Transitional Justice* 106.

⁴⁹ This has led to criticism that efforts to deal with the past have been, at best, ‘piecemeal’. See Christine Bell, ‘Dealing With the Past in Northern Ireland’ (2002) 26 *Fordham International Law Journal* 1095.

⁵⁰ Agreement (n 1) Declaration of Support.

⁵¹ It has been suggested that this was a deliberate omission, due to the position of the UK government that the conflict was an internal matter. Bell (n 49).

⁵² See, for example Agreement (n 1) Strand One Annex A, which sets out the Ministerial Pledge of Office, requiring all Ministers in the new institutions to promote equality and prevent discrimination.

⁵³ Other international legal developments also served to ground the Agreement, including developments on self determination and minority rights, Christine Bell and Kathleen Kavanaugh, ‘Constructive Ambiguity, or Internal Self Determination? Self Determination, Group Accommodation and the Belfast Agreement’ (1998) 22 *Fordham International Law Journal* 1345; and the emergence of a fundamental rights jurisprudence in the European Court of Justice, cited by David Trimble, ‘The Belfast Agreement’ (1998) 22 *Fordham International Law Journal* 1145, 1148.

within the UK to incorporate the provisions of the Convention into domestic law. The inclusion of human rights provisions that mirrored those protected by the Convention therefore allowed Unionist politicians to accept human rights as part of broader constitutional reform within the UK and to assert their belief that ‘the legal protection of human rights was an indispensable part of any agreement’.⁵⁴

In this way, the Agreement and the parties responsible for ‘selling’ it to their respective constituencies drew on international standards and international comparison as a means of legitimising the inclusion of strong human rights provisions.⁵⁵ The Agreement was therefore framed in the language of transcendence,⁵⁶ whereby internationally validated human rights provisions could be used to externalise and transcend difficult political issues that might have prevented agreement from being reached. While not directly using the language of transition, the sentiment is the same. As discussed in Chapter Two, Teitel’s conceptualisation of the role of law in transition draws heavily on the transcendent quality of international law, whose incorporation of principles of justice allow it to transcend domestic politics.⁵⁷ The language of the Agreement similarly speaks of a desire to reach agreement on principles that could be agreed by both sides.⁵⁸ The Agreement therefore represented the promise of a new order, of a reconciled politics *within* Northern Ireland. This shifted the focus of the constitutional question away from the status of Northern Ireland as a part of either the United Kingdom or a united Ireland and placed it squarely on the jurisdiction of Northern Ireland. Any future decision over the status of Northern Ireland would be made by the people of Northern Ireland themselves.⁵⁹ This principle marked a break from the previous constitutional order, created by the Government of Ireland Act 1920. The Agreement specifically refers to

⁵⁴ Trimble (n 53).

⁵⁵ See Mageean and O’Brien (n 30) on the international context within which the Agreement was located.

⁵⁶ See in particular Kate Fearon and Monica McWilliams, ‘The Good Friday Agreement: A Triumph of Substance Over Style’ (1998) 22 *Fordham International Law Journal* 1250 on the adoption of an interest-based negotiating position by the Women’s Coalition—focusing on the language of rights rather than on divisive constitutional politics.

⁵⁷ See Chapter 2.1.a.ii.

⁵⁸ See Barry Collins, ‘The Belfast Agreement and the Nation that “Always Arrives at Its Destination”’ (2002) 20 *Penn State International Law Review* 385.

⁵⁹ This is known as the ‘consent’ principle, contained in the Agreement (n 1) Declaration of Support, ‘Constitutional Issues’, Art 1(1). This was accompanied by the removal of a territorial claim to Northern Ireland enshrined in the Constitution of the Republic of Ireland, which was amended to recognize the principle of consent. Nineteenth Amendment to the Constitution Act 1998

the past, and to its own role in marking a break from that past, to ensure a new start for politics in Northern Ireland. This suggests a linear progression, in which the injustice of the past gives way to the future. When seen in these terms, one flows naturally from the other.

However, while the Agreement can be narrated as ‘progress’ away from violence towards peace, a Derridean reading of the Agreement problematizes this linear characterisation. Rather than viewing the Agreement as ‘a moment inscribed in the homogenous tissue of a history’,⁶⁰ it becomes what Derrida terms a ‘rupture’—a break from the past that introduces a new system.⁶¹ In short, the moment of the signing of the Agreement was a moment of originary violence in which the legal order was simultaneously destroyed and re-founded.⁶² This was the moment in which the framework of ‘emergency’ gave way to that of ‘human rights’ and subsequently ‘transition’. Seeing the moment of the Agreement as a rupture, rather than simply a step in a natural progression, has implications for how we interpret both the past and the present. While human rights were enshrined at the heart of the Agreement, different parties had different reasons for their inclusion. The following section will discuss how this difference in understandings of the role and significance of rights led to competing interpretations of the Agreement and the need for legal reform.

c. The Agreement as a Constitutional Moment

By definition, peace agreements that give rise to transitions from war to peace will be framed against a backdrop of contestation over the legitimacy of the state and the legality of the prior regime and its laws.⁶³ However, the idea of law representing a natural progression is one that is of interest in the context of revolutionary violence and transition. History is replete with examples of hard-won political concessions being enshrined into law. From the Magna Carta to the Universal Declaration of Human Rights, war or revolution are inevitably followed by the declaration of a new legal order. The violence that preceded the law is absorbed into a progressive account

⁶⁰ Force of Law (n 11) 13.

⁶¹ Margaret Davies, ‘Derrida and Law: Legitimate Fictions’ in Tom Cohen (ed), *Jacques Derrida and the Humanities: A Critical Reader* (Cambridge University Press 2002) 213, 226.

⁶² Force of Law (n 11).

⁶³ The field had its origins in the examination of how successor regimes chose to deal with an abusive prior regime. See Neil J Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (USIP 1996) vol 1-3.

of the move from the state of war to that of peace founded on law. The moment in which the Declaration is made, and the concessions achieve legal form, is a constitutional moment—the moment in which a new institution is created. In the modern context of transitional justice, the peace agreement fulfils this role of moving a state from the unmitigated violence of war, conflict or repression, to peace.⁶⁴ The signing of a peace agreement will represent a rupture with the existing order. It will be the moment that marks a break from the past and institutes a new order. While peace agreements take many disparate forms, and are intended to fulfil different roles at different stages of transition, the fact that they are intended to mark at least the beginning of new order means that they have increasingly been characterised as having constitutional form.⁶⁵ This was the case in Northern Ireland, where the Agreement represented for some ‘a new constitutional beginning for resolving a historic problem’.⁶⁶ The Agreement ‘[laid] down the terms upon which people in Northern Ireland, from all communities, [were] willing to be governed’.⁶⁷ As such it has been interpreted as a constitutional moment, whereby the Agreement and its implementing legislation were ‘constituent acts in the establishment of a new polity’.⁶⁸ The aim of the Agreement, according to one central figure, was to create unity from diversity.⁶⁹ When seen in these terms, the Agreement founds both a new legal order and a new political order.⁷⁰

As discussed in the context of the Belfast Agreement, the peace agreement must be both backward- and forward-looking. It must speak to past injustice while also crafting a new future for the state. This backward-looking element will respond directly to the perceived injustices of the past (and by extension to the illegitimacy of the previous regime) and, in this way, is firmly rooted in ideas of justice and moral progress. The new order is expressly juxtaposed with the past—the binary of before

⁶⁴ The majority of ‘transitions’ are now brought about by negotiated settlement rather than outright victory, thereby making the peace agreement an integral aspect of the study of transition and transitional justice. See Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press, 2000).

⁶⁵ Christine Bell, ‘Peace Agreements: Their Nature and Legal Status’ (2006) 100 *American Journal of International Law* 373.

⁶⁶ McEvoy and Morison (n 17) 964.

⁶⁷ *ibid* 969.

⁶⁸ *ibid*. This interpretation of the Agreement as a constitutional moment was subsequently confirmed by the House of Lords in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

⁶⁹ John Hume, ‘Ireland – The Healing Process’ (1998) 22 *Fordham International Law Journal* 1171.

⁷⁰ This is described by Campbell, Ní Aoláin and Harvey (n 4) 327, as a ‘fluid and reconstituted political space’.

and after—the ‘before’ of illegitimacy and conflict juxtaposed with the ‘after’ of legitimacy and peace. When seen in these terms, the Agreement is no different from the revolutionary Declarations that have preceded it. Throughout history, revolutionary Declarations have drawn on the language of transcendence to guarantee their authority. From the ‘self-evident truths’ of the American Declaration of Independence, to the values of ‘*liberté, égalité, fraternité*’ that underpinned the French Declaration, appeals are made to a higher authority in order to legitimise the violence of revolution and the re-founding of legal order. This appeal to higher principles suggests that the new law, rather than representing a violent rupture, simply embodies and gives effect to (natural) principles of justice that precede the law.⁷¹ In so doing, it seeks not only to legitimate the physical violence that has led to the re-founding of law, but also to conceal the violence of the Declaration itself. It masks the history of violent contestation that has given rise to the Declaration, presenting instead a unified set of principles (of justice or equality, for example) upon which the new legal order will be founded. It is this narrative of progress towards law that Derrida seeks to problematize in his essay ‘Declarations of Independence’, in which he addresses the linearity of the constitutional moment.⁷² Derrida’s analysis is significant for transitional justice because it reveals the way in which contestation is masked and one particular view is made to appear the impartial or ‘correct’ view of the Declaration and its requirements.

The previous section discussed how there were differing interpretations of the significance of the human rights provisions of the Agreement. This flows from the fact that Northern Ireland was a ‘conflicted democracy’ in which there are sharply divided opinions over the use of violence and the need for legal reform.⁷³ The nature of ‘justice’ is not accepted as self-evident in this case.⁷⁴ This exposes the oppositional structure in which debates over the role and significance of human rights occur. Where a distinction is drawn between a natural order and a positive legal order, the

⁷¹ See Jacques De Ville, ‘Sovereignty Without Sovereignty: Derrida’s Declarations of Independence’ (2008) 19 *Law and Critique* 87.

⁷² Jacques Derrida, ‘Declarations of Independence’ in Elizabeth Rottenberg (ed), *Negotiations: Interventions and Interviews, 1971-2001* (Stanford University Press 2002) 46

⁷³ Colm Campbell and Fionnuala Ní Aoláin, ‘The Paradox of Transitions in Liberal Democracies’ (2005) 27 *Human Rights Quarterly* 172.

⁷⁴ This is largely due to the fact that the transition is negotiated rather than arising from outright revolution.

question to be asked is whether the Declaration, by drawing on transcendent values, simply declares the existence of these values (natural law) or whether the act of making the Declaration creates them (positive law). In other words, does law precede violence or does violence precede law? This distinction also bears on the authority of the Declaration itself. Where 'natural' principles of justice and truth are relied upon to ground the Declaration, the Declaration can be read as law-preserving, in that it gives effect to, and guarantees, existing principles of natural law.⁷⁵ However if the existence of transcendent standards is rejected, the Declaration is seen not as a law-preserving act, but as a law-creating, or 'positive', act. Rather than declaring the existence of values, the effect of the declaration is to bring those values into being by virtue of their promulgation in law. This leads to two clearly defined and competing philosophical positions on the legitimacy of the Declaration. It is the clear distinction between the two that Derrida seeks to destabilise. As discussed in Chapter Three, the separation between nature and its institution is an artificial one for Derrida. Rather than trying to distinguish values existing outside of the law from those created by law, Derrida sees law as arising as the result of the constant negotiation between these two positions.⁷⁶ It is, therefore, not possible to draw a rigid distinction between the two concepts, but rather it is necessary to recognise the relationship between them and how this shapes our understanding of law. Reverting to Derrida's original example - that of a declaration of independence - Derrida highlights the paradox of this approach, 'One cannot decide, ... whether independence is stated or produced by this utterance'.⁷⁷ There are traces of both present in the Declaration.⁷⁸ This dynamic is also visible in the context of the Agreement. The question that 'Declarations of Independence' raises in respect of the Northern Ireland example is whether, at the time of the Agreement, the parties were united in support of (transcendent) human rights values, of which support was simply being declared in the Agreement, or whether human rights and equality, and the unity in diversity that they created, were produced by the Agreement? By exploring this question, we begin to reveal the negotiation between competing positions, and the way in which law relies on the subordination of alternative views to ensure its own dominance. The following

⁷⁵ See De Ville (n 71), suggesting that this incorporates self-evident matters of justice and rights that had previously been lacking.

⁷⁶ See Chapter 3.

⁷⁷ Declarations of Independence (n 72) 49.

⁷⁸ For more detailed discussion of this dynamic see Chapter 3.1.

section will therefore discuss competing interpretations of the significance of human rights, and how they reveal the paradoxical nature of the Agreement itself.

d. Declaring or Creating Unity?

The language of the Agreement itself is much more cautious than that of revolutionary declarations. It is, of course, a negotiated settlement that recognises, rather than denies, the existence of competing political views and aspirations. Nevertheless, the paradoxical nature of the Agreement as a foundational document remains. There are two possible, and competing, explanations for the inclusion of human rights and equality in the Agreement. The first is that it was simply giving effect to existing values of international law. In dissolving the existing political bond, that of the Government of Ireland Act and the specific political community that it had created, the Agreement draws on the language of human rights - the existence of which is a fact to be recognised.⁷⁹ Human rights and the entitlement to respect are not values that are being created by the Agreement, but rather their existence is being reflected in the Agreement. When seen in these terms, the text of the Agreement institutes, in the new legal order, principles and values that precede it. Those responsible for negotiating and drafting the Agreement simply 'represent' an existing constituency or 'people' that has given them the authority to act on their behalf in instituting these principles in law.⁸⁰ This element of representation of a community is further rubberstamped by seeking the consent of the people by referenda.⁸¹ Therefore, when seen in this light, the Agreement reflects transcendent international values of human rights that were simply consigned to writing by those who drafted the Agreement and given authority through the referenda.⁸² The Agreement therefore does not create anything new but simply institutes and guarantees values that already exist—namely international law standards of human rights.⁸³ In this way the

⁷⁹ Agreement (n 1) 'Rights, Safeguards and Equality of Opportunity'.

⁸⁰ In this way the role of the 'people' is broadly analogous to the idea of the nation that has in the past been the foundational origin of law. See Collins (n 58) 386.

⁸¹ Referenda on the Agreement were held in both Northern Ireland and the Republic of Ireland, as required by the Agreement. Agreement (n 1) 'Validation, Implementation and Review' S 2.

⁸² See Declarations of Independence (n 72) 48 where Derrida suggests that the author of the text simply represents those who have delegated to him the task of drawing up what they *knew* they wanted to say. This interpretation of the Agreement as reflecting existing principles is also evident in Mageean and O'Brien's analysis of the way in which human rights advocacy underpinned the substantive provisions of the Agreement (n 30).

⁸³ For discussion of the importance of locating the Agreement in international law see John Morrison and Marie Lynch, 'Litigating the Agreement: Towards a New Judicial Constitutionalism for the UK

Agreement can be regarded as a law-preserving act. This interpretation is significant because it regards human rights as normative, and as such non-negotiable, commitments. There is some support for this position in the fact that both Nationalist and Unionist politicians were able to see benefit to themselves in supporting the use of the language of human rights to frame the Agreement.⁸⁴

The alternative position is that the Agreement, rather than reflecting the existence of consensus on the values of human rights and equality, actually created these new norms. When seen in these terms, the values of human rights and equality that underpin the Agreement are read not as transcendent standards that precede the law, but as the legal results of a process of political negotiation in which parties reached agreement on how competing aspirations should be guaranteed. This would cast the Agreement as a performative act—one that produces a new community and a new legal order. In this light, the political community and its values do not exist before the Agreement is signed, but rather are created by the act of signature.⁸⁵ Rights, when seen from this position, are political—the subject of negotiation rather than pre-existing normative commitments. There is certainly evidence for this reading of the Agreement. The fact that the text of the Agreement itself speaks of the existence of different political aspirations appears to acknowledge the attempt to create unity rather than to reflect it. Research also suggests that the Agreement was regarded by those who drafted it as a political, rather than a legal, document that created a space within which difficult issues could be addressed.⁸⁶ The way in which the Agreement is crafted also carefully speaks to each side of the community, allowing them to support it for their own reasons rather than on the basis of a transcendental standard of right that is simply being reflected.

To read the Agreement from a Derridean perspective, however, requires that we resist the urge to try and characterise the Agreement as *either* a constative (law-preserving)

from Northern Ireland' in Kieran McEvoy and others (eds), *Judges, Transition and Human Rights: Essays in Memory of Stephen Livingstone* (Oxford University Press 2007) 105, 106.

⁸⁴ This dynamic is referred to as 'constructive ambiguity' whereby particularly contentious issues were left deliberately vague in order to secure agreement. For discussion see David Mitchell, 'Cooking the Fudge: Constructive Ambiguity and the Implementation of the Northern Ireland Agreement, 1998–2007' (2009) 24 *Irish Political Studies* 321.

⁸⁵ *Declarations of Independence* (n 72) 49.

⁸⁶ Morrison and Lynch (n 83) 115.

or a performative (law-creating) act and to justify that conclusion. Rather, a Derridean reading requires that we recognise the relationship of mutual contamination between the two.⁸⁷ The moment at which the Agreement was signed contains both law creating and law preserving elements, and the two cannot be separated out into a neat narrative of cause and effect. The Agreement was both constituted by and constitutive of a new human rights and equality agenda.⁸⁸ This means that our understanding of the Agreement is constructed not on fixed positions but rather on the relationship between two competing interpretations of human rights as either normative or political.⁸⁹

Whether the Agreement declared or created a new legal order, what remains clear is that once it was signed and instituted in law, the previous constitution was destroyed and a new one founded.⁹⁰ This, for Derrida, is the outcome of all revolutionary violence. From the point that the Agreement was signed and ratified, it was guaranteed as a new order that had been created and therefore must be protected by law.⁹¹ The Agreement, as a foundational document, claims its authority by virtue of the break that it marks with the past, in the way in which the order that it creates can be distinguished from the conflicted past.⁹² When read in the light of Derrida's economy of violence, the originary aspect of this moment of re-founding law becomes clear. By definition there will be (at least) two opposing sides in any violent conflict. The moment at which the Declaration is founded is therefore a moment of violence. It is the point at which one side emerges dominant and subordinates its opposition. In more practical terms, the Declaration marks the point at which violence gives way to law and the point at which the *means* of revolutionary violence potentially become justified by the *end* of a more just order.⁹³ However for Derrida it is not possible, *at that moment in time*, to judge whether the 'end' of the new legal order justified the

⁸⁷ Force of Law (n 11) 40.

⁸⁸ In these terms it can be characterized as a performative act that supposes anterior conventions. Ibid 27.

⁸⁹ This is discussed in more detail in Chapter 6.

⁹⁰ Force of Law (n 11).

⁹¹ Declarations of Independence (n 72) 51.

⁹² In these terms the Agreement can be read as what public lawyers term a 'critical juncture' in which the constitutional moment provides a new and different foundation for the constitution. For discussion in context see Morrison and Lynch (n 83).

⁹³ Derrida describes the assumption that 'just' ends, determined by reference to natural or transcendental standards, will ultimately justify the means (violence) as a common presupposition of natural and positive law. Force of Law (n 11) 32.

violent ‘means’ that led to it.⁹⁴ Nor is it possible to judge at the moment of origin whether or not the new legal order will be capable of establishing legitimacy or authority.⁹⁵ This happens only through the on-going process of negotiation between two opposing positions,⁹⁶ and the emergence of one position as dominant over the other, thus subordinating it in a violent hierarchy of meaning. The moment of founding law is a moment of metaphysical violence that will ultimately become the new source of authority of the law. Yet at the moment in which it is founded, it is neither legal nor illegal.⁹⁷ This means that although we speak of the violence of law when we speak of the Agreement, this violence also has no intrinsic quality. While there were those who supported the Agreement and those who opposed it, on the metaphysical level the Agreement itself was neither ‘good’ nor ‘bad’. This judgment comes only afterwards, and depends on how the Agreement itself is interpreted and how well the violence of the origin is concealed.

How violence, both political and metaphysical, is interpreted in the post-Agreement phase depends on the interplay between past, present and future. For example, a decision that the Agreement requires significant reform of the police force carries with it an implicit acceptance of the human rights narrative and a rejection of the security narrative. The moment of decision is a moment of metaphysical violence in which the security narrative is violently subordinated to that of human rights. Over time this will colour our interpretation of the past. If the law declares that those who opposed the State were the victims of abuse of their human rights, this lends legitimacy to the use of violence and calls into question the authority of the previous legal order. This can be contrasted with the effect of a judgment that confirms the restriction of fair trial rights as necessary to counter a terrorist threat, the effect of which is to delegitimise the use of violence and uphold the authority of the law. With each decision that accepts the human rights discourse, the use of political violence appears incrementally more justified as a necessary means towards a just end, even if

⁹⁴ *ibid* 36. This for Derrida is a moment of ‘non’ law. This also reflects his rejection of the ‘metaphysics of presence’ discussed in Chapter 3.

⁹⁵ And whether or not it will succeed in legitimizing the violence that led to its institution. On this dynamic see Costas Douzinas, ‘Violence, Justice and Deconstruction’ (2005) 6 *German Law Journal* 171.

⁹⁶ Force of Law (n 11) 36. ‘Only the yet-to-come (*l’avenir*) will produce intelligibility or interpretability of this law.’

⁹⁷ *ibid* 14.

the suffering caused along the way was regrettable.⁹⁸ In this way the law is violent, because it is complicit in the privileging of one particular interpretation at the expense of the other. This represents the force *of* law—violence in the metaphysical sense. What we have seen is that there were competing understandings of the significance of human rights in the Agreement. Our assessment of the Agreement, and the legal order that it created, is constructed on the interplay between these oppositional positions in which one will ultimately subordinate the other. However, in order to ensure its own authority, the new legal order must conceal the history of violent contestation from which it emerged.⁹⁹ The following section will discuss how the violence of the origin of the Agreement has been concealed, and how one particular account of the significance of human rights has become established as the dominant account. This is particularly interesting as it reveals the way in which the terms of contestation over law have been set, and how this has had the effect of creating new sites of silence and exclusion.

2. CONCEALING THE VIOLENCE OF THE ORIGIN

a. Northern Ireland in ‘Transition’

In 2003 it was argued that analysis of the Agreement should be ‘sited in an emerging field of legal scholarship, that of “transitional justice”’.¹⁰⁰ Transitional justice, it was argued, ‘demands engagement with the specific legal imperatives operative in the case of societies in transition...’¹⁰¹ By advocating the re-framing of the Agreement as a transitional justice measure, this analysis sought to shift the primary site of engagement with the Agreement away from established UK constitutional law and towards the emergent legal framework of transition. This analysis firmly locates Northern Ireland as undergoing a ‘move away from violent conflict to political contestation’, placing it firmly within the parameters of the new ‘conceptual space’ of transitional justice.¹⁰² The benefit of adopting this lens through which to view the

⁹⁸ This reflects Derrida’s suggestion that interpretive models give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretive model in question. *Force of Law* (n 11) 36.

⁹⁹ Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, John Hopkins University Press 1976)

¹⁰⁰ Campbell, Ní Aoláin and Harvey (n 4) 318.

¹⁰¹ *ibid.*

¹⁰² *ibid* 319. For discussion of the ‘conceptual space’ of transitional justice see Chapter 2.1

Agreement, it was argued, was that it could act as both a ‘mediating paradigm and a prescriptive framework’.¹⁰³ In particular, the flexibility of the framework of transition would allow for a transformative approach to the interpretation and implementation of the Agreement. This would help to mitigate the risks of a clash of the ‘distinct logics of law and politics’ that would inevitably occur when the political gains of the Agreement were subjected to legalistic (and, by implication, conservative) interpretation.¹⁰⁴

A further effect of adopting the framework of transition was to expose post-Agreement legal reform in Northern Ireland to the closer application of international law, and in particular to the emergent international standards of transitional justice. In 2004, the Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies elaborated a legal framework of transition, emphasising legal rule of law imperatives for post-conflict societies.¹⁰⁵ This international framework compensated for the absence of any strong transitional justice provisions in the Agreement itself, and provided an additional source of law to which parties could have recourse when making political demands. In particular, the international law framework of transition provided legal standards in relation to dealing with the past, most notably in terms of a ‘right to truth’, a right to a remedy and guarantees of non-repetition of human rights abuse.¹⁰⁶ These provisions had been absent from the negotiated settlement of the Agreement, yet were to prove central to the way in which public discourse around the past developed. While there are a number of competing conceptual and legal frameworks within which the Agreement and its conceptual significance are analysed,¹⁰⁷ the one that has come to dominate is that of transition.

Derrida identifies a dominant discourse as arising when three key tiers of society combine—namely the political, the media and academic spheres.¹⁰⁸ According to Derrida, dominance occurs where all three ‘communicate and co-operate toward

¹⁰³ Campbell, Ní Aoláin and Harvey (n 4) 326.

¹⁰⁴ *ibid* 324.

¹⁰⁵ United Nations, ‘Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies’ (UN Doc S/2004/616, United Nations 2004).

¹⁰⁶ These are discussed in more detail in Chapter 6

¹⁰⁷ See Morrison and Lynch (n 83) 108-09.

¹⁰⁸ Jacques Derrida, ‘Spectres of Marx’ (1994) 15 *New Political Science* 31

producing the greatest force with which to assure the hegemony [of that discourse]'.¹⁰⁹ The effect of this co-operation is to produce a discourse founded in the 'incontestable self-evidence' of the truths it proposes.¹¹⁰ In the case of Northern Ireland, there is strong evidence to suggest that the combination of political discourse,¹¹¹ media reporting¹¹² and academic intervention¹¹³ in the peace process has in recent years shifted the debate firmly onto the terrain of transitional justice.

b. Dominant and Subordinate Accounts of Conflict

Arguments in favour of framing the Agreement within the conceptual space of transition arise from the existence of conflicting interpretations of why the Agreement was necessary and what it was intended to achieve. The way in which the Agreement and its requirements would be interpreted therefore very much depended on how those responsible for its interpretation and implementation viewed its purpose. The argument in favour of adopting the lens of transitional justice through which to view the Agreement is explicitly rooted in the concern that a conservative interpretation that remained centred in UK constitutional law would not give effect to some of the more far-reaching political demands that had underpinned the Agreement, particularly in respect of human rights.¹¹⁴ The framework of transition takes as its starting point that law in the past has been problematic.¹¹⁵ As law itself has been partly responsible for the problem, any use of law will also risk perpetuating the violence of law. Law in transition must therefore be 'both the subject and object of change'.¹¹⁶ What this

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.* Obradovich-Wochnik also notes this trend in transitional justice in Serbia, where she suggests that society has been constituted through an alliance between NGOs and academics. 'The "Silent Dilemma" of Transitional Justice: Silencing and Coming to Terms with the Past in Serbia' (2013) 7 *International Journal of Transitional Justice* 328.

¹¹¹ As evidenced in the Stormont House Agreement

¹¹² See, for example, the participation of Desmond Tutu on a BBC Northern Ireland series of programmes on 'Facing the Truth', aired in 2006, in which victims and perpetrators were brought face-to-face with each other. More recently, the BBC in Northern Ireland has begun to put pressure on non-state actors in respect of the past.

¹¹³ In this context this refers not particularly to the contribution of academic analysis, but the way in which academics have teamed up with policy organisations to influence the way in which demands are made. See, for example, Committee on the Administration of Justice, 'Mapping the Rollback: Human Rights Provisions of the Belfast/Good Friday Agreement 15 Years On' (Belfast, 2013), presented in partnership with both Queen's University Belfast and the University of Ulster (2013). See also Bridge of Hope's 'Transitional Justice Grass Roots Toolkit' developed with the University of Ulster's Transitional Justice Institute.

¹¹⁴ Committee on the Administration of Justice (n 113).

¹¹⁵ Campbell, Ní Aoláin and Harvey (n 4) 334, stating that 'Typically, one of the products of extended conflicts is the use and abuse of legal form...'

¹¹⁶ *ibid.*

suggests is that by viewing law as flexible, and as being able to adapt to a unique political context such as transition, that law can break free from its abusive past to become a new agent for change.¹¹⁷ This is the ‘imperative of normative discontinuity’ that characterises the role of law in transition.¹¹⁸ It is for this reason that the focus is relocated away from established domestic law towards international legal standards, which are viewed as being both independent of the parties to a conflict and also providing comparative reference points which can help to shape the justice debate.¹¹⁹ This largely involves adopting a strongly normative approach to the role of human rights. The framework of transition is itself regarded as an exceptional measure.¹²⁰ The emergency legislation and derogation from human rights obligations that punctuated the legal landscape during the Troubles were represented as exceptional and short-term measures designed to ensure the restoration of the rule of law. Similarly the framework of transition is regarded as a regime of exceptionality whereby there is divergence from established models of legality, but this is justified by the ends of re-establishing the integrity of the rule of law.¹²¹

While arguments in favour of the application of the framework of transition are framed in the language of transcendence, they represent a deeply political choice. By asserting as a matter of fact that the starting point for analysis of the Agreement should be that there were systematic institutional failings in Northern Ireland, and that law itself had been implicated in causing and sustaining the conflict, a substantive statement is being made on where the responsibility for the conflict lies and how that should be addressed. For some, this choice also makes an implicit statement on the legitimacy or otherwise of the violence that preceded the Agreement. While the language of ‘transition’ is absent from the Agreement, it has been suggested that it envisaged a ‘context of transition’.¹²² Characterising Northern Ireland as being ‘in transition’ therefore also represents a further moment of violence, in that one

¹¹⁷ For detailed discussion of the claims made in respect of the role of law in transition see Chapter 2

¹¹⁸ Teitel (n 33) 224.

¹¹⁹ Campbell, Ní Aoláin and Harvey (n 4) 334.

¹²⁰ For discussion of the exceptional temporality of emergency and transition see Fionnuala Ní Aoláin, ‘Transitional Emergency Jurisprudence: Derogation and Transition’ in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence: Transitional Justice and the ECHR* (Cambridge 2011).

¹²¹ For discussion of the tension between differing modes of legality in respect of transitional justice see Ruti Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Law Journal* 69 (hereinafter ‘Genealogy’). See also Teitel (n 33) 224 where she justifies departure from conventional legality in terms of democratic consolidation.

¹²² Anthony and Mageean (n 45) 181, 200.

particular account of the causes of the conflict in Northern Ireland was privileged and inscribed into the legal framework. Competing accounts of conflict, and of the role of human rights, were thereby subordinated in the violent hierarchy of meaning. The concept of ‘transition’, bringing with it its own specific legal imperatives, provides an interpretive framework that will sustain the law and colour subsequent interpretations of the Agreement and its purpose. This is not a disputed aim of the application of the framework of transition.¹²³ In casting the role of law in transition as being both backward- and forward-looking, the model assumes that law will be used to achieve specific political outcomes, and that this sometimes stands contrary to established notions of legality.¹²⁴ What is not acknowledged in this discourse, however, is the way in which, in seeking to move away from violence, the legal framework of transition captures violence at its heart. This violence consists of the manner in which the Agreement and the framework of transition themselves both shape and constrain permissible accounts of what the conflict was about and how it should be resolved. The narrative that has emerged dominant is the one according to which the conflict was about human rights and equality within Northern Ireland. The ‘normative’ interpretation of human rights has been privileged at the expense of the ‘political’ interpretation. This does not mean that other interpretations do not exist, but rather that they have been subordinated by the ‘normative’ approach that analyses legal and political reform in the objectively framed language of human rights.¹²⁵ It then follows that if the problem is defined as one of legal shortcomings, it can be resolved by law and legal guarantees. The effect of the post-Agreement framework of transition is therefore that all accounts of the conflict, and indeed of post-conflict politics, must be articulated in the language of ‘law’ and ‘transition’.¹²⁶ The creation of this powerful interpretive context has implications for how the debate is shaped. For example, transitional justice traditionally focuses on abuses committed by the state. The dominance of this framework means it is less easy to accommodate competing demands for truth and accountability from non-state actors.¹²⁷ Similarly, those who

¹²³ See Campbell and Ní Aoláin (n 73) on the politics of the label of transition in conflicted democracies.

¹²⁴ Genealogy (n 121).

¹²⁵ For discussion see Jennifer Curtis, *Human Rights as War By Other Means: Peace Politics in Northern Ireland* (University of Pennsylvania Press 2014).

¹²⁶ For further discussion see Catherine Turner, *Deconstructing Transitional Justice* (2013) 24 *Law and Critique* 193.

¹²⁷ Colm Campbell and Catherine Turner, ‘Utopia and the Doubters: Truth, Transition and the Law’ (2008) 23 *Legal Studies* 374; Kieran McEvoy, ‘Human Rights, Humanitarian Interventions and

choose not to engage are themselves marginalised and silenced.¹²⁸ Their voices are no longer one among equals, but rather are subordinated in the violent hierarchy of meaning that has been created by the transitional framework.

Returning to the tertiary structure of the economy of violence, it has been demonstrated how the Agreement represents a moment of originary violence, in which the law is destroyed and re-founded. This first stage of the economy is the moment of constitution of a new order, framed as a ‘transition’ from conflict to peace. The second stage of the economy is that of reparatory violence, in which the violence of the origin is concealed. As discussed in Chapter Three, this concealment is a necessary part of the establishment of the authority of law.¹²⁹ If the Agreement is successful, then gradually the history of division and violence that gave rise to it will be forgotten, and the violence of the law concealed.¹³⁰ The success of the idea of ‘transition’, and the extent to which the Agreement can be read as having created an interpretive framework that at once upholds and conceals the violence of the law, can be seen in the way in which its terms have been interpreted in the Court.

c. Litigating the Agreement (and concealing the violence of the origin)

A central conceptual element of transitional justice is the use of law to mediate political decisions. By removing particularly contentious issues from the realm of politics, it is suggested that law in transition can secure meaningful change. In the context of the Agreement in Northern Ireland, it is clear how the rationale, if not necessarily the language, of transition has been adopted. Underpinning a transitional justice approach is a purposive approach to the interpretation of the Agreement, one which recognises the Agreement as playing a role in responding to a legacy of past injustice. However, rather than viewing this as a purely political task of redressing past imbalances, the application of the lens of transition casts the task as a legal one. The narrative of transition, to be successful, must be constructed on the idea of

Paramilitary Activities in Northern Ireland’ in Colin Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Hart 2001) 215.

¹²⁸ This is discussed in more detail in Chapter 6.

¹²⁹ See Chapter 3 for discussion

¹³⁰ Jacques Derrida, ‘Devant la Loi’ in Alan Udof (ed), *Kafka and the Contemporary Critical Performance* (Indiana University Press 1987) 128, 134 (hereinafter ‘Before the Law’). Law should be without history, genesis or any possible derivation. ‘To enter into relations with the law which says “you must” or “you must not” is to act as if it had no history, or at any rate no longer depended on its historical presentation.’

consensus. It is presented as a normative (and, as such, objective) regime that provides a framework for political reconciliation.¹³¹ It is with this process that the violence of the origin of the law is concealed.

The Agreement, a political document, was given legal form primarily in the Northern Ireland Act 1998. It was this legislation that transformed the political undertakings of the Agreement into law in Northern Ireland.¹³² With this came a new constitutional context, as well as the potential for subsequent legislation and political decisions to be subjected to judicial review on the basis of a range of grounds of competence, not least human rights and equality.¹³³ These competences created an interpretive context for law in post-Agreement Northern Ireland that was evidenced in the decisions of the domestic courts and continues to shape the way in which ‘transition’-related arguments are made. The first and clearest example of the court accepting the constitutional nature of the Agreement came in the case of *Robinson v Secretary of State for Northern Ireland*.¹³⁴ *Robinson* concerned a challenge by the Democratic Unionist Party to the legality of the election of a First Minister and Deputy First Minister, on account of the fact that it had taken place outside the timeframe for elections specified in the Northern Ireland Act. While concerned with a technical point, the *Robinson* case is significant because of the way in which it constructs the Agreement and its implementing legislation. The judgment is clear that the Court regards the Act as having constitutional status, and that it explicitly accepts the Agreement as marking a new constitutional beginning for Northern Ireland.¹³⁵ This, according to the Court, is the new context in which the Agreement should be interpreted, with the majority considering that the ‘relevant statutory provisions should be read in the light of the context set by the Belfast Agreement’.¹³⁶ Once this context had been recognised, the Court confirmed that the Act should be interpreted ‘generously and purposively’, in light of the ‘values which the constitutional

¹³¹ Catherine Turner, ‘Flag Protests, Politics and Transition in Northern Ireland’ [2013] Critical Legal Thinking <<http://criticallegalthinking.com/2013/02/04/flag-protests-politics-and-transition-in-northern-ireland/>> accessed 6 August 2015.

¹³² Specific measures were also introduced by separate legislation. See for example Northern Ireland (Sentences) Act 1998; The Police (Northern Ireland) Act 2000; Justice (Northern Ireland) Act 2002; and, more recently, the Victims and Survivors (Northern Ireland) Order 2006.

¹³³ Morrison and Lynch (n 83).

¹³⁴ [2002] UKHL 32.

¹³⁵ *Robinson* (n 68) Per Lord Hoffmann para 25.

¹³⁶ See Gordon Anthony, ‘Judicial Review in Northern Ireland – A Guide to the “Real” Devolution Issues’ (2009) 14(3) Judicial Review 230, 232.

provisions are intended to embody'.¹³⁷ The reasoning of the Court is also resonant of the underlying rationale of transitional justice, namely that some flexibility in legal interpretation may be required to give effect to transitional aims. Lord Bingham suggests that 'where constitutional arrangements retain scope for the exercise of political judgment, they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude'.¹³⁸ Beyond *Robinson*, there is further evidence in the case law of the Northern Ireland courts that the judiciary has accepted the rationale of a 'new beginning' and of a post-Agreement 'context' within which decisions are to be made. This includes the Court upholding a claim challenging the oath of allegiance required for elevation to the senior bar in Northern Ireland,¹³⁹ giving the newly-created Northern Ireland Human Rights Commission the right to intervene as a third party in the litigation of human rights issues,¹⁴⁰ and confirming that taxi licensing regulations should also be read in light of the Agreement and in particular should not disadvantage former prisoners on account of conflict-related convictions.¹⁴¹

More recent case law has confirmed the way in which the Agreement has provided a legal 'context' within which legal argument and decision-making takes place. In the 2011 case of *Re Colaiste Feirste*, the applicant sought judicial review of the decision by the education authorities not to provide dedicated transport for pupils attending an Irish language-medium secondary school in Belfast.¹⁴² In arguments on behalf of the applicant, reference was made to the Agreement, and specifically to the economic, social and cultural rights provisions therein. The applicant highlighted the undertaking made by the parties to the Agreement to facilitate and encourage the use of the Irish language and asserted that this should be regarded not merely as an aspirational principle, but as a legal duty.¹⁴³ In accepting the applicant's arguments, the Court confirmed that the statutory duties placed on the education authority must be

¹³⁷ *Robinson* (n 68) Per Lord Bingham para 11

¹³⁸ *Ibid* per Bingham LJ para 12.

¹³⁹ *In Re Treacy's and Another's Application for Judicial Review* [2000] NI 330

¹⁴⁰ *In Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25. This was subsequently confirmed in legislation in the Northern Ireland Act (1998) s 69.

¹⁴¹ *In the Matter of an Application by Damien McComb for Judicial Review* [2003] NIQB 47.

¹⁴² *In the Matter of an Application by Colaiste Feirste for Judicial Review of a Decision of the Department of Education Relating to School Transport* [2011] NIQB 98.

¹⁴³ This assertion was based on the Education (Northern Ireland) Order (1998) Art 89, which required the government to facilitate and encourage the development of Irish medium education.

construed in light of the Agreement.¹⁴⁴ Similarly, in the 2015 case of *Re CAJ*, the court accepted arguments that the failure of the government to publish an Anti-Poverty and Social Exclusion strategy amounted to a breach of obligations arising from the St Andrews Agreement.¹⁴⁵ The reasoning in this case was based on the principle of equality that underpinned the Agreement. Section 28(E) of the Northern Ireland Act 1998, which had its origins in the St Andrews Agreement, required the government to ‘adopt a strategy setting out how it proposes to tackle poverty, social exclusion and patterns of deprivation based on *objective need*’.¹⁴⁶ The applicant in this case interpreted the criteria of ‘objective need’ as central to tackling discrimination in the allocation of resources and, as such, as an ‘important milestone in the development of equality law in Northern Ireland’. The Court, finding that the government had failed in its statutory duty, accepted this reasoning.¹⁴⁷ The interpretive ‘context’ set by the Agreement therefore has force well beyond the relatively narrow band of ‘dealing with the past’ cases that are most commonly associated with transitional justice. The cases discussed speak to a much broader and more holistic interpretation of the requirements of transition and the role of law in facilitating the redress of past injustices.¹⁴⁸

The way in which the Court interprets the Agreement, as having created a particular context that should guide future decision-making, is an integral element of the concealment of the originary violence of the Agreement. For Derrida the idea of context as a means of grounding legal interpretation and decision-making is problematic.¹⁴⁹ The way in which the Agreement is framed as having set a context within which decisions should be made assumes that we can ascribe fixed and immutable intention to those who signed the Agreement. It assumes that there is one definite (and identifiable) context, and that if that context is appropriately respected, a ‘correct’ answer to the political or legal problem can be ascertained. In particular, it

¹⁴⁴ *In the Matter of an Application by Colaiste Feirste* (n 142) para 16.

¹⁴⁵ *Re Committee on the Administration of Justice (CAJ) and Another’s Application for Judicial Review* [2015] NIQB 59.

¹⁴⁶ Northern Ireland Act (1998) s 28E(1). Emphasis added.

¹⁴⁷ While the government was found to have failed in its statutory duty the discussion of the meaning of ‘objective need’ was obiter, and as such, lacking binding legal effect for the time being.

¹⁴⁸ For a good discussion of the role of courts and judges in distinguishing present from past, see Christiane Wilke, ‘Enter Ghost: Haunted Courts and Haunting Judgments in Transitional Justice’ (2010) 21 *Law and Critique* 73.

¹⁴⁹ Jacques Derrida, ‘Signature, Event, Context’ in Alan Bass (tr), *Margins of Philosophy* (The Harvester Press 1982) 307.

appears to support the idea that the inclusion of human rights in the Agreement was based on ‘normative’ rather than ‘political’ considerations. However, this belies the range of different positions, interest and intentions that combined to create the Agreement. For Derrida, context is never absolutely determinable.¹⁵⁰ The very essence of writing—of committing ideas to text—is that that text should be able to be understood in the absence of its author.¹⁵¹ This may mean in the physical absence of an author—someone who has died, for example—or it may also mean in the event that the author ceases to support its provisions. The act of writing itself is characterised by the possibility of being repeated.¹⁵² The text therefore breaks free from the context in which it was created.¹⁵³ What this means in practical terms is that, rather than there being one singular and fixed ‘context’ that must ground subsequent interpretation of the text, each time the text is interpreted a new context is generated.¹⁵⁴ The context does not precede the decision, but rather is (re)constituted by it. By representing the decisions of the Court as an exercise in purposive legal interpretation, determined by context and thereby denying the political and essentially contested nature of the decision being made, the violence of the origin of the law is repeated.¹⁵⁵ And yet this decision is presented as the impartial operation of the law. This leads us back to the economy of violence. From the examples cited, it is clear that legal decision-making, both legislative and judicial, is now framed by the Agreement and the need to give effect to its (normative) terms. As discussed in Chapter Four, our understanding of key concepts, such as where the boundary between legal and non-legal and indeed legitimate and illegitimate, is drawn depends not on a fixed and immutable standard but rather on the interplay between the different opposing positions. And yet this political dynamic towards adjudication is not open and acknowledged but it concealed behind legal form.¹⁵⁶ In the act of

¹⁵⁰ *ibid* 310.

¹⁵¹ *ibid* 320.

¹⁵² Derrida cites, by way of example, the use of citation. The ability to cite is an inherent quality of writing. Derrida asks ‘What would a mark be that one could not cite?’ *ibid* 321. Subotić (n 48) also notes that this is a key feature of the new transitional justice toolkit approach.

¹⁵³ Signature, Event, Context (n 149) 320.

¹⁵⁴ The fact that writing can be cited, put between quotation marks, suggests that it can ‘break with every given context, and engender infinitely new contexts in an absolutely nonsaturable [sic] fashion’. *ibid* 320.

¹⁵⁵ Force of Law (n 11). The moment of decision is both law-preserving, in that it confirms law as the basis on which decisions are made, but also law-destroying, in that with each decision the old law is destroyed and a new one constituted.

¹⁵⁶ Before the Law (n 130) 145. ‘Law is intangible, it is forbidden or illicit to change or disfigure it, or to touch its form’.

decision-making, the authority of the law is re-asserted and simultaneously concealed. This has implications for the possibility of resistance and articulating an alternative reading of the law.

The cases cited demonstrate that the application of the framework of transition has, in some ways, been empowering. The existence of international law standards has been used to lend authority to demands for reform. But, in other ways, it has been disempowering, in that it has restricted the permissible demands to those that can be framed in law, and in particular those that are recognised as being ‘legitimate’ transitional justice demands. The gradual change in terminology is significant in that the use of these terms in judgments of the higher courts serves to inscribe the political struggle over the causes and responsibility for the conflict into law.¹⁵⁷ This in turn ‘intrinsically [defines] the possibilities of elaborating a historical narrative’.¹⁵⁸ As a result, the idea of transition, and the constraints that it has placed on political contestation in post-Agreement Northern Ireland, has also been divisive. The effect of the dominance of law is to silence those who oppose the rhetoric of transitional justice. For example the acceptance of ‘transition’ as the appropriate framework for analysis of the Agreement largely excludes both Unionist narratives of the conflict, rooted in terrorism and security,¹⁵⁹ but also those of Republicans, now commonly referred to in a pejorative sense as ‘dissidents’, who do not recognise the narrative of human rights and equality within Northern Ireland as being the aim of the ‘struggle’.¹⁶⁰ These alternative positions on the causes of the conflict and the legitimacy of the Agreement are largely suppressed in current political discourse. The language of legal imperative leaves little room for negotiation or compromise.¹⁶¹ In establishing its own authority, the legal order created by the Agreement relies on the exclusion of all competing narratives. This moment of originary violence is perpetuated by the context-driven approach to legal interpretation outlined. While it is

¹⁵⁷ See Alejandro Castillejo-Cuéllar, ‘Historical Injuries, Temporality and the Law: Articulations of a Violent Past in Two Transitional Scenarios’ (2014) 25 *Law and Critique* 47, 53.

¹⁵⁸ *ibid.*

¹⁵⁹ Kirk Simpson, ‘Untold Stories: Unionist Remembrance of Political Violence and Suffering in Northern Ireland’ (2008) 3 *British Politics* 465.

¹⁶⁰ For discussion see Curtis (n 125).

¹⁶¹ See, for example, McEvoy and others, who criticize the community relations approach as ignoring the fact that human rights and equality ‘legislation is based upon binding international legal standards, which cannot simply be abolished.’ Lesley McEvoy, Kieran McEvoy and Kirsten McConnachie, ‘Reconciliation is a Dirty Word: Conflict, Community Relations and Education in Northern Ireland’ (2006) 60 *Journal of International Affairs* 81.

by no means the case that all political questions that come to be decided under the Agreement or the Northern Ireland Act are re-interpreted as legal questions, or as questions in which the Court should diverge from established legal principles,¹⁶² the Agreement nevertheless profoundly shapes legal discourse and the way in which political demands are framed. The struggle for ownership of the language of transition is no less political than the violence that preceded it. And yet the use of legal form shields decisions from challenge. It is here that the violence of the law lies. Rather than acknowledging the existence of alternative interpretations, competing narratives are subordinated to the dominant account of human rights and transitional justice as a normative framework within which decisions are to be made. The violence of this hierarchy is not open and acknowledged, but is denied as the necessary means by which law establishes its own authority.

From the preceding discussion it can be seen how law-making and legal decision-making in the transitional phase mimic that criticised during the Troubles. Whereas during the Troubles the legislature and the Court accepted the security rationale and the need for emergency legislation to combat a terrorist threat,¹⁶³ in the transitional phase the Court is guided by the values of the Agreement, thus implicitly accepting human rights and equality-based arguments for legal reform.¹⁶⁴ The way in which the story of the conflict is told begins to be shaped by the interpretive framework of transition, inherently privileging one side over the other. In this way it can be seen how, in subordinating the narrative of security to that of human rights, the hierarchy has been exposed and largely reversed. Each time a decision is made that re-affirms the centrality of human rights and equality, the violence of the origin is repeated and alternative positions on the requirements of the Agreement are silenced. However, the silenced positions do not cease to exist. Rather, they remain trapped as the excluded trace within the law.¹⁶⁵ As discussed in Chapter Four, where the violence of the law is improperly concealed or where the State fails to acknowledge the place of law within an economy of violence,¹⁶⁶ it can give rise to challenge. This is the third level of the

¹⁶² See Anthony (n 136).

¹⁶³ Stephen Livingstone, 'The House of Lords and the Northern Ireland Conflict' (1994) 57 *Modern Law Review* 333.

¹⁶⁴ Brice Dickson, 'The House of Lords and the Northern Ireland Conflict – A Sequel' (2006) 69 *Modern Law Review* 383.

¹⁶⁵ Jacques Derrida, *Positions* (The Athlone Press 1981).

¹⁶⁶ *Laws of Reflection* (n 13).

economy of violence, that of the violence of reflection. In Northern Ireland, protest over some aspects of the Agreement and legal reform have begun to spill over into physical violence on the streets. This is the case in respect of two particular issues - those of flags and parades.

3. THE VIOLENCE OF REFLECTION- FLAGS, PARADES AND THE PAST

While the Agreement continues to be the primary reference point for legal decision-making in Northern Ireland, cracks have appeared, which are beginning to make visible the violence of the origin of the new legal order. As discussed in Section One the purpose of the Agreement was to attempt to create a new polity in Northern Ireland. This polity would be characterised by its respect for diversity and its commitment to human rights and the rule of law. In order to do this, it was necessary to project an image of unity. However, as Collins suggests, deconstruction ‘reveals the way in which the act of constituting the nation in legal discourse is also an act of excluding those counter-discourses that challenge the nation’s unitary character’.¹⁶⁷ While it is not argued, either in this thesis or in political discourse in Northern Ireland, that the Agreement sought to either declare or create a unified ‘nation’, the idea that the Agreement could create a new polity, unified in its respect for diversity,¹⁶⁸ does suggest that the use of law and legal discourse mimics this trend. The new boundaries that were set were those of ‘pro-’ and ‘anti-Agreement’. One was either for the Agreement or against it. This, rather than transcending opposition, simply shifted the boundaries.

There are three key pinch points around which opposition to the Agreement, and the idea of ‘transition’, are coalescing. These are flags, parades and the past. Each represents a particularly fraught political issue where law has been unable to accommodate the competing demands being made. Each demonstrates the exclusionary nature of the discourse of transition and the use of law to further the aims of transition. The first issues, of flags and parades, together present an example of where the interpretive context of the Agreement is deemed to have gone too far and

¹⁶⁷ Collins (n 58) 389.

¹⁶⁸ Hume (n 69).

has begun to create a new sense of grievance and marginalisation among some Unionist communities. In respect of the second example, that of the past, transitional justice is deemed not to have gone far enough. The inherent limitations of law and the division that it creates have prevented any meaningful progress on the past from being made. The remainder of this chapter will consider the issues of flags and parades, while the past and efforts to ‘deal’ with it will be the subject of the next chapter.

a. Flags

One of the core values that underpins the Agreement is that of equality. Speaking directly to a history of discrimination in the past, the Agreement has been central to the articulation of demands for economic, social and cultural rights. While in some cases the Agreement has been used successfully to campaign for increased recognition of these rights, in other cases it has been used to strike down measures that were deemed to be essentially political. This has caused problems for the apparent impartiality of the Agreement and the idea of transition, particularly for the Unionist and Loyalist communities. For example, whereas judicial review has been successfully used in furtherance of what would be perceived as ‘Nationalist’ demands,¹⁶⁹ it has been perceived as being biased against Unionist demands. For example, an application for judicial review of a policy requiring that recruitment to the new Police Service of Northern Ireland (PSNI) be done on a 50:50 Catholic/Protestant basis was rejected.¹⁷⁰ Similarly, the appointment of an Interim Victim’s Commissioner, nominated for the post by a Unionist political party, was overturned as a result of judicial review.¹⁷¹ One of the reasons given for the decision in the High Court was that the appointment was politically motivated,¹⁷² and therefore in breach of the provisions of the Northern Ireland Act that outlawed discrimination, giving legal effect to the commitment made in the Agreement to strengthen anti-

¹⁶⁹ For examples see Section 2.C.

¹⁷⁰ *Re Parsons* [2004] NI 38. The purpose of the 50:50 rule was to redress the balance in the police force and make it more representative of the community, and therefore more acceptable. However the effect was that it was made difficult for Protestant applicants to gain positions within the police, resulting in allegations of discrimination in favour of Catholic applicants. The measures were found to be proportionate on the grounds that they were time-limited.

¹⁷¹ The position of Victim’s Commissioner was also created to give effect to the terms of the Agreement in relation to the needs of victims. *ibid* s6 para 11-12.

¹⁷² The candidate had been nominated by the Democratic Unionist Party, who at that time was opposed to the Agreement and had refused to participate in government.

discrimination legislation.¹⁷³ In another case, the appointment of two members of Loyal Orders to the Parades Commission was ruled unlawful.¹⁷⁴ While these decisions are based on the need to ensure that public appointment procedures are conducted on the principle of merit and appointing the best candidates for the job, and are mostly decided on very technical points of public law rather than on broad ‘context’ considerations, the *perception* created by these decisions is that the law leans against Unionists, and in favour of Nationalists, where the interpretation of the Agreement is concerned.¹⁷⁵ This is part of a broader problem whereby human rights and equality are traditionally associated with Nationalist and Republican narratives of the conflict rather than those of Unionists,¹⁷⁶ which is in turn consolidated by the acceptance of the narrative of transition. This has created an opposition that continues to dominate legal argumentation in the post-conflict environment.¹⁷⁷

This dissatisfaction was made visible to the world in December 2012, following a decision of Belfast City Council to restrict the number of days that the Union flag could be flown over City Hall. This decision was justified with reference to the equality and parity of esteem provisions of the Agreement,¹⁷⁸ and sparked weeks of protest, some of which turned violent. The violence of these protests returns us to Derrida’s economy of violence, whereby the violence of reflection is that stage of the economy most commonly associated with physical violence. The eruption of violence in the context of the flag protests represented a much deeper disillusionment with post-Agreement politics, namely a perception that the law is being used unfairly against Unionist and Loyalist communities.¹⁷⁹ The physical violence of the protests therefore reflects back the metaphysical violence of the origin, revealing the manner of the exclusion of these groups from the dominant political community.¹⁸⁰ The

¹⁷³ *Re Downes*’ para 47. The decision in the House of Lords was, however, reached on a very technical ground that did not speak to the context.

¹⁷⁴ *Re Duffy’s Application* [2008] UKHL 4.

¹⁷⁵ For discussion see Roger MacGinty and Pierre Du Toit, ‘A Disparity of Esteem: Relative Group Status in Northern Ireland After the Belfast Agreement’ (2007) 28 *Political Psychology* 13.

¹⁷⁶ See Mageean and O’Brien (n 30). See also Morrison and Lynch (n 83) on the role of lawyers in advising Sinn Féin on the Human Rights, Equality and Safeguards provisions of the Agreement.

¹⁷⁷ For discussion of this see Catherine Turner, ‘The “Right” to Protest on Northern Ireland’s Streets’ (Human Rights in Ireland, 20 January 2013) <<http://humanrights.ie/civil-liberties/turnerresponse/>> accessed 14 August 2015.

¹⁷⁸ For a detailed analysis of these protests see Paul Nolan and others, *The Flag Dispute: Anatomy of a Protest* (Queens University Belfast 2014).

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

problem is not necessarily the fact of the decision to restrict the flying of the flag. Rather, it exists in the feeling that the law belongs to one community at the expense of the other. The violence of the law exists in the way in which debate is constrained by the terms of the rhetoric of the Agreement and its institution in legal form. The dominance of one particular way of understanding the Agreement and the significance of the human rights and equality provisions, and its representation as objective law, means that alternative views will necessarily be subordinated in the violent hierarchy of meaning.¹⁸¹ Whereas the language of human rights and equality contained in the Agreement and incorporated into law in the Northern Ireland Act provide a legitimising legal framework for political reforms, those who seek to maintain the status quo or to oppose reforms for valid political reasons have no such means of opposition. To oppose human rights and equality, or even to challenge the interpretation of what human rights and equality requires, is to appear reactionary, to risk having oneself branded as a bigot and having one's opinion dismissed as irrelevant, or as attempting to drag Northern Ireland back into the past.¹⁸² The dominance of the Agreement and the narrative of transition—the progress away from past and towards the future—create a profoundly uneven playing field on which these debates must play out. When seen in the context of transitional justice, this is problematic. The justification given for having a distinct conceptualisation of the rule of law in transition is that it can help to transcend political divisions. However when analysed through the lens of the economy of violence, what these most recent protests demonstrate is that oppositional structures have not been transcended. Rather the opposition has been reversed, laying bare the continued existence of a binary structure and a relationship of violent hierarchy between the two. The protests reflect the metaphysical violence of this hierarchy, making it visible through physical violence.¹⁸³ Therefore the violence of the protests can be read as a demand for equality—as a demand to have one's voice heard—that simply reflects back the principles of the Agreement, most notably that of parity of esteem.

¹⁸¹ Positions (n 165).

¹⁸² For another good example of this, see the debate between Traditional Unionist Voice MLA Jim Allister and Sinn Féin MLA Daithí McKay on the Special Advisor Bill in Stormont. This bill sought to prevent those with serious criminal convictions from being employed as special advisors to MLAs. During this debate, no fewer than 107 references were made to the Agreement and the need to prevent Northern Ireland from going back to the flawed justice systems of the past. The Official Report of the Debate is available at <http://www.niassembly.gov.uk/globalassets/documents/official-reports/plenary/2012-13/revised-daily-part-3-june-2013.pdf>.

¹⁸³ Laws of Reflection (n 13).

b. Parades

A similar demand is made in respect of the restriction of Loyal Order parades. The years since the early 1990s have seen a resurgence in conflict surrounding parades, with increasing numbers of protests against the particular routes that parades take.¹⁸⁴ These protests have been framed as human rights protests, demanding in particular the 'right' to be free from sectarian harassment.¹⁸⁵ This has resulted in some high profile parades being restricted or re-routed away from what were traditional routes. Following the signing of the Agreement, as part of the reform of legal administration, an independent statutory body (the Parades Commission) was established to adjudicate on parades and make determinations where routes were disputed.¹⁸⁶ The aim of this was to place mediation and consensus at the heart of the process.¹⁸⁷ However the reality has been a little different. One particular example serves to illustrate the conflict that now surrounds Parades Commission determinations. In July 2013, a North Belfast Lodge notified the Commission of a proposed parade along an arterial route from North Belfast into the City Centre and home again that evening.¹⁸⁸ The proposed route passed a strongly Republican residential area, and residents also notified the Commission of a counter protest. This parade took place in the context of a history of violent clashes at this particular location, which lies in one of the most volatile and divided areas of Belfast. The Parades Commission allowed the parade to pass on the outward route subject to restrictions, but determined that it should not pass the flashpoint on the way home. Enforcement of this determination resulted in serious violence and rioting during which a prominent Unionist politician was injured.¹⁸⁹ The site at which the parade was stopped has remained a protest site and focal point for the increasing disillusionment of this community with the new legal order that has been created in Northern Ireland. In publishing its determination on the parade, the Parades Commission justified the restriction in light of statutory duties imposed by

¹⁸⁴ For background see Democratic Dialogue, 'Politics in Public – Freedom of Assembly and the Right to Protest' (Belfast, 1998).

¹⁸⁵ This is not a right reflected in any existing convention.

¹⁸⁶ Public Processions (Northern Ireland) Act 1998.

¹⁸⁷ This aim is repeated in determinations made by the Commission. See for example the 2013 determination on one of the most contentious parade routes <<http://www.paradescommission.org/fs/files/det-ligoniel-true-blues-lol-1932-12july-2013.pdf>>.

¹⁸⁸ *ibid.*

¹⁸⁹ McHugh M and McKeown L, 'DUP MP Nigel Dodds hit by brick during north Belfast Twelfth riot' *Belfast Telegraph* (Belfast, 13 July 2013) <<http://www.belfasttelegraph.co.uk/news/northern-ireland/dup-mp-nigel-dodds-hit-by-brick-during-north-belfast-twelfth-riot-29417638.html>> accessed 19 October 2015.

Northern Ireland-specific legislation, the Human Rights Act and the ECHR.¹⁹⁰ This therefore made it clearly a legal determination set against a context of human rights and competing claims in terms of what rights should be being protected.¹⁹¹ Chapter Four discussed how the restriction of a civil rights march in Derry in 1969 led to a more general sense of grievance in respect of the law and how it operated.¹⁹² Clear parallels can be drawn between that march and the 2013 parade and the way in which protest has developed since then. In the immediate aftermath of the parade, Unionist politicians claimed that the anger and frustration that the community felt towards the Parades Commission was justified, and indeed that the Parades Commission bore responsibility for the violence that was the inevitable result of their determination.¹⁹³ The Parades Commission has become the specific focus of a more general sense of marginalisation that has led to protesters and their political supporters to draw analogies between their own ‘struggle’ and that of the US civil right movement.¹⁹⁴ The language of civil rights is once again being engaged as a means of articulating political isolation and making demands for a voice to be heard.

While there are clearly competing versions of this story and where the responsibility for violence lies, what the example demonstrates is the way in which opposition has become re-inscribed in Northern Ireland. In the 1970s, there was a community that felt alienated, felt that the State did not adequately meet their political and social aspirations, and felt that the law and the agents of its enforcement were biased against them.¹⁹⁵ Now the hierarchy has been inverted and it is the previously dominant community that is feeling alienation and powerlessness. While it is easy to dismiss this as ‘justice’ or as simply ‘sour grapes’ on the part of the Loyalist communities in particular, to do so is foolhardy in light of the consequences of failing to adequately address political grievance in the 1970s. It is for this reason that to invert the

¹⁹⁰ Parades Commission (n 187).

¹⁹¹ For detailed discussion of this theoretical debate see Michael Hamilton, ‘Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty Limiting Principles in the Context of Transition’ (2007) 27 *Oxford Journal of Legal Studies* 75.

¹⁹² Chapter 4.1.c

¹⁹³ Comments of the first minister Peter Robinson published in the *Belfast Telegraph* (n 189).

¹⁹⁴ This analogy is not new in this context, but has been being drawn by Unionist politicians since the Agreement. See Gregory Campbell, ‘The Peace Process and the Protestants’ in Dominic Murray (ed), *Protestant Perceptions of the Peace Process in Northern Ireland* (Cain 2000).

¹⁹⁵ As documented in Boyle and others, *Law and State: The Case of Northern Ireland* (University of Massachusetts Press 1975). I originally made this comparison in ‘The “Right” to Protest on Northern Ireland’s Streets’ (Human Rights in Ireland, 20 January 2013) <<http://humanrights.ie/civil-liberties/turnerresponse/>> accessed 14 August 2015.

hierarchy is not enough without also addressing the structures that give rise to conflict. Without addressing structures the cycle of violence will simply re-establish itself.

4. CONCLUSION - THE HIERARCHY INVERTED

For Derrida the inversion of violent hierarchies is the necessary first step in deconstruction.¹⁹⁶ The reversal of the binary of emergency and human rights was necessary in order to highlight the 'conflictual and subordinating structure of opposition'.¹⁹⁷ Understanding this dynamic, and the inherent violence of law, is crucial to understanding the division that exists over the past in Northern Ireland. Inverting the binaries reveals the oppositional nature of thought and the dominance of one particular (legalistic) way of conceptualising politics in Northern Ireland. This is true whether 'emergency' or 'transition' is the lens through which politics is refracted. Derrida is also clear, however, that the inversion of hierarchies is only the first step of deconstruction.¹⁹⁸ If we remain in this stage, then we remain within an oppositional structure, with the risk that the hierarchy will re-assert itself. It is suggested that this is the point that has now been reached in Northern Ireland.

This chapter asked whether, in light of the inherent violence of law, a model of transitional justice rooted in law could effectively address political conflict. It has demonstrated that the legal framework of transition has itself exerted a form of (metaphysical) violence on politics in Northern Ireland. Whereas in the past the law had been used to de-legitimise violence, and with it the political aspirations of those who engaged in or supported the use of violence, the acceptance of the 'normative' human rights arguments marked the beginning of a new phase marked by the metaphysical violence of law. As the issues of flags and parades demonstrate, the effect of law can be exclusionary. This exemplifies Derrida's theoretical point that violence and law are locked in a cycle of justification whereby past violence is accepted as having been necessary in order to bring about the change that has been

¹⁹⁶ Positions (n 165). Discussed in Chapter 3.

¹⁹⁷ *ibid* 41.

¹⁹⁸ *ibid*.

secured,¹⁹⁹ and the new legal order that relies for its authority on the way in which it guarantees that change. This represents a new form of (legal) violence that exerts its own force. The way in which the Agreement is framed represents the extent to which narratives that underlay the use of violence have been accepted. Their incorporation into the Agreement gave them legal form and dressed them in the cloak of legal legitimacy. Violence therefore remained at the heart of the new law. This dynamic can be understood on two levels. The first, and more common, is that in accepting narratives of grievance that underpinned violence, the government has capitulated to violence. Here, violence and law are still seen as two separate phenomena. Violence, in the form of terrorism, has exerted an external force on law, and has managed to bend law to its will. This will result in a perception that the new order is fundamentally unjust. The other way of looking at it, and the one that is proposed in this thesis, is that violence was always present within the law. Rather than violence exerting an external pressure on law, violence comes from within law. As discussed in the previous chapter, the law itself was a form of violence. The concepts of emergency (violence) and human rights (law) existed in a state of violent hierarchy. The two existed not as separate and divisible concepts, but only with reference to each other.²⁰⁰ Popular understandings of law and legality were constructed with reference to the interplay between the two. Whereas during the Troubles the discourse of terrorism and emergency conditioned attitudes towards violence and the legitimacy of legal responses to it, in the post-Troubles 'transition' phase, attitudes towards the legitimacy of the law are conditioned to a much greater extent by popular understandings of human rights. What has happened is simply that the violent hierarchy has been reversed. This is a cyclical rather than a linear movement. Law has not replaced violence. The twin concepts of human rights (law) and emergency (violence) are still present within the law, but human rights has now managed to establish itself as the dominant discourse, and with it the discourse of emergency has been violently subordinated. Our understanding of law and legality therefore continues to be constructed on the interplay between violence and law and will be determined largely on the basis of which narrative has managed to establish itself as

¹⁹⁹ Douzinas (n 95). Discussed in Chapter 4.

²⁰⁰ *Of Grammatology* (n 99). Discussed in Chapter 3.

dominant at any given time.²⁰¹ What is important to recognise, therefore, is the interplay between the two. As violence is immanent to law, it cannot be transcended. We cannot move *from* violence *to* law. The violence continues in legal, rather than physical, form. It is the failure to acknowledge this violence, or to recognise its effects, that poses a risk for transitional justice. The dominance of the 'normative' approach to human rights and transitional justice has succeeded in excluding the 'political' view in which conflict related issues are a matter for negotiation. The effect of this is to enclose the debate over the past within the 'theatrical space' of transitional justice. This inherently limits the possibilities for political compromise, and creates new sites of silence and exclusion. It creates a powerful barrier to those who wish to challenge the dominance of this discourse. The most recent violence on the streets of Northern Ireland represents the re-assertion of that which has been suppressed. The excluded trace of politics is now challenging the dominance of the 'normative' order. In this way, in relying on law to achieve political reform, the model has reproduced the patterns of conflict that it sought to disarm.

It is suggested that nearly twenty years after the Agreement, the hierarchy has re-asserted itself, and that although the emergency/human rights hierarchy has been inverted, we remain trapped within a conflictual opposition. No real structural change has been made that would allow politics in Northern Ireland to break free from oppositional modes of thinking. This is particularly true in respect of dealing with the past, where the antinomies of victim and perpetrator, and acknowledgement and denial, continue to dominate the debate. The fact that the violence of law cannot be transcended raises further questions for transitional justice. In particular if law is the means by which justice is to be achieved, how can we avoid justice being tainted by the violence of the law? Does this element of mutual contamination between violence and law make justice impossible to achieve? These questions are explored in the following chapter, which examines the way in which the hierarchy has re-asserted itself, and how we might step outside the opposition in Northern Ireland.

²⁰¹ Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes tr, Routledge 2001).

CHAPTER 6: JUSTICE

In its relatively short history, transitional justice as a field of inquiry has generated an impressive body of literature assessing, in abstract terms at least, the meaning of 'justice' in transition. From the early years that were dominated by the criminal justice response and the 'duty to prosecute',¹ through the introduction of the concept of 'truth as justice',² and via the 'local versus global' debates,³ a range of different claims have been made in respect of how justice is to be both defined and achieved in the aftermath of violent conflict. And yet nobody is claiming to have found the one correct answer. While a range of transitional justice mechanisms are deemed 'necessary' steps towards dealing with a conflicted past, no one mechanism has yet managed to achieve the elusive goal of being the embodiment of justice. 'Justice' remains an essentially contested concept, despite the attention that has been paid to its pursuit in recent decades.

However, notwithstanding the absence of an agreed definition of justice, there has been considerable work undertaken in law and policy aimed at defining what justice might entail in transition. On a conceptual level, the meaning of 'justice' in transition has two aspects. The first is backward-looking accountability for abuses of the past. The second is the forward-looking guarantee of non-recurrence. The second is guaranteed by the first. By ensuring accountability for the past, a new and more just future will be guaranteed.⁴ Seen in these terms, justice is the goal towards which law and legal reform is oriented. It has also been treated as a concept with fixed meaning, whose achievement can be measured and evaluated.⁵ The previous two chapters have explored in detail the relationship between violence and law that characterises transitional contexts. This chapter now seeks to explore the relationship between law and justice. This relationship is central to any analysis of transitional justice, but is

¹ Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regimes' (1991) 100 Yale Law Journal 2539.

² Bronwyn Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 Human Rights Quarterly 95.

³ Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (Hart 2008).

⁴ United Nations, 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies' (UN Doc S/2004/616, United Nations 2004).

⁵ For discussion see Geoff Dancy, 'Impact Assessment, not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice' (2010) 4 International Journal of Transitional Justice 355.

one that has been largely overlooked in the literature. It will be suggested that, rather than interrogating the relationship *between* law and justice, transitional justice literature tends to equate justice *with* law. This is visible in the assumption upon which much policy and practice in the field is premised, namely that the outcome of legal reform will be justice.⁶ This is the basic foundation on which the field of transitional justice is constructed. However it also reflects the binary nature of transitional justice and the desire for determinate and present outcomes that a deconstructive reading seeks to destabilise.

Derrida's deconstruction of the relationship between law and justice provides valuable insight into the limitations of viewing justice as a determinate outcome to be achieved through law. Drawing primarily on his work in 'Force of Law', this chapter seeks to problematize the over-reliance on law as a means of both defining and pursuing justice. In so doing, it seeks to shed light on one of the most intractable problems that punctuates the 'transition' in Northern Ireland, namely the question of 'the Past'. The idea that we need to 'deal with the past' is one that is gaining traction. Whereas it was once seen as a specifically Republican political strategy,⁷ there is now more widespread acknowledgement that some form of reckoning is required in order for Northern Ireland to move forward.⁸ However the purpose of such an exercise, and the terms on which it should be approached, remain sharply contested.⁹ Reading justice through Derrida's deconstruction of law sheds new light on this debate. The previous two chapters have illustrated the immanence of violence to law. If justice is equated with law then it stands to reason that justice will also then be contaminated by the violence of the law. This chapter therefore builds on the analysis of the violence of law presented in the previous two chapters to explore the implications of equating justice with law. It suggests that 'law as justice' keeps transitional justice trapped within an oppositional logic. It is only by recognising the violence of law, and

⁶ See Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000).

⁷ See Bill Rolston, 'Dealing with the Past: Pro-State Paramilitaries, Truth and Transition in Northern Ireland' (2006) 28 *Human Rights Quarterly* 652; Patricia Lundy and Mark McGovern, 'A Trojan Horse? Unionism, Trust and Truth-Telling in Northern Ireland' (2008) 2 *International Journal of Transitional Justice* 42.

⁸ See the Stormont House Agreement (2014) in which all parties signed up to proposals for dealing with the past. Discussed in more detail in Section 2 below.

⁹ See most recently Sinn Féin rejection of government proposals. Kearney V, 'Proposed legislation on past unworkable, says Sinn Féin' *BBC News* (Northern Ireland, 8 October 2015) <<http://www.bbc.co.uk/news/uk-northern-ireland-34481123>> accessed 8 October 2015.

resisting the urge towards closure that justice, in a Derridean sense, becomes a possibility.

This chapter is divided into two sections. Section One provides a brief overview of key claims in respect to the relationship between law and justice in transition. It outlines the emergence of a new normative concept of the right to truth that underpins a range of transitional justice mechanisms. Using Northern Ireland as an example, the section considers the way in which truth has come to be linked to justice in transition, outlining the key component elements of truth and the way in which they are to be achieved in transitional contexts. It therefore highlights the connection made in law and policy between institutional mechanisms for dealing with the past and justice, and demonstrates the reliance placed on law as a means of achieving justice. Section Two considers how deconstruction of the relationship between law and justice can contribute to our understanding of the possibility of transitional justice. It first examines the dominance of law in framing the debate over dealing with the past, suggesting that the debate remains trapped within an oppositional structure. The oppositional nature of the debate makes it contentious and perpetuates division over the purpose to be served by addressing the past. The section then moves on to address the distinction that Derrida draws between law and justice. It explores in detail Derrida's conception of justice, illustrating it with reference to transitional justice and the debate over dealing with the past in Northern Ireland. Finally, the Chapter concludes by considering what Derrida's conception of justice 'to come' can contribute to our understanding of justice, and how ultimately it may provide a means of breaking free from the oppositional structure of law that has characterised the 'transition' in Northern Ireland to date.

1. WHAT IS TRANSITIONAL 'JUSTICE'?

Mapping an understanding of 'justice' in transition has been comparatively simplified in recent years. In the past such an exercise required a detailed review of the bodies of literature pertaining to, for example, criminal justice, truth recovery and victims, to name but a few, and an attempt to distil normative claims of general application from

those.¹⁰ However, the codification in recent years of the foundational principles of transitional justice has made this task much easier. As discussed in Chapter Two, the effect of the recent push towards codifying transitional justice in expert reports and toolkits has been to institute a significant new body of law and policy that brings together, in one coherent framework, the requirements of transitional justice.¹¹ As ‘justice’ constitutes the *logos* of this endeavour, it is therefore possible to trace, through analysis of this newly instituted framework, the perceived relationship between law, as the *means*, and justice, as the *end*, of transitional justice.¹²

The institution of a common definition of justice is significant not only in terms of international law, but also because of the influence that international norms exert on domestic transitions. As discussed in Chapter Five, domestic transitions will be framed with reference to international standards. Demands in respect of transitional justice are buttressed by appeals to the higher authority of international law.¹³ Further, governments can be called to account for their failure to adequately implement these international standards. Legal normativity is therefore a very powerful political weapon in post-conflict politics. Once particular rights in respect of transitional justice have achieved the status of law, they then become the subject of analysis in terms of whether or not the particular ‘right’ has been vindicated. The existence of this framework is therefore evident not only as abstract principles in international law and policy, but also in practice in how claims in respect of dealing with the past are articulated and evaluated in domestic contexts. In Northern Ireland, the question of how to deal with past violations and abuses is not commonly discussed in terms of ‘transitional justice’. Rather it is the language of ‘dealing with the past’ that dominates political discourse.¹⁴ However, while the terms of description may vary,

¹⁰ See Christine Bell, *Lex Pacificatoria: The Law of the Peacemaker* (Oxford University Press 2006) on the potential for drawing conclusions of general application

¹¹ See, most prominently, the updated Secretary General’s Report. United Nations, ‘The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies: Report of the Secretary General to the Security Council’ (UN Doc S/2011/634, United Nations 2011).

¹² It is of course acknowledged that there are many and various interpretations of ‘justice’ in this context, but this, it is suggested, is the dominant discourse, which is the subject of the current deconstruction. See Chapter Two for more detailed discussion.

¹³ See for example Amnesty International, ‘Northern Ireland: Time to Deal with the Past’ (Belfast, 2013), which highlights the binding nature of international law and standards on the UK government. This is discussed in more detail in Section 1.b below.

¹⁴ However, see the recent NIHR report advocating a ‘transitional justice approach’ that suggests an attempt to mainstream the language of transitional justice into the dealing with the past debate.

the content of the debate is dominated by the architecture of transitional justice.¹⁵ As discussed in Chapter Five, the language of transition is a relatively new import into law and politics in Northern Ireland. Absent from the Agreement itself, the terms transitional justice, and also ‘truth recovery’, have gradually entered the legal landscape through the work of academics and NGOs that have helped to shape the debate in this area.¹⁶ This has helped to focus the debate over what, if anything, should be done to address the legacy of the past. In this regard, the debate on dealing with the past that continues in Northern Ireland exemplifies the way in which the international framework on justice in transition founds and shapes domestic interactions. The next section will therefore discuss how justice has been defined in international law and policy, and how this definition has shaped approaches to dealing with the past in Northern Ireland.

a. How is ‘Justice’ Defined?

The Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (the Report), which has underpinned much of the expansion of the field of transitional justice, explicitly articulates a ‘common language for justice’ that underpins the United Nations’ (UN) activities in the field of transitional justice. The definition provided casts justice as ‘an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs’.¹⁷ The way in which this is to be achieved is explicitly linked to the protection of individual rights, as articulated in both procedural and substantive terms in international law. This linking of justice with rights reveals a clear causal connection between law (in the form of human rights law) and the justice that is sought. This connection between law and justice has also developed with specific reference to the exigencies of justice in transition.¹⁸ While the emphasis on accountability and the vindication of rights already speaks to a legalistic approach to justice, the content of the law has also evolved significantly to encompass the

Northern Ireland Human Rights Commission, ‘Dealing with Northern Ireland’s Past: Towards a Transitional Justice Approach’ (Belfast, 2013).

¹⁵ Kieran McEvoy, ‘Making Peace with the Past: Options for Truth Recovery Regarding the Conflict In and About Northern Ireland’ (Healing Through Remembering, 2006); Amnesty International (n 13).

¹⁶ This alliance is common in transitional societies. See Jelena Obradović-Wochnik, ‘The “Silent Dilemma” of Transitional Justice: Silencing and Coming to Terms with the Past in Serbia’ (2013) 7 International Journal of Transitional Justice 328.

¹⁷ Secretary General’s Report 2011 (n 11) para 7.

¹⁸ For more detailed discussion see Chapter Two

particular context of transition. In this way, as discussed in Chapter Five, the law provides a common language in which demands in respect of transitional justice can be made. Most notably for the purposes of this thesis, an updated version of the Report, published in 2011, highlighted how the ‘normative framework supporting transitional justice’ had been strengthened¹⁹ and now includes a ‘right to justice, truth and guarantees of non-recurrence’.²⁰ The most notable development in this context is the evolution of a ‘right to truth’ that acts as a focal point for the pursuit of justice.²¹ The emergence of this particular legal construct brings increased coherence to the debate over how to achieve ‘justice’ in transition. Linked both to the duty to investigate (sometimes referred to as the right to justice) and to the right to an effective remedy, the right to truth is a central link in the ‘justice’ chain.²² It provides a more clearly articulated basis from which both theory and activism can proceed.²³ The dominance of this particular model of justice is evident in the way in which it has come to frame the debate over dealing with the past in Northern Ireland.

The right to truth is regarded as an autonomous and imprescriptible right of victims of human rights abuse.²⁴ As such, it places a legal obligation on the State to ensure that the right is vindicated.²⁵ There are a number of different justifications given for placing obligations on states in respect of truth. These include the suggestion that truth is necessary for the consolidation of peace or for achieving reconciliation, which

¹⁹ Secretary General’s Report 2011 (n 11) para 17.

²⁰ *ibid* para 19.

²¹ The ‘Right to Truth’ was recognized by the Human Rights Council in 2005. UN Commission on Human Rights, *Human Rights Resolution 2005/66: Right to the Truth* (E/CN.4/RES/2005/66, United Nations 2005). It was further characterized as an inalienable and autonomous right in ‘Report of the Office of the High Commissioner for Human Rights, Implementation of General Assembly Resolution 60/251 Entitled Human Rights Council’ (UN Doc A/HRC/5/7, United Nations 2007). For more detail on the origins of this right see Eduardo González and Howard Varney (eds), *Truth Seeking: Elements of Creating an Effective Truth Commission*. (Brasilia and New York, 2013)

²² According to the Office of the High Commissioner for Human rights, ‘From the conceptual viewpoint, this right therefore occupies a central and fundamental position in action to combat impunity and in the quest for justice.’ United Nations, ‘Report of the Office of the High Commissioner for Human Rights, Implementation of General Assembly Resolution 60/251 Entitled Human Rights Council’ (UN Doc A/HRC/5/7, United Nations 2007) para 3.

²³ The seminal work in this regard is that of Priscilla Hayner. Hayner first documented the work of truth commissions internationally, before bringing her findings together into a coherent conceptual framework for analyzing the contribution of truth to justice in transition. This conceptual framework then allowed for the construction of a normative regime, and continues to underpin work in both theory and practice. Priscilla Hayner, ‘Fifteen Truth Commissions – 1974-1994’ (1994) 16 *Human Rights Quarterly* 597.

²⁴ United Nations, ‘Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity’ (UN Doc E/CN.4/2005/102/Add.1, United Nations 2005)

²⁵ *ibid*.

are often cited as the basis for establishing a truth commission in the aftermath of conflict.²⁶ Truth, it is argued, can help to establish facts and promote accountability,²⁷ thereby contributing to the establishment of a credible historical record. It can ensure that victims' needs are met, and contribute to justice, thereby preventing recurrence of the abuse.²⁸ It is therefore a central pillar of the framework of transitional justice. This centrality is evident in the Northern Ireland context where reports by NGOs continue to highlight the role that truth-telling plays in dealing with the past. In 2006, in a report that pre-dates the articulation by the UN of a 'right to truth', the cross-community initiative *Healing Through Remembering* published a range of different options for dealing with the past.²⁹ Each of these was rooted in a different vision of 'truth' and the role that it could play. This report, as the first of its kind, was influential in opening up the debate over what 'truth' entailed in Northern Ireland's transition, but also in making the statement that truth was important. This was again highlighted by the Consultative Group on the Past (CGP), established by the Government in 2007 to consult on how best to deal with the past. In their report, published in 2009, the CGP emphasised that truth was 'crucial to the prospect of reconciliation'.³⁰ Most recently, a report by Amnesty International, published in 2014, has again highlighted the importance of truth as an 'essential element of the duty to investigate human rights violations...'.³¹ Truth therefore underpins calls to deal with the past in Northern Ireland.

In the transitional context, the right to truth has been interpreted as including a number of different composite elements, all of which may contribute to justice in the aftermath of conflict. The first of these is the right to an investigation. This is an essential aspect of being able to secure access to justice and ensure that victims, and society at large, have access to the relevant information necessary to pursue the truth about the violations that they have suffered. The most notable development in this

²⁶ UN Commission on Human Rights, *Human Rights Resolution 2005/66: Right to the Truth* (E/CN.4/RES/2005/66, United Nations 2005).

²⁷ Secretary General's Report 2011 (n 11).

²⁸ For the most detailed account of claims made in respect of truth seeking in transition see Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2010).

²⁹ McEvoy (n 15).

³⁰ Consultative Group on the Past, 'Report of the Consultative Group on the Past' (HC 2009-10, UK Parliament 2009) 25 < http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf. (accessed 17 November 2015) (hereinafter 'CGP').

³¹ Amnesty International (n 13).

regard is the elaboration by the ECHR in the context of Article 2 of a procedural element of the right to life, which places an obligation on the State to conduct an effective investigation into any death that occurs as a result of the use of force by the State. The development of this procedural requirement has been driven largely as a result of cases emanating from Northern Ireland, in which the actions of the State in respect to the lethal use of force have been challenged.³² In this regard, Article 2 of the ECHR has provided a pivotal reference point from which claims in respect of accountability for past deaths resulting from state action can proceed.³³ The procedural element of the right to life under Article 2 has been interpreted as requiring that the investigation be independent,³⁴ its findings must be made publicly available³⁵ and it must be effective in determining responsibility for the death.³⁶ Therefore, on a fundamental level, the right to an investigation engages the right of victims to know what happened. It also speaks to the need to ensure that victims have effective access to justice in order to pursue their cases. This right to an investigation, and access to justice, forms part of the long-established ‘right to an effective remedy’, defined as ‘equal and effective access to justice’, as well as access to information concerning violations, and adequate, effective and prompt reparation for harm suffered.³⁷ The existence of such rights for victims places a corresponding duty on the State to ensure that the laws and procedures are in place to meet those requirements.³⁸ From a transitional justice perspective, it has been argued that the incorporation of the provisions of the ECHR, including Article 2, into domestic law in the UK through the Human Rights Act brought with it a particular responsibility in respect of facilitating Northern Ireland’s transition from conflict to peace.³⁹ Termed a ‘litigation strategy’,⁴⁰

³² The procedural aspect of Art 2 was first set out in the case of *McKerr v United Kingdom* [2002] 34 EHRR 20.

³³ Marny Requa and Gordon Anthony, ‘Coroners, Controversial Deaths, and Northern Ireland’s Past Conflict’ [2008] Public Law 443, 444.

³⁴ *Jordan v United Kingdom* [2003] EHRR 2; *McKerr v United Kingdom* [2002] 34 EHRR 20; *Kelly v United Kingdom* App no 17579/90 (ECHR, 4 May 2001)

³⁵ *Kaya v Turkey* [1998] 28 EHRR 1

³⁶ *McCann, Farrell and Savage v United Kingdom* [1996] 21 EHRR 97

³⁷ ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’: GA Res. 60/147 (UN Doc. A/RES/60/147, United Nations 2006) para 11.

³⁸ The existence of these obligations is confirmed in the Guidelines (*ibid*) The scope of the obligation includes the duty to ‘investigate violations effectively, promptly, thoroughly and impartially...’ *ibid* para 3b.

³⁹ Christine Bell and Johanna Keenan, ‘Lost on the Way Home? The Right to Life in Northern Ireland’ (2005) 32(1) *Journal of Law and Society* 68.

⁴⁰ *ibid*.

effective use has been made of the jurisprudence of the ECHR in respect of the procedural obligation contained in Article 2 to put pressure on the State to reform key structures within the criminal justice system.⁴¹ In particular, the requirement of an effective investigation has been interpreted as holding at least the possibility of redressing the previous difficulties in countering arguments on the part of the State that their use of force was legitimate.⁴² It therefore redresses past illegitimacy through a programme of 'legal institutional transformation', encompassing the structures of policing and criminal justice.⁴³

The final link in the justice chain is the right to reparation. According to the UN Guidelines, reparations are intended to 'promote justice by redressing gross violations of international human rights law...'⁴⁴ Reparation is a broadly defined concept in transitional justice and includes aspects of restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.⁴⁵ It requires not only the verification of facts, but also full public disclosure of the truth of what happened. As a result of this broad and holistic definition of reparation, it has been held to encompass less legal and more social outcomes, such as the preservation of historical memory, for example, or the provision of social and health services aimed at social rehabilitation in the wake of human rights abuse. However, of particular note in this context is the guarantee of non-recurrence that requires the review and reform of law so as to prevent future conflict. In the Northern Ireland context, Amnesty International emphasised how establishing the truth about the past will make it 'less likely that past violations and abuses would be repeated'.⁴⁶ This guarantee of non-recurrence in many ways is the underpinning foundation of the right to truth, and provides a legitimating discourse. 'Truth' is the way in which the future is insured against a recurrence of the past.

This comprehensive institution of a law and policy of transitional justice, evidenced in the increasing body of international law and its application in the domestic context, brings claims in respect of accountability and reparation within the scope of the legal

⁴¹ In particular: coronial law; police ombudsman; inquiries.

⁴² Bell and Keenan (n 39) 73.

⁴³ *ibid* 70.

⁴⁴ Guidelines (n 37) 15.

⁴⁵ For more detailed definitions of each of these elements see *ibid* paras 15-23.

⁴⁶ Amnesty International (n 13) 15.

framework.⁴⁷ This lends them the authority of law and legitimates them as demands in a transitional context. As Subotić suggests, transitional justice advocacy relies on a ‘legalistic frame to portray their claims as universally objective and uncontroversial because they rely on human rights standards’.⁴⁸ They are no longer simply political or moral demands, but are rather a source of international legal obligation on the part of the State.⁴⁹ This provides a crucial focal point for advocacy and campaigning in respect of accountability for the past.⁵⁰ Further, in addition to the articulation of the substantive content of justice in transition, international law increasingly provides a clear framework for achieving those requirements. This is evidenced in the menu of options available to states for dealing with the past. The next section will discuss how the existence of this menu of options is reflected in debate in Northern Ireland, and the effect that it has had on the articulation of political claims in respect of the past.

b. How is ‘Justice’ Achieved?

Chapter Two discussed how, in transitional justice, theory has often followed practice. The establishment of trials and truth commissions did not arise at first as a result of a normative framework for transition that included the ‘right to truth’.⁵¹ Rather claims for normativity in respect of truth have followed from the experiences of transitional societies that have established such mechanisms.⁵² The two now dovetail, with a range of institutional options available for the pursuit of justice. These centre primarily on the requirement of an effective investigation into abuses. As suggested, there is no one institutional mechanism that is regarded as being *the* correct way to achieve truth and justice in transition. However, just as the various requirements of truth and justice have been elaborated in a more or less coherent legal framework, there is now also broad convergence of opinion over the ways in which the rights themselves can be addressed. There are a number of well-established mechanisms that have been used and promoted internationally as a means of meeting

⁴⁷ See Jelena Subotić, ‘The Transformation of International Transitional Justice Advocacy’ (2012) 6 *International Journal of Transitional Justice* 106.

⁴⁸ *ibid* 118.

⁴⁹ Guidelines (n 37).

⁵⁰ For a detailed analysis of how the international law framework has shaped domestic advocacy see Subotić (n 47).

⁵¹ See Ruti Teitel, ‘Transitional Justice Genealogy’ (2003) 16 *Harvard Human Rights Law Journal* 69 (hereinafter ‘Genealogy’) on the origins of these mechanisms and their place within the conceptual and legal development of transitional justice.

⁵² Hayner (n 23).

transitional justice requirements, as demonstrated by the ‘toolkits’ that provide practical guides to these mechanisms, including prosecutions, truth commissions, vetting and reparations.⁵³ These mechanisms are also reflected in the debate over dealing with the past in Northern Ireland. Termed the ‘landscape of legal processes’ by the CGP,⁵⁴ there are a range of mechanisms that already exist, and a number that do not currently exist but whose establishment now appears imminent.⁵⁵ What is striking, however, is that this ‘landscape’ identified by the CGP is largely reflective of the *visible* debate over dealing with the past.⁵⁶ These mechanisms form the common basis of analysis presented in NGO reports and academic commentary on the subject of dealing with the past.⁵⁷ As such there is a clearly demarcated intellectual space within which the debate over dealing with the past is being conducted. This debate occurs within the ‘theatrical space’ created by the international model of transitional justice.⁵⁸ The existence of legal obligations that are regarded as ‘imprescriptible’ rights and guaranteed as a matter of international law serve to ‘insure’ claims in respect of the need to deal with the past in the domestic context.⁵⁹ This is a good example of the displacement of political questions into the legal realm, where particular claims can be ‘insured’ with reference to the higher authority of international law, thereby guaranteeing their status as legal obligation in the domestic transitional context. It is another example of the way in which ‘normative’ understandings of human rights have subordinated ‘political’ understandings.⁶⁰

⁵³ For discussion see Chapter 2.2.

⁵⁴ CGP (n 30) 106.

⁵⁵ Stormont House Agreement (n 8).

⁵⁶ It is also largely consistent with the international ‘package’ composed of truth, justice and reparations. See Subotić (n 47) 120.

⁵⁷ See for example Kieran McEvoy and Louise Mallinder, ‘Truth, Amnesty and Prosecutions: Models for Dealing with the Past’: 2nd Submission to Haas-O’Sullivan Talks (Belfast, 2013). The authors were asked to provide a report on applicable ‘models’ to be considered.

⁵⁸ Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes tr, Routledge 2001). See also Subotić (n 47).

⁵⁹ Jacques Derrida, ‘Force of Law: The Mystical Foundation of Authority’ in Drucilla Cornell and others (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992) (hereinafter ‘Force of Law’) on ‘insuring’ international law in this context is used to insure the role of law against challenges either in respect of its origin or its dominant interpretation.

⁶⁰ This is equally true in both the international and domestic contexts. Dube highlights how the emphasis on the ‘packaged’ version of justice ‘has ostracized those who harbor different feelings, emotions, views and perspectives on transitional justice’. Siphwe Ignatius Dube, ‘Transitional Justice Beyond the Normative: Towards a Literary Theory of Political Transitions’ (2011) 5 *International Journal of Transitional Justice* 177, 183.

The past year has seen significant developments in relation to dealing with the past in Northern Ireland. In December 2014, the main political parties reached agreement on, among other issues, the creation of a number of bodies to address the legacy of the past.⁶¹ The Stormont House Agreement (SHA) has effectively moved the debate from disagreement over whether there should be any form of reckoning with the past on to the terrain of the detail of how it should be addressed.⁶² This agreement is explicitly framed as contributing toward the ‘transition to long term peace and stability’⁶³ and attempts to create a more holistic process for dealing with the past to replace the piecemeal approach that has dominated efforts to date.⁶⁴ It has also made the prospect of progress on the past a more immediate reality, in that a commitment has been made that the legacy mechanisms envisaged by the SHA will be created by 2016, and that their work will be completed within five years of that date. The SHA reflects two distinct aspects of truth recovery—namely the pursuit of factual or ‘forensic’ truth, reflected in the commitment to facilitating the pursuit of justice and information recovery in a manner that is human rights compliant,⁶⁵ as well as addressing the more broadly defined goal of ‘narrative’ truth reflected in the commitment to promote reconciliation and acknowledge and address the suffering of victims and survivors.⁶⁶ To this end, the SHA makes a commitment to establish four separate legacy mechanisms for dealing with the past. These can be divided roughly along the individual/collective axis of those pursuing forensic truth, namely the investigation of historic cases with a view to providing information to victims and their families, and those that are oriented towards the narrative function of truth, in terms of broader social benefit.

The first of these legacy mechanisms to address forensic truth is a Historical Investigations Unit (HIU). The primary purpose of this unit will be to ‘take forward

⁶¹ Stormont House Agreement (n 8).

⁶² See Committee on the Administration of Justice, ‘Dealing with the Past in Northern Ireland: Implementing the Stormont House Agreement’ (2015) Conference Report and Papers <<http://www.caj.org.uk/contents/1289>>.

⁶³ Stormont House Agreement (n 8) 21.

⁶⁴ See Christine Bell, ‘Dealing With the Past in Northern Ireland’ (2002) 26 *Fordham International Law Journal* 1095 on the ‘piecemeal’ approach to dealing with the past. This term has come to be the accepted shorthand for the failure to adequately deal with the past to date.

⁶⁵ Stormont House Agreement (n 8) 21. There is also specific commitment that the approach to dealing with the past will be balanced, proportionate, transparent, fair and equitable.

⁶⁶ In drawing this distinction between two different aspects of truth recovery, I draw on the work of McEvoy (n 15) in mapping the different approaches to truth.

investigations into outstanding Troubles-related deaths'.⁶⁷ This mechanism is most closely associated with criminal justice and with the human rights obligations of the State in terms of conducting effective investigations into controversial deaths. If established, it will replace the range of mechanisms that currently exist to comply with the Article 2 obligations.⁶⁸ The existing package of measures includes public inquiries,⁶⁹ investigations by the Police Ombudsman and on-going criminal investigations of historic cases by the Historical Enquiries Team (HET) of the Police Service of Northern Ireland (PSNI).⁷⁰ The purpose of this unit is first and foremost to investigate historic cases and to bring new prosecutions where evidence allows.⁷¹ The work of the HIU will be complemented by an Independent Commission for Information Retrieval (ICIR).⁷² The purpose of this body will be to 'enable victims and survivors to seek and privately receive information about the (Troubles-related) deaths of their next of kin'.⁷³ This body will remain entirely separate from the justice system⁷⁴ and information passed to it will not be admissible in criminal or civil proceedings.⁷⁵ For victims, this means that while they may be provided with information by this body, that information alone will not lead to a prosecution. While this may appear to compromise justice for victims, it is nevertheless an important feature in light of the aim of the Commission to retrieve information that might not be forthcoming where a threat of criminal or civil proceedings remains.⁷⁶ While information provided in this context cannot be passed on to the Historical Investigations Unit, and will not contribute towards the pursuit of criminal justice, the

⁶⁷ Stormont House Agreement (n 8) 30.

⁶⁸ With the exception of legacy inquests, which will continue to operate as a separate process to the HIU. Ibid 31. For discussion of the role and significance of inquests, see Requa and Anthony (n 33).

⁶⁹ See Marny Requa, 'Keeping Up with Strasbourg: Article 2 Obligations and Northern Ireland's Pending Inquests' [2012] 4 Public Law 610 on how these meet transitional justice requirements.

⁷⁰ Stormont House Agreement (n 8) 34. provides that the Historical Investigations Unit will consider all cases in respect of which the Historical Enquiries Team and the Police Ombudsman NI have not completed their work, including HET cases which have already been identified as requiring re-examination.

⁷¹ Ibid 35. The decision whether to prosecute or not lies with the Director of Public Prosecutions.

⁷² This model builds on the existing Independent Commission on the Location of Victim's Remains that allows information on the whereabouts of the 'disappeared' to be passed to the authorities in confidence.

⁷³ Ibid 41.

⁷⁴ Ibid 45.

⁷⁵ Ibid 46. The Commission would also be exempted from judicial review, freedom of information, Data Protection and National Archives legislation in both the UK and Ireland as a means of safeguarding the confidentiality of the process. Ibid 47.

⁷⁶ While information provided to the ICIR will be inadmissible in criminal or civil proceedings, the simple act of providing information to the ICIR does not guarantee immunity from suit, nor does it constitute an amnesty for those providing information. Where evidence or information comes to light from other sources, such as an HIU investigation, the individual may still face prosecution. Ibid 49.

Commission nevertheless contributes towards truth recovery through the collection of information that can be passed to victims, thereby satisfying the needs of victims to know what happened to their loved ones and why.⁷⁷ Information received by the ICIR may also contribute to thematic analysis of the conflict, thereby also contributing to broader narrative goals. These two bodies specifically address the need to investigate past crimes and to provide as much information as possible to victims. As such they are victim-centred and individually-oriented. The other two bodies address more explicitly the social function of truth recovery.

The first of these is an oral history archive that will ‘provide a central place for people from all backgrounds ... to share experiences and narratives related to the Troubles’.⁷⁸ The value of oral history projects is well recognised in transitional justice scholarship, and indeed a number of such projects already operate in Northern Ireland.⁷⁹ The key contribution that such a body makes to truth and dealing with the past is in providing a forum for victims and survivors to have their story heard. It thus speaks clearly to the overarching principle of acknowledging and addressing the suffering of victims and survivors. Such an archive potentially broadens the pursuit of truth beyond individual cases and re-focuses attention to broader social and personal issues. It is also an important source of information from which the proposed Implementation and Reconciliation Group will draw. This group is to be established to ‘oversee themes, archives and information recovery’.⁸⁰ Information may be drawn from any of the legacy mechanisms, and the function of this body will be to oversee the production of a thematic report or reports that highlight key themes and patterns emerging from the other legacy mechanisms. This body is the one explicitly charged with ‘contribut[ing] to reconciliation, better understanding of the past and reducing sectarianism’.⁸¹ Its function is therefore the production of the narrative truths of the conflict, contributing to the overarching goal of justice through truth, acknowledgement and reconciliation.

⁷⁷ This in itself is an important goal of truth recovery in transitional justice. See Hayner (n 28).

⁷⁸ Stormont House Agreement (n 8) 22.

⁷⁹ Ardoyne Commemoration Project, *Ardoyne: The Untold Truth* (Belfast, 2002). For analysis of such participatory processes see Patricia Lundy and Mark McGovern, ‘Whose Justice: Rethinking Transitional Justice from the Bottom Up’ (2008) 35 *Journal of Law and Society* 265.

⁸⁰ Stormont House Agreement (n 8) 51.

⁸¹ *ibid* 52.

Expressly noted in the context of the work of the IRG is the fact that the ‘UK and Irish governments will consider statements of acknowledgement...’⁸²

What unites the different options proposed by different bodies is the influence that law exerts on their design. The requirements of justice in transition are determined by reference to legal rules and standards, which in turn constrain what is and is not considered to be a legitimate response to past conflict.⁸³ This is summed up in the assertion that any initiative to deal with the past must be ‘human rights compliant’.⁸⁴ Arguably this approach follows naturally from the conceptualisation of transitional justice that has cast law not only as a means of achieving justice, but also as incorporating values of justice.⁸⁵ In the context of entrenched social conflict, the model of transitional justice intentionally attempts to displace difficult political issues, such as dealing with the past, from the realm of politics and into the realm of law as a means of depoliticising truth and justice.⁸⁶ The aim of this strategy is to provide objective standards that can frame the debate, thereby keeping it within the parameters of law and away from physical violence. This is done with reference to the overarching *logos* of justice, a transcendental, or natural, standard which is to be achieved through legal means. The risk with this approach, however, is that it reduces the pursuit of justice in transition to a calculation where efforts are concentrated on ensuring that initiatives comply with law and with legal standards rather than on deeper inquiry as to what justice really means.⁸⁷ Deconstructive reading begins to destabilise the certainties associated with the determinate ‘means’ and ‘ends’ of law and justice. Derrida suggests that the concepts of law and justice cannot be regarded as fully distinct from each other.⁸⁸ For Derrida, justice does not exist as an objective or transcendent standard that can be achieved through law.⁸⁹ But nor is justice the

⁸² *ibid* 53.

⁸³ For example the 2006 Healing Through Remembering Report (n 15) included the option of ‘Drawing a Line Under the Past’. This option has ceased to appear in policy documents on the past, and in fact now represents the excluded ‘other’ of the dealing with the past debate, in that it is no longer considered a legitimate option.

⁸⁴ Stormont House Agreement (n 8).

⁸⁵ Teitel (n 6) (see Chapter 2.1 for discussion). In the context of truth recovery see Leebaw (n 2).

⁸⁶ Teitel (n 6), discussed in Chapter 2.1.

⁸⁷ See Alejandro Castillejo-Cuéllar, ‘Historical Injuries, Temporality and the Law: Articulations of a Violent Past in Two Transitional Scenarios’ (2014) 25 *Law and Critique* 47.

⁸⁸ Indeed, he states that ‘Everything would be simple if this distinction between justice and *droit* were a true distinction, an opposition whose functioning was logically regulated and permitted mastery’. *Force of Law* (n 59) 22.

⁸⁹ See discussion in Chapter 3.1 on *Différance*.

same thing as law. Rather, the two exist in a relationship of interdependence. In 'Force of Law', Derrida identifies how law, or 'right', 'claims to exercise itself in the name of justice, and that justice is required to establish itself in the name of a law that must be "enforced"'.⁹⁰ It is this interrelationship between law and justice that both opens up the possibility of deconstruction and makes it necessary.⁹¹ Crucially what deconstruction reveals is the way in which equating justice with law undermines the possibility of justice. If law is violent, then treating justice as the same as law will inscribe the same oppositional structure into the concept of justice.

Central to calls for truth recovery in transitional contexts is the rationale that truth will lead to a shared understanding of the conflict that will in turn foster reconciliation and the creation of a new political community.⁹² As Bankowski suggests, the project of reconciliation that drives much of the 'truth' work in transitional justice 'assumes that a perfected past can perform reintegration'.⁹³ This is rooted in a linearity whereby a conflicted past is replaced with a new legal order that in turn guarantees the future.⁹⁴ A normative framework of transition therefore sets a specific outcome to be achieved - namely justice.⁹⁵ The means by which this is to be achieved is through the vindication of the right to truth, with the attendant calculations and compromises that it entails. Therefore justice, under this model, is measured by reference to whether or not law and legal standards pertaining to the right to truth have been properly implemented. This is a linear progression, from violence to law, and ultimately to justice. This can be seen in the way in which Northern Ireland's 'transition' is narrated. In the beginning there was conflict, violence, murder, injustice. This is the contested *past*, the legacy of which transitional justice aims to address. In the case of Northern Ireland, the most commonly accepted temporal scope of the problematic 'past' is the period of the 'Troubles', dating from 1969 until the Agreement of 1998.⁹⁶

⁹⁰ Force of Law (n 59) 22.

⁹¹ *ibid.*

⁹² Amnesty International (n 13); McEvoy (n 15); Hayner (n 28).

⁹³ Zenon Bankowski, 'The Risk of Reconciliation' in Scott Veitch (ed), *Law and the Politics of Reconciliation* (Ashgate 2007) 49.

⁹⁴ This is the guarantee of non-recurrence that characterizes transitional justice, and the 'forward looking' element of justice in transition. Teitel (n 6).

⁹⁵ Increasingly justice is being interpreted instrumentally, as a means towards the broader goal of reconciliation and reconstruction. Nevertheless, the pursuit of 'justice' remains significant. See, e.g., Leebaw (n 2); Dube (n 60); Subotić (n 47).

⁹⁶ Although it should be acknowledged that this 'definition' of the temporal scope of the conflict is in itself a form of violence in that it obliterates broader historic narratives of injustice and dates the

Transitional justice operates in the *present*. In 2015 we grapple with how best to deal with the contested past. The aim of the various mechanisms proposed in the Stormont House Agreement is to attempt to come to some sort of resolution of the past. This reflects the foundational assumption of transitional justice that the past must be addressed. Society, it has been suggested, has a ‘right to the truth about the past’.⁹⁷ Crucially, the purpose of this exercise, the end towards which the means of truth recovery aims, is to arrive at a ‘shared understanding’ of the past. This involves challenging what are seen as ‘obstacles to laying bare the truth’⁹⁸ and the ‘failure to develop a shared public understanding and recognition of the abuses committed by all sides’.⁹⁹ It also places an emphasis on concepts such as acknowledgement and reconciliation as a means of achieving this end.¹⁰⁰ In turn, the goal of achieving a shared public understanding of the conflict is not just an imperative for the present, but also for the *future*. Knowing the truth, it has been suggested, is essential to ensure that lessons can be learned, making it less likely that the past will be repeated.¹⁰¹ It is thus clear how the debate over dealing with the past is structured along a temporally linear spectrum in which the means of truth are oriented towards a determined end of justice. The next section will consider Derrida’s deconstruction of the relationship between law and justice and what it reveals about both the linearity of the model and also the possibility of arriving at a determined end to transition.

2. LAW AND JUSTICE

‘Force of Law’ presents Derrida’s first explicit engagement with the relationship between law and justice. Whereas his earlier work had articulated the interplay of violence and law,¹⁰² it was not until ‘Force of Law’ that he explicitly addressed the implications of this immanence of violence to the law for our understanding of justice. In this regard, the definition of justice is important, because if justice is

existence of ‘conflict’ only from the emergence of anti-state political violence. See Castillejo-Cuéllar (n 87).

⁹⁷ Healing Through Remembering, ‘Dealing with the Past? An Overview of Legal and Political Approaches Relating to the Conflict in and about Northern Ireland’ (Belfast, 2013).

⁹⁸ Amnesty International (n 13) 5.

⁹⁹ *ibid* 7.

¹⁰⁰ See most notably CGP (n 30) 54.

¹⁰¹ Amnesty International (n 13) 15.

¹⁰² See Chapter 4

regarded as the same thing as law, or alternatively if law is viewed as a means to justice, then justice will similarly be tainted by the violence of the law. When seen in this light 'justice' becomes a problematic endpoint of transition. Law, for Derrida, is 'essentially deconstructible'. As discussed in Chapter Three, a concept is 'essentially deconstructible' where it is founded on interpretable textual strata (i.e. it exists in codified form), or where its ultimate foundation is by definition unfounded.¹⁰³ Put simply, deconstruction of law entails interrogating its claims to legality or to legitimacy.¹⁰⁴ This means that we do not accept at face value claims of self-evidence, impartiality or objectivity in transitional justice. Rather, a constantly questioning attitude towards the law must be maintained. Recent developments in transitional justice at the levels of both scholarship and policy have focused on articulating the relationship between law and justice in transition. The institution of the *logos* of justice into the written text of law and policy in this context therefore makes deconstruction of claims to legitimacy possible. It also reveals the distinction between law and justice that underpins Derrida's understanding of justice. Whereas law for Derrida is 'essentially deconstructible', justice cannot be deconstructed.¹⁰⁵ Rather the *distinction* between law and justice is what makes deconstruction possible.¹⁰⁶ For Derrida, 'deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of [law] (authority, legitimacy etc.)'.¹⁰⁷ Derrida terms this interval in which deconstruction takes place an *aporia* - a brief space in time before a legal decision is made.¹⁰⁸

For Derrida, justice is not a fixed and quantifiable standard whose achievement can be measured. Justice exists in 'aporetic experiences', in 'moments in which the decision between just and unjust is never insured by a rule'.¹⁰⁹ What does this mean in practice? Where justice is treated as the endpoint of law, it becomes a fixed destination, something towards which law and legal decision-making is oriented. However, while law may be oriented towards justice, to say that the correct

¹⁰³ Force of Law (n 59) 14. See Chapter 3 for more detailed discussion.

¹⁰⁴ *ibid.* For detailed discussion, see Chapter 3 and Chapter 4.

¹⁰⁵ However, Derrida distinguishes justice from law; 'nor is it a transcendent standard that exists outside or beyond the law and can as such be achieved through law.' *ibid.* 14.

¹⁰⁶ *ibid.* 15.

¹⁰⁷ *ibid.* 15.

¹⁰⁸ *ibid.* 15.

¹⁰⁹ *ibid.* 16.

interpretation or application of law can achieve justice is a different proposition.¹¹⁰ Addressing the distinction between law and justice, Derrida suggests that law is a calculation. It is a process whereby an outcome is achieved by reference to existing rules and standards, and the outcome is guaranteed or 'insured' by those rules. It therefore deals in certainties, and the balancing of competing positions with reference to existing rules and conventions. In contrast, a Derridean concept of justice rejects the certainty associated with law in favour of an open-ended approach in which justice is never fully present but remains locked in a continual process of negotiation and re-negotiation.¹¹¹

In order to understand this point it is necessary to return for a moment to Derrida's early work on violence and the construction of meaning. For Derrida, meaning is constructed on the interplay between oppositional concepts that exist in a state of hierarchy.¹¹² Meaning rests on the ability of one particular concept or interpretation to dominate others. Similarly, the authority of law guarantees the interpretation privileged by law through the act of legal decision-making. Whereas prior to the decision being made there may be many competing interpretations of what justice would entail, the act of decision-making privileges one 'dominant' interpretation and violently subordinates and excludes all others. At this moment the exercise of law is reduced to a calculation—to the application of the objective law—and the possibility of justice is thereby lost. Derrida further elaborates on this dynamic with reference to the purported universality of law. He highlights how 'justice, as law, seems always to suppose the generality of a rule, a norm or a universal imperative'.¹¹³ This creates a clear tension between the application of an apparently universal rule and the experience of that rule by the individual. Even where the general rule requires consideration of its effect in singular or individual cases, to act simply in accordance with objective law is not doing justice.¹¹⁴ Therefore, for Derrida, justice exists in the moment just before the decision is made. In this moment there remains the *possibility*

¹¹⁰ Derrida states that 'law is the element of calculation; and it is just that there be law, but justice is incalculable...' *ibid* 16.

¹¹¹ This is the element of deferral that underpins the structure of *différance* upon which all meaning is constructed. Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, John Hopkins University Press 1976).

¹¹² *ibid*. This is the essential structure of *différance* upon which all meaning is constructed.

¹¹³ Force of Law (n 59) 17.

¹¹⁴ *ibid*.

that any of the competing interpretations may be chosen as the correct one. All compete on equal terms, none being able to rely on law to guarantee its dominance. This is the moment in which 'the decision between just and unjust is never insured by a rule'.¹¹⁵ Once the decision has been made, that possibility disappears. To speak of justice as a *possibility* is therefore to speak of justice as residing in the moment, no matter how brief, before the violence of the law intervenes. This, for Derrida, is the *aporia* in which justice resides, and it is characterised by its openness to the 'other'.¹¹⁶ Where deconstruction becomes relevant is in how it encourages a relentless pursuit of justice.¹¹⁷ Law as justice encourages the moment of decision. It prioritises the present certainty of legal determination over the inherent risk of leaving disagreements unresolved.¹¹⁸ However deconstruction, rather than accepting dominant or given narratives of what the law is and how it can resolve conflict in an impartial manner, requires on-going deconstruction of the law itself, to ensure that its dominance does not bury the possibility of justice. For this reason, for Derrida, deconstruction is justice.¹¹⁹

Having explained his understanding of justice, Derrida goes on to provide a number of examples of how and where these *aporias* between law and justice arise. For Derrida it is in these spaces that deconstruction finds its privileged place.¹²⁰ Each of these examples, it is suggested, casts light on some of the limitations of relying too heavily on law as a means of ensuring justice in transition. They also provide useful tools through which to deconstruct attitudes towards dealing with the past. In the case of Northern Ireland, the debate over dealing with the past is often represented as a clash between those who call for a comprehensive process to investigate the past and those who resist such calls.¹²¹ This is the classic antinomy of 'acknowledgement'

¹¹⁵ *ibid* 16.

¹¹⁶ *ibid*.

¹¹⁷ Derrida suggests that 'constantly to maintain an interrogation of the origin, grounds and limits of our conceptual, theoretical or normative surrounding justice is on deconstruction's part anything but a neutralization of the interests of justice'. *ibid* 20.

¹¹⁸ See Emiliios Christodoulidis, 'Truth and Reconciliation and Risks' (2000) 9 *Social and Legal Studies* 179.

¹¹⁹ *Force of Law* (n 59) 15.

¹²⁰ *ibid* 21.

¹²¹ In broad terms this division is drawn along political lines, with Nationalists and Republicans more likely to be in favour of 'dealing with the past' than Unionists or Loyalists. For discussion, see Lundy and McGovern (n 7).

versus 'denial' that is characteristic of transitional justice.¹²² Because of the dominance of the transitional narrative, and the ability of its advocates to appeal to the higher normative authority of international law to back up their claims, there is a quality of self-evidence about the assertion that an overarching mechanism for dealing with the past is necessary.¹²³ This is further supported by the fact of the concrete political proposals, soon to achieve legal status, as to how this is to be achieved.¹²⁴ The following section will therefore use Derrida's exemplars to illustrate the applicability of deconstruction to the Northern Ireland context.

a. First Aporia: The Rule

'...if the act simply consists of applying a rule, of enacting a program or effecting a calculation, we might say that it is legal, that it conforms to law,... but we would be wrong to say that the decision was just.'¹²⁵

The first *aporia*, and the most straightforward, builds on the distinction drawn above between law and justice. For Derrida, law is not the same thing as justice. Rather, the ability to distinguish between on the one hand the calculated application of a legal rule and the pursuit of justice on the other is key. The very fact that a right to justice, to truth or to a remedy have been instituted in law and policy makes them 'essentially deconstructible'. This is particularly clear in the context of the instituted definition of justice in transition. As discussed in Section One, the right to truth, including the right to justice, has been interpreted as incorporating a number of elements, most of which are also evidenced in practice in the case of Northern Ireland. These include, most notably, efforts at satisfying the procedural requirement of Article 2. Given the ongoing pertinence of questions over accountability for state actions during the Troubles, it has been suggested that these cases 'form part of the transitional legal landscape in Northern Ireland' and that 'any response to them must be conceptualised in that frame of reference'.¹²⁶ Indeed Article 2 has been used both to frame demands

¹²² Colm Campbell and Fionnuala Ní Aoláin, 'The Paradox of Transitions in Liberal Democracies' (2005) 27 Human Rights Quarterly 172.

¹²³ This is the prevailing political and legal context discussed in detail in Chapter 5. See also Jacques Derrida 'Spectres of Marx' (1994) 15 New Political Science 31 on self-evidence.

¹²⁴ Stormont House Agreement (n 8).

¹²⁵ Force of Law (n 59) 23.

¹²⁶ Fionnuala Ní Aoláin, 'Truth Telling, Accountability and the Right to Life in Northern Ireland' (2002) 5 European Human Rights Law Review 572, 573.

for justice, but also to critique efforts by the State to satisfy its obligations thereunder. This particular debate therefore encapsulates well what Derrida refers to as the 'element of calculation' inherent in the enforcement of law.

As discussed, Article 2 has been used effectively to require the State to engage with the requirements of transitional justice in Northern Ireland. By pursuing a 'litigation strategy', lawyers for the families of those killed by the State during the course of the Troubles have managed to force the State to provide mechanisms for providing information on historic cases.¹²⁷ In this regard, Article 2 has been explicitly characterised as requiring transitional justice,¹²⁸ in the form of effective investigations and access to justice. It has also managed to move particularly contentious issues, such as collusion between state forces and paramilitary organisations, from the political into the legal realm, thereby making them visible to the law and forcing a response from the State.¹²⁹ However there have also been limitations to this mechanism as a means of 'dealing with the past'. The most pertinent of these, and that which best illustrates Derrida's concern with rules, is that framing 'justice' as a matter of compliance with the requirements of Article 2 has allowed for a technical response to historic cases. This is what Derrida refers to as the 'conservative and reproductive activity of judgment'.¹³⁰ Where a legal decision consists of simply applying a generic rule, Derrida highlights how 'we might say what it is legal, that it conforms to law, ... but we would be wrong to say that the decision was just'.¹³¹ This dynamic has formed the basis of considerable critique of efforts to deal with the past to date in Northern Ireland.

A good example of this reductive capacity of law and legalism is seen in respect of what are known as 'legacy inquests'.¹³² Whereas the coronial court has been widely regarded as one among the package of measures designed to ensure Article 2 compliance, and therefore contribute towards the 'right to truth', its potential in

¹²⁷ Bell and Keenan (n 39).

¹²⁸ *ibid.*

¹²⁹ Ní Aoláin (n 126).

¹³⁰ Force of Law (n 59) 23.

¹³¹ *ibid* 23.

¹³² These are inquests into controversial deaths that occurred before the Human Rights Act came in to effect in 2000. For discussion see Requa (n 69).

respect of historic cases has been significantly curtailed in practice.¹³³ In 2004, the House of Lords, when asked to rule on whether or not the procedural obligations contained in Article 2 applied to investigations into controversial deaths that occurred before the Human Rights Act came into force in 2000, decided that it did not. This confirmation of the principle of non-retroactivity effectively prevented Article 2 from being used to require new investigation into historic cases, thereby limiting its use as a mechanism for dealing with the past. The principle of non-retroactivity was modified in the 2011 case of *Re McGaughey*, in which the Court confirmed that there might be certain circumstances in which Article 2 may bind a state in respect of a death that occurred post-2000.¹³⁴ Specifically any *new* investigation into a death occurring prior to 2000 must be Article 2 compliant. This ruling led to a number of requests being lodged with the Attorney General for Northern Ireland for inquests to be established.¹³⁵ However, the ruling does not apply to all deaths and the decision has caused uncertainty in this respect that is likely to reduce the question of to which cases *McGaughey* applies to an ever more detailed ‘calculation’ as to what the law requires.¹³⁶ The very detailed technical nature of the deliberation on this issue arguably stands at odds with a more holistic approach to dealing with the past, of which inquests are simply one element.

The second example of legalism constraining the pursuit of truth relates to public inquiries. Inquiries have been used as a high profile mechanism for investigating particularly controversial deaths, including those that occurred on Bloody Sunday. While such inquiries ostensibly fall within the bounds of transitional justice as ‘one source of truth among other legalistic mechanisms of transitional justice’,¹³⁷ there is a strong vein of critique that highlights the risk that the terms of reference upon which inquiries are founded may be unduly restricted, and as such be used by governments

¹³³ This fact has been officially acknowledged in the Stormont House Agreement, (n 8) 31.

¹³⁴ Specifically this applies to cases where, although the death occurred before 2000, no effective investigation took place before that date. Such cases are thereby distinguished from those that were investigated prior to 2000, to which Article 2 does not apply. For detailed discussion of the *McGaughey* decision see Marny Requa, ‘Keeping Up with Strasbourg: Article 2 Obligations and Northern Ireland’s Pending Inquests’ [2012] 4 Public Law 610.

¹³⁵ *ibid* 619.

¹³⁶ *ibid* 619.

¹³⁷ Requa (n 69) 406.

to ‘deflect criticism and avoid blame’.¹³⁸ Seen in this light, where the terms of reference are designed in such a way as to satisfy narrowly defined legal obligations, but do not address broader truth or justice concerns, there is a risk that the inquiry impedes, rather than advances, justice.¹³⁹ Similarly the work of the Historical Enquiries Team has been critiqued as falling short of the requirements of Article 2, both procedurally, in terms of how it has conducted its investigations,¹⁴⁰ but also on a broader level in terms of how its approach to securing apologies for families can in fact deny the possibility of justice.¹⁴¹ Lundy and Rolston highlight the risk that issuing apologies as a result of HET investigations into killings by soldiers may be used by the State to ‘insulate itself from further probing that might eventually yield more telling results...’¹⁴² and in this way ‘establish a narrative of the past that resonates with the state’s self image’.¹⁴³ They stress that apology taken alone cannot obviate the need for the State to comply with its human rights obligations, nor be regarded as sufficient form of reparation. What unites these critiques is the perceived failure to adequately take into account the specific context created by transitional justice when interpreting the purpose of such bodies. By treating ‘justice’ as a matter of compliance with law and legal terms of reference the possibility of deeper transformation is buried. Justice becomes reduced to the calculation of whether or not law has been properly implemented. It also arguably allows the ‘emergency’ narrative to re-establish itself against that of ‘human rights’. Indeed it has been suggested that this ‘context’ itself has constrained progress on using Article 2 as a means of addressing cases related to the past. Bell and Keenan suggest that in this case the context of Northern Ireland actually impedes the progressive development of Article 2 because of fear of ‘past’-related cases and the risk of opening the floodgates to a large number of historic cases.¹⁴⁴ In addition, and more broadly speaking, the risk of relying too heavily on a normative model of what dealing with the past *should* look

¹³⁸ Angela Hegarty, ‘The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland’ (2002) 26 Fordham International Law Journal 1148 1159.

¹³⁹ See Requa (n 69) for discussion of this dynamic.

¹⁴⁰ Patricia Lundy, ‘Can the Past be Policed? Lessons from the Historical Enquiries Team in Northern Ireland’ (2009) 11 Journal of Law and Social Challenges 109.

¹⁴¹ Patricia Lundy and Bill Rolston, ‘Redress for Past Harms? Official Apologies in Northern Ireland’ [2015] International Journal of Human Rights <<http://dx.doi.org/10.1080/13642987.2015.1050235>> accessed 19 October 2015.

¹⁴² *ibid* 13.

¹⁴³ *ibid* 5.

¹⁴⁴ Bell and Keenan (n 39) 82.

like constrains the potential of critique to shape the debate in new directions.¹⁴⁵ What the preceding discussion reveals is that, while there is a robust debate being conducted with respect to the requirements of the law, this engages only a narrow definition of justice.

It has been argued that such mechanisms must be located within the broader framework of transitional justice, making justice a ‘consequentialist yardstick’ by which they can be judged.¹⁴⁶ A restrictive reading of the requirements of Article 2 effectively prevents it from being used as vehicle for a systemic process for addressing the past. Each of these critiques focuses on the way in which law narrows the terms on how the government will deal with the past.¹⁴⁷ The decision being made is a calculation, a balancing of a calculated and reductive reading of the requirements of the law that protects the interest of the State, and a more expansive reading that would confirm the ‘transitional justice’ elements of the case. A common criticism that unites them is that, by taking an unduly restrictive approach to investigation of the past, the opportunity is lost to address broader goals of truth recovery. In contrast to this element of calculation, Derrida does not suggest that legal decision-making can be avoided, but rather highlights the responsibility that the judge bears for making ‘fresh judgment’. At the heart of this *aporia* is the violence of the law. A decision that consists simply of conformity with the law cannot be justice because the law upon which it rests is itself a moment of violence. Therefore to justify a legal decision with reference to prior conventions and laws simply defers the possibility of justice.¹⁴⁸ As discussed in Chapter Four, the moment of founding of all law will be a moment of violence. In this moment, ‘in the founding of law or in its institution, the same problem of justice will have been posed and violently resolved...’¹⁴⁹ Therefore all decisions that are justified or ‘insured’ by reference to law and specific legal orders will themselves bear that violence.¹⁵⁰ The judge therefore has an obligation to

¹⁴⁵ See, for an example, the limits of normative critique Aoife Duffy, ‘A Truth Commission for Northern Ireland’ (2010) 4 International Journal of Transitional Justice 26 using human rights law to critique the CGP proposals.

¹⁴⁶ Lundy and Rolston (n 141) 6.

¹⁴⁷ For a more general critique of this trend, see Colm Campbell and Catherine Turner, ‘Utopia and the Doubters: Truth, Transition and the Law’ (2008) 23 Legal Studies 374.

¹⁴⁸ Force of Law (n 59) 14.

¹⁴⁹ *ibid* 23.

¹⁵⁰ For example, the ‘violence’ of the origin of the ECHR and the legal order that it created will also be brought to bear on the decision. For more detailed discussion see Chapter 4.

consider the singularity of each case and to be guided by the call for justice rather than simply the formulaic application of law. This leads us to the second *aporia*, in which Derrida discusses the implications of the violence of law for the possibility of making a just decision.

b. 'Second *Aporia*: The Ghost of the Undecidable'

'Justice as law is never exercised without a decision that *cuts*, that divides.'¹⁵¹

This *aporia* follows on from the first, in that it relates to the process through which a legal decision must pass. As outlined above, for Derrida, justice exists in the moment before the decision is made, where an infinite number of possibilities remain. As this moment precedes every legal decision, every decision should therefore pass through this phase of what Derrida terms the 'undecidable'.¹⁵² This undecidability does not consist simply of the balancing of two clearly defined and competing positions. It is not concerned with 'two contradictory and very determinate rules, each equally imperative'.¹⁵³ Such form of balancing is simply a calculation in which predetermined rules are applied. Rather, the experience of 'undecidability' refers to the openness to infinite possibilities that exceeds the exercise of calculation. This moment of 'undecidability' itself represents an *aporia* in that it is a fleeting moment before a decision is made, in which there are no set or determinate outcomes. It is a moment in which no one authoritative law can determine what a 'just' outcome would be. The significance of the concept of 'undecidability' therefore lies in the way in which it requires us to remain open to divergent interpretations of justice, and to resist the temptation to shape experiences and testimonies to fit pre-conceived criteria. This point is particularly important with respect to the distinction between factual or forensic truth, and the broader goals of acknowledgement and reconciliation that are often promoted as flowing from truth recovery processes.¹⁵⁴ Whereas forensic truth can be pursued on an individual or case-by-case basis, acknowledgement and reconciliation translates this demand for truth, and for acknowledgement, into a

¹⁵¹ Force of Law (n 59) 24 (emphasis in original).

¹⁵² *ibid* 24.

¹⁵³ *ibid*.

¹⁵⁴ See Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 Columbia Human Rights Law Review 101.

political demand that will be more easily shaped by law.¹⁵⁵ As the CGP highlighted, the two versions of the past that dominate debate in Northern Ireland differ not so much in the facts of what happened, but in the moral assessment of the rightness and wrongness of what was done by opposing sides.¹⁵⁶ From this flows myriad other divisions, including most prominently the disagreement over who is legitimately entitled to call themselves a 'victim'.¹⁵⁷ Competing accounts of the legal and moral justification of violence on both sides leads to particularly acute disagreement over victimhood and allegations on both sides that a problematic hierarchy of victimhood exists.¹⁵⁸ This division persists, notwithstanding the codification of the definition of a 'victim' in legislation,¹⁵⁹ thus demonstrating the practical limitations of law as a means of transcending politics. This, it is suggested, is where law and its claims to impartiality, rather than transcending difficult political issues, is complicit in creating and sustaining polarised and oppositional models. The existence of a specific legal framework created by transitional justice introduces an element of violence into legal decision-making. What this means is that where a decision is made with reference to the imperatives of transitional justice, it will recreate the violence of that legal order. Inevitably, therefore, the decision will be divisive.

The interpretive context that has been created by the Agreement has cast Northern Ireland as being in 'transition' from a state of conflict to that of peace. Integral to the 'transitional' context is the assumption that law has in the past 'failed' to deal with conflict.¹⁶⁰ This stands in stark contrast to Unionist memories and understandings of the conflict.¹⁶¹ Therefore one of the reasons most often expressed for Unionist resistance to dealing with the past is that it will be used as a vehicle for historical

¹⁵⁵ As McEvoy and McConnachie suggest, 'law formalizes blame, both practically and symbolically.' Kieran McEvoy and Kerstin McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2013) 22 *Social and Legal Studies* 489, 504.

¹⁵⁶ CGP (n 30) 53.

¹⁵⁷ For a good example of the divisive nature of this debate, see Hansard, 'Daily Debates' (2013) Col 234 onwards, in which the Democratic Unionist Party address the definition of a victim.

¹⁵⁸ See Cheryl Lawther, *Truth, Denial and Transition: Northern Ireland and the Contested Past* (Routledge 2014).

¹⁵⁹ S 3 of the Victims and Survivors (Northern Ireland) Order 2006 defines a victim as 'someone who has been ... injured as a result of or in consequence of a conflict related incident'. It therefore incorporates a broad interpretation of victimhood. It further includes those bereaved in such incidents, or who care for those injured as a result of such incidents s 3(b) and 3(c).

¹⁶⁰ Campbell and Ní Aoláin (n 122).

¹⁶¹ See Kirk Simpson, *Unionist Voices and the Politics of Remembering the Past in Northern Ireland* (Palgrave 2009).

revisionism.¹⁶² The fear is often expressed that Republicans will use such processes as a means of legitimating their own actions while simultaneously blaming Unionists for causing the conflict.¹⁶³ When read through the lens of transitional justice, this position appears to be rooted in a political intransigence borne of the loss of a previously privileged political position.¹⁶⁴ Unionist unwillingness to engage is interpreted as a form of denial over their culpability for the conflict.¹⁶⁵ What a Derridean perspective reveals, however, is that far from arriving from outside law, this position flows quite logically from the relationship between violence, law and justice.¹⁶⁶

The orientation of transitional justice towards past redress for failings of the law creates a perception that ‘justice’ in this context relates only to justice for abuses committed by the State.¹⁶⁷ Demands for truth are further advanced on the Republican side.¹⁶⁸ Having effectively mobilised around the transitional model and the legal imperatives of investigation, successful campaigns for inquiries to date have tended to focus on allegations of state wrongdoing.¹⁶⁹ This is a not unexpected consequence of the fact that both human rights law and transitional justice are state-centric models. They are founded on the need to hold the State to account for its treatment of its citizens. However, this feeds into a broader fear that any process of ‘truth recovery’ will inevitably focus on wrongdoing by the State, and will as such be inherently biased in favour of Republican meta-narratives of the conflict.¹⁷⁰ The effect of relying on law as a means of addressing justice in transition is to attempt to ‘fit’ complex and

¹⁶² *ibid.*

¹⁶³ Rolston (n 7); Lawther (n 158).

¹⁶⁴ See Kirk Simpson, ‘Political Strategies of Engagement: Unionists and Dealing with the Past in Northern Ireland’ (2013) 8 *British Politics* 2.

¹⁶⁵ Lawther (n 158).

¹⁶⁶ For Derrida, recognizing this violence is the condition for critique. ‘For a critique of violence—that is to say an interpretive, meaningful evaluation of it—to be possible, one must first recognize meaning in a violence that is not an accident arriving from outside law.’ *Force of Law* (n 59) 35.

¹⁶⁷ For example, the CGP highlighted a fatalistic attitude among Unionists that any process of dealing with the past would inevitably find the State to be at fault. CGP (n 30) 68. This leaves ordinary Unionists doubly vulnerable in that they fear a Republican strategy that seeks to place blame for the conflict on the State, but also an ‘Ulsterisation’ of the blame on the part of the State, displacing responsibility away from the British government and on to the locally-recruited security forces, thereby placing the blame almost entirely on the Northern Ireland Unionist community.

¹⁶⁸ Unionists, in contrast, continue to express preference to a criminal justice response to historic cases whereby crimes would be investigated and perpetrators punished. See for example Ulster Unionist Party, *Proposals for Flags, Parades and Dealing with the Past* (March 2014) <<http://uup.org/assets/images/featured/proposals%20on%20parades%20protests%20flags%20and%20dealing%20with%20the%20past.pdf>> (accessed 16 November 2015)

¹⁶⁹ See Requa (n 69).

¹⁷⁰ Rolston (n 7); Lundy and McGovern (n 7).

competing narratives of violence and suffering into a neat and formulaic framework. Transitional justice as a legal order prescribes a body of rules and criteria that sets the terms of contestation. Its binary structure requires that we be able to distinguish between the competing positions. In this way law will ‘cut, and divide’.¹⁷¹ It works within an oppositional structure in which there will be two ‘sides’ that adopt competing positions and shapes the way resistance to dealing with the past is analysed. For example, transitional justice takes as its starting point that there have been failures of law in the past. The antinomy that this creates is that between acknowledgement and denial.¹⁷² *Either* one ‘acknowledges’ these past failures, and implicitly accepts the narrative of past injustice that has given rise to it, *or* one ‘denies’ it, rejecting the narrative of injustice in favour of a competing interpretation of the causes and legitimacy of political violence. This opposition, and the way in which it shapes analysis of transitional justice, flows naturally from the oppositional structure of law. It also bears on our capacity to recognise the other side. The ‘context’ of transitional justice creates a particular lens through which stories of the conflict are refracted. Their significance is interpreted in light of the desired outcome of transition—namely the ‘acknowledgement’ of past abuses. This in itself represents a form of violence, in that these stories are not heard on their own terms, but rather their validity is judged on the extent to which they conform to transitional justice imperatives of truth and acknowledgement.¹⁷³ The acceptance of one narrative *necessarily* entails the violent subordination of the other. This element of violence is integral to the law. Therefore, the debate on dealing with the past will always be trapped within an oppositional structure whereby one side will ‘win’ and the other will ‘lose’.¹⁷⁴ In this way reliance on law can result in our efforts at transcending violence and conflict remaining trapped within an oppositional structure and as such trapped within a cycle of metaphysical violence.

¹⁷¹ Force of Law (n 59) 24.

¹⁷² Campbell and Ní Aoláin (n 122). For detailed discussion of the significance of the concept of denial in transitional justice, see Lawther (n 158).

¹⁷³ See Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015)

¹⁷⁴ This dynamic in turn gives rise to the unwillingness of some to participate in a process where the terms are viewed as being set in advance in a way that favours one side at the expense of the other. See Simpson (n 164).

The practical result of this oppositional structure of law, and its dominance in framing the debate on dealing with the past in Northern Ireland, is that the debate on the adequacy of the mechanisms proposed by the Stormont House Agreement continues to be conducted, for the most part, from the trenches. Both sides have their own narratives, and both have their own dead.¹⁷⁵ Collective memory is shaped on both sides by emblematic instances of violence that embody collective suffering.¹⁷⁶ On both sides are stories of human suffering, and the desire to know the truth of what happened. Yet these remain inextricably, and problematically, linked to the struggle for the macro-narrative of the conflict.¹⁷⁷ This is what Derrida refers to as the oscillation between two determinate positions. There are two competing and equally compelling stories of victimhood for which there are demands for truth and acknowledgement of wrongdoing. And yet in this case justice, in a Derridean sense, cannot be achieved through the application of law.¹⁷⁸ Any decision made in these circumstances will be a moment of violence because it will necessarily privilege one narrative at the expense of the other. This reveals the divisive nature of any attempt to deal with the past, where questions of suffering and victimhood are bound up with contested narratives of the past.¹⁷⁹ Indeed, to take the analysis a step further, the application of law to adjudicate between these two competing positions does not even allow for the experience of ‘undecidability’ that is a necessary element of justice for Derrida. The effect of channelling debates about dealing with the past into the binary structure of law is to effectively exclude or suppress the myriad alternate stories and experiences that do not fit neatly in to these dominant narratives.¹⁸⁰ For example, an oppositional model does not easily accommodate stories of non-state or intra-

¹⁷⁵ For significance see Jacques Derrida, *Politics of Friendship* (George Collins tr, Verso 1997) (hereinafter ‘Politics of Friendship’).

¹⁷⁶ On the significance of collective memory for transitional justice in the Northern Ireland context see Kris Brown, ‘What it was Like to Live Through a Day: Transitional Justice and the Memory of the Everyday in a Divided Society’ (2012) 6 *International Journal of Transitional Justice* 444

¹⁷⁷ As Weinstein highlights, the toolkit approach to transitional justice can result in painful debate about whose views have priority. Harvey Weinstein, ‘Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief’ (2011) 6 *International Journal of Transitional Justice* 1, 4.

¹⁷⁸ Although of course justice, in the retributive, criminal justice sense, can still be pursued.

¹⁷⁹ This dynamic is not unique to Northern Ireland but rather plays out across transitional societies. See McEvoy and McConnachie (n 155).

¹⁸⁰ This is a common theme in transitional justice. See, e.g., Fiona Ross, *Bearing Witness: Women in the Truth and Reconciliation Commission in South Africa* (Pluto 2003); Claire Moon, ‘Narrating Political Reconciliation: Truth and Reconciliation in South Africa’ (2006) 15 *Social and Legal Studies* 257; Fionnuala Ní Aoláin and Catherine Turner, ‘Gender, Truth and Transition’ (2007) 16 *UCLA Women’s Law Journal* 229.

community violence, such as the torture and execution of suspected informers by the IRA.¹⁸¹ Nor does it accommodate stories of Unionist victims of state violence for whom criticising the State risks appearing to accept Republican versions of history.¹⁸² It does not allow for broader interrogation of complex relationships between the State, political leadership and grass roots communities that could help to destabilise the boundaries of this opposition, particularly on the Unionist side.¹⁸³ More problematically, the binary nature of the Republican versus Unionist opposition effectively excludes other alternative means of analysing the causes of the conflict. For example, a gender perspective is notably absent from all official discourse on dealing with the past,¹⁸⁴ as is a broader socio-economic analysis of violence.¹⁸⁵

The dominance of the transitional justice narrative and its emphasis on the benefits of truth recovery also effectively silences those who question the underlying value of truth,¹⁸⁶ or who question the capacity of ‘transitional justice’ to achieve justice at all. The very existence of these competing versions of justice is what constitutes the ‘undecidability’ through which any decision must pass. It is also what ceases to exist at the moment the decision is made. And yet these alternative voices do not simply disappear at the moment of decision. Rather, they remain trapped within the law itself,¹⁸⁷ the dangerous trace of the excluded that threatens the dominance of the law. The excluded presence of these alternative conceptions of justice, those that are suppressed at the moment of decision, prevents any decision from being absolutely

¹⁸¹ For discussion see Campbell and Turner (n 147).

¹⁸² Kirk Simpson, *Truth Recovery in Northern Ireland: Critically Interpreting the Past* (Manchester University Press, 2009) 28; Lundy and McGovern (n 7).

¹⁸³ Contrast, for example, Lawther’s work on Unionist political elites and the official discourse on dealing with the past with Simpson’s ethnographic and oral history work with grassroots Unionist communities. Each views Unionist positions on truth recovery through a different lens and comes out with differing perspectives on Unionist attitudes in this regard. Lawther (n 158); Simpson (n 161).

¹⁸⁴ Legacy Gender Integration Group, ‘Gender Principles for Dealing with the Legacy of the Past’ (Belfast, 2015).

¹⁸⁵ In fact, despite the articulation of a strong concept of equality in the Agreement, the discourses of transitional justice and equality do not really ‘speak’ to each other. Tim Cunningham, ‘Monitoring Equality – Reflexive Regulation, Planning Systems, and the Role of Discrimination Law: Lessons from Northern Ireland’ (2015) 14 *Equal Rights Review* 119. See also Paul Nolan, ‘Northern Ireland Peace Monitoring Report No. 3’ (Community Relations Council 2014); Committee on the Administration of Justice, ‘Equality in Northern Ireland: The Rhetoric and the Reality’ (Belfast, 2006).

¹⁸⁶ See for example Cheryl Lawther, ‘Denial, Silence and the Politics of the Past: Unpicking Opposition to Truth Recovery in Northern Ireland’ (2013) 7 *International Journal of Transitional Justice* 157, quoting a prominent Unionist political leader who questions how knowing the truth will help.

¹⁸⁷ This is the structure of *différance* within which all meaning operates. See Chapter 3 for discussion.

just.¹⁸⁸ As Derrida writes, ‘its ghostliness deconstructs from within any assurance of presence, any certitude or any supposed criteriology that would assure us of the justice of a decision, in truth of the event of a decision’.¹⁸⁹ The fact that there are many and competing visions of what justice should entail means that we can never say that the correct application of the law has achieved, in objective terms, justice. It is only by recognising the complexity of the debate and the way in which it has marginalised those accounts that do not fit neatly into the oppositional structure that undecidability, and justice, can be experienced. For this to be achieved, as the thesis suggests, the urge must be resisted to reduce complex testimonies to a binary opposition between two competing versions of ‘truth’.

The fact that any legal decision will be a moment of violence leads to the third and final *aporia*. Law in times of transition is valued for its certainty, for the closure it brings and for the way in which it can signal a new beginning. However Derrida’s third *aporia* specifically addresses the limitations of this drive for certainty and for determinate presence that characterises transitional justice.

c. ‘Third *Aporia*: The Urgency that Obstructs the Horizon of Knowledge.’

‘But justice, however unrepresentable it may be, doesn’t wait. ... a just decision is always required *immediately*, “right away”’.¹⁹⁰

The previous two *aporias* have addressed how Derrida sees justice as residing in the moment before a legal decision is made that re-asserts the authority of law. What has been demonstrated is how deconstruction challenges legal determinacy and the ‘certitude of a present justice’.¹⁹¹ It does so, according to Derrida, in the name of an infinite justice, based not on calculation and exchange, but rather as something that is owed as a ‘gift without exchange ... without calculation and without rules’.¹⁹² Here Derrida is suggesting that ‘justice’ requires recognition of the individual rather than

¹⁸⁸ Derrida writes that there is ‘no moment in which a decision can be called presently and fully just; either it has not yet been made according to a rule, and nothing allows us to call it just, or it has already followed a rule—whether received, confirmed, conserved or reinvented—which in its turn is not absolutely guaranteed by anything; and moreover if it were guaranteed, the decision would be reduced to calculation and we couldn’t call it just.’ *Force of Law* (n 59) 24.

¹⁸⁹ *ibid* 25.

¹⁹⁰ *ibid* 26.

¹⁹¹ *ibid* 25.

¹⁹² *ibid* 25.

the application of general rules. Where any determination on the 'past' is made with reference to the legal framework of transitional justice, it will 'always maintain within itself some irruptive violence...' ¹⁹³ in which the singular is subordinated to the general. Justice consists in the recognition of the singularity of each particular case. This is contrasted with the generality of a rule, which is insured by law or prior convention. The application of a general rule is no more than a calculation and therefore cannot be called 'justice.' In the context of dealing with the past, the 'singular' represents the voice of each individual victim and their experience of suffering. ¹⁹⁴ The 'general' represents the desire for a shared understanding of conflict that insures the future against a recurrence of the past. ¹⁹⁵ The 'singular' needs of the victim are therefore juxtaposed with the 'general' aim of social reconstruction. Attempts to institute public engagement on the subject of the past ignores singularity in favour of a generalised model of how best to address truth and justice. ¹⁹⁶ However, the fundamental premise of Derrida's work is that we cannot rely on fixed binaries to guarantee meaning. Deconstruction requires us to work between the two poles of the singular and the general and to recognise the on-going negotiation between them. While an ideal of justice would require a judge to consider the full singularity of each particular case, there will never be enough time available to do this. ¹⁹⁷ Justice requires a decision, and therefore some element of legal violence will be inevitable. ¹⁹⁸ What is necessary is to recognise this element of violence.

This returns us to the idea of justice as an end point to be achieved, a definite point towards which law can carry us. The desire for a determinate presence of justice demands that a decision be made and that an endpoint be reached. ¹⁹⁹ This is a philosophical incarnation of what Weinstein has more recently identified as the 'myth

¹⁹³ *ibid* 27.

¹⁹⁴ Hastings Donnan and Kirk Simpson, 'Silence and Violence among Northern Ireland Border Protestants' (2007) 72 *Ethnos* 5.

¹⁹⁵ The effect of this 'general' conception of justice is to subordinate individual experiences to the general, to mould them to fit the desired narrative of justice.

¹⁹⁶ See Brandon Hamber and Richard Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post Conflict Societies' [2002] Research Papers: Paper 5 <http://digitalcommons.uconn.edu/hri_papers/5> accessed 19 October 2015. See also Weinstein (n 177); Dube (n 60).

¹⁹⁷ Force of Law (n 59) 26. For Derrida, the court 'cannot furnish itself with infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it'.

¹⁹⁸ *ibid* 26.

¹⁹⁹ Derrida describes this as a 'structural urgency and precipitation of justice'. *ibid* 27.

of closure' that drives much work in the field of transitional justice.²⁰⁰ Reconciliation, achieved through narrative truth, is the goal. This speaks directly to the calculations that are made in respect of truth and justice in transition - namely, what is the price of peace? The paradigmatic examples in this regard include the exchange of truth in return for immunity from prosecution or the receipt of information or apology in exchange for forgiveness. In each case a calculated transaction is conducted, during which political considerations intervene in the relationship between the victim and the perpetrator.²⁰¹ In this context there is an underlying assumption that truth will further understanding and will therefore combat partial narratives and myths that prevent any collective understanding from emerging.²⁰² While on the personal level this form of engagement with the 'other' can help to improve relationships, at the political level it is complicated by the macro-struggle that continues to play out over the conflict and the relationship between violence, law, and consequently justice, that underpins it.²⁰³ In these terms justice becomes trapped between an ideal standard, whereby truth recovery, acknowledgment and forgiveness lead to justice and a reconciled future, and the empirical reality of on-going challenge to the ends and means of dealing with the past.²⁰⁴

This is a theme that Derrida explores further in his essay *On Cosmopolitanism and Forgiveness*. Here, addressing specifically the question of forgiveness in the wake of mass atrocity, Derrida distinguishes between genuine interpersonal reconciliation on one hand, and the 'calculated transaction' required when politics intervenes in the victim/perpetrator relationship on the other. On the interpersonal level, Derrida suggests that 'as soon as the victim "understands" the criminal, as soon as she exchanges, speaks, agrees with him, the scene of reconciliation has commenced'.²⁰⁵ This is true even where the victim cannot forgive; for, in recognising the other,

²⁰⁰ For Weinstein, this reflects a broadening of the goals of transitional justice to encompass the 'elusive ideas of reconciliation and closure in order to move countries towards a broader vision of reconstituted societies based upon democratic principles, rule of law and observance of human rights norms'. Weinstein (n 177).

²⁰¹ On Cosmopolitanism and Forgiveness (n 58).

²⁰² Healing Through Remembering (n 97). This theme is well-explored in Lawrence McKeown's play 'Those You Meet on the Street', reviewed by Catherine Turner, 'The Art(s) of Dealing with the Past' (RightsNI, 1 April 2015) <<http://rightsni.org/2015/04/the-arts-of-dealing-with-the-past/>> accessed 19 October 2015.

²⁰³ On Cosmopolitanism and Forgiveness (n 58).

²⁰⁴ Ibid; Spectres of Marx (n 123).

²⁰⁵ On Cosmopolitanism and Forgiveness (n 58) 49.

reconciliation has begun.²⁰⁶ However where this form of exchange is ‘required’ as a means towards a pre-determined end, it is no longer possible to speak of true reconciliation, for the encounter has been reduced to a transaction, calculated to adhere to rules.²⁰⁷ This is particularly true when speaking of forgiveness in the context of truth recovery.²⁰⁸ The emphasis placed on acknowledgement, or on the idea of atonement for a wrong committed, for Derrida reduces the idea of apology and forgiveness to a conditional exchange,²⁰⁹ in which forgiveness is invoked in pursuit of a definite political goal behind which ‘all sorts of strategic ruses can hide themselves abusively behind a “rhetoric” or a “comedy” of forgiveness...’²¹⁰ The singular experience of the victim is subordinated to the general goal of reconciliation, and in this process the responsibility for reconciliation is shifted onto the victim.²¹¹ The personal and the political (or the singular and the general) therefore represent opposite poles in terms of reconciliation as well as justice. Personal reconciliation, which is the prerogative of the victim alone, resides in the sphere of pure forgiveness, made without condition.²¹² In contrast, political reconciliation exists as a calculated strategy, as a means towards an end. Rather than collapsing the distinction between the two and speaking of a generalised concept of ‘reconciliation’, the challenge is to find a way to work between the two.²¹³ In practical terms this speaks to the distinction between ‘forensic’ truth and ‘narrative’ truth and the difficulty of reconciling the pursuit of the two.

Working between personal and political reconciliation without a determined endpoint of unity allows for the possibility of acknowledging the other without necessarily accepting the legitimacy of their position in respect of the macro-causes of violence. This re-focuses attention on the personal rather than the political, allowing the debate

²⁰⁶ *ibid.*

²⁰⁷ *ibid.* 50. ‘A “finalized” forgiveness is not forgiveness; it is only a political strategy or a psychotherapeutic economy.’

²⁰⁸ While the relationship between truth, forgiveness and reconciliation is far from clear or agreed in transitional justice, there is nevertheless a tendency to conflate the three. See Rebecca Saunders, ‘Questionable Associations: The Role of Forgiveness in Transitional Justice’ (2011) 5 *International Journal of Transitional Justice* 119. This is discussed in more detail in Chapter 2.

²⁰⁹ On Cosmopolitanism and Forgiveness (n 58) 34.

²¹⁰ *ibid.* 50.

²¹¹ Dube (n 60); Panu Minkinnen, ‘Ressentiment as Suffering: On Transitional Justice and the Impossibility of Forgiveness’ (2007) 19 *Law and Literature* 513. For an example of this dynamic in context see Lundy and Rolston (n 141).

²¹² In particular, pure forgiveness does not require repentance on the part of the perpetrator.

²¹³ On Cosmopolitanism and Forgiveness (n 58) 45. ‘It is between these two poles, irreconcilable and indissociable, that decisions and responsibilities are to be taken.’

over the past to move beyond the stalemate caused by the rigidity of law. This requires a willingness to abandon the ideal of 'closure' or of a temporally bounded space within which transitional justice will be achieved. In short, it requires the creation of a political space 'in the middle' within which these processes can occur.²¹⁴ In contrast to the drive for certainty that law embodies - the need to have 'dealt' with the past - a political space requires that the past remain the subject of an on-going and open conversation.²¹⁵ This is not to suggest that there should be no official processes or mechanisms to support this conversation. Nor does it deny that there may be difficult truths that need to be heard on both sides. Rather these processes should be based on a 'narrative of inclusion whereby participants open themselves to others and learn from them and are changed by them'.²¹⁶ Rather than viewing justice as the outcome of a process in which two previously oppositional positions are reconciled, it must be seen as the continual process of negotiation between these two positions. Seen in these terms the conflict and the past will not be 'resolved' - it is unlikely that an agreed account of rights and wrongs of the conflict will be reached - but nor will politics remain trapped in an oppositional cycle of violence (physical or metaphysical) whereby opposing sides jostle to assert their dominance and necessarily silence their opposition. This approach can be summed up, in the words of Derrida, as justice '*to come*'.

Law as the means of achieving justice in transition risks emphasising victory, and a 'completion where one will be the winner and one the loser'.²¹⁷ Where dealing with the past, and the questions of victimhood, recognition and acknowledgement that it entails, are framed predominantly with reference to law, the ability to rely on law to assert the 'rightness' of one's own position, and the righteousness of one's own actions absolves each person, individually and collectively, from the obligation to listen to the other.²¹⁸ Reliance on a legal discourse of 'rights' risks entrenching differences and turning victims into 'competitors not collaborators' in the pursuit of

²¹⁴ Bankowski (n 93); Andrew Schapp, 'The Time of Reconciliation and the Space of Politics' in Scott Veitch (ed), *Law and the Politics of Reconciliation* (Ashgate 2007) 9, 14.

²¹⁵ Emiliios Christodoulidis, 'Truth and Reconciliation and Risks' (2000) 9 *Social and Legal Studies* 179, 189.

²¹⁶ Bankowski (n 93) 63.

²¹⁷ *ibid* 59.

²¹⁸ Bankowski suggests that 'resting secure in your victimhood defines your identity as timeless and unwilling to engage'. *ibid* 51.

justice.²¹⁹ Where there is a chance that a legal determination can be achieved that confirms that one side was right and the other was wrong, there is no incentive for either side to listen to the other, to hear their experiences as anything other than politically manipulated half-truths, nor to recognise that, although they may differ in their opinions, behind each story is a personal tragedy.²²⁰ The desire to achieve a shared narrative of conflict undermines the possibility of listening and recognition on the political level through the emphasis it places on the need to resolve disagreement.²²¹ Where rights are asserted, they rely on the force of law for their authority.²²² The metaphysical violence of the law therefore permeates all levels of the debate over law and justice in transition. The violence of law means that relying on law as a means to justice keeps politics trapped within a 'moral economy of exchange and power'²²³ defined by the oppositional concepts of victim and perpetrator, winner and loser and trapped within a cycle of violence. The violence of the law cannot be transcended, therefore what is necessary is to recognise its existence and try to find ways to break free from the oppositional model created by law. One way of doing this, facilitated by Derrida's philosophy of justice, is by adopting an approach based on justice as recognition of the other.²²⁴ This has particular resonance for the pursuit of 'narrative' truth in Northern Ireland. The work of the proposed Oral History Project and the Implementation and Reconciliation Group in particular can be guided by a more open-ended approach that recognises rather than denies the ongoing contestation over the past. In particular this would require engagement with the possibility that no agreed narrative of the past is possible. This does not mean that pursuing 'truth' is futile. It may be possible to establish some objective truths, particularly 'forensic' truths. However the purpose of such an exercise should not be to eliminate differences of opinion through the articulation of a unified account of the conflict, but rather to provide a forum within

²¹⁹ *ibid* 51.

²²⁰ This is a risk inherent in any legal institution, namely that it will 'support hegemonic collective memories to the suppression of others'. Christodoulidis (n 215) 193.

²²¹ *ibid* 194.

²²² Bankowski (n 93) 57.

²²³ *ibid* 60.

²²⁴ Mathias Mahlmann, 'Law and Force: 20th Century Radical Legal Philosophy, Post Modernism and the Foundations of Law' (2003) 9 *Res Publica* 19, 31. 'Respect for the Other is the means of escaping this violence...'

which a democratic conversation can take place, where views on both sides are openly challenged rather than suppressed or excluded by the violence of the law.²²⁵

4. CONCLUSION: JUSTICE 'TO COME'

It will never be possible to say that 'justice' in the Derridean sense has been achieved. Rather Derrida sees justice as a possibility, as something that is always 'to come'.²²⁶ This represents an injunction to view justice as an open-ended process that requires continual deconstruction. It also requires an acknowledgement that justice means different things to different people and that any model that seeks to comprehensively deal with the past must be able to accommodate not just multi-faceted but also competing views.²²⁷ Justice 'to come' is not simply the reproduction of the present, but rather 'opens up for *l'avenir* the transformation, the recasting or refounding of law and politics'.²²⁸ It thus speaks of the need to break free from existing structures, from rules, calculations and anticipations.²²⁹ Derrida takes care to distinguish his conception of justice 'to come' from the idea of a regulative ideal that sets a horizon on the possibility of achieving justice.²³⁰ In this regard he is distinguishing his concept of justice from that of Kant, and in particular from the idea of a transcendent standard of justice that can be achieved through law or right.²³¹ For Derrida, for reasons already discussed, the pursuit of justice through law will always involve some 'dissymmetry and some quality of violence'.²³² This is because of the desire to be able to say that justice has been achieved in the here and now.²³³ In contrast, Derrida's vision of justice is open-ended—it is always 'to come'.²³⁴ This conception of justice offers an alternative to the conceptualisation of law as justice that dominates

²²⁵ See also Campbell & Turner (n 147)

²²⁶ Force of Law (n 59) 27.

²²⁷ See Noa Vaisman, 'Variations on Justice: Argentina's Pre- and Post- Transitional Justice and the Justice to Come' [2015] *Ethnos* <<http://dx.doi.org/10.1080/00141844.2015.1080746>> accessed 19 October 2015.

²²⁸ Force of Law (n 59) 27.

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ See Jacques Derrida, 'Autoimmunity: Real and Symbolic Suicides' in Giovanna Borradori (ed), *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (University of Chicago Press 2003) 85 (hereinafter 'Autoimmunity') on the critique of a regulatory ideal.

²³² Force of Law (n 59) 27.

²³³ This is the metaphysics of presence that Derrida sees as characterizing classical philosophy, and which deconstruction seeks to destabilize. See Chapter 3 for discussion.

²³⁴ Force of Law (n 59).

transitional justice. It enjoins us to conceive of justice as something that requires the on-going recognition of the singularity of the other and their experiences of suffering as well as our own.²³⁵ Bankowski sums up what it means to act ‘in the middle’, to reject the certainties of law in favour of a more open ended concept of justice ‘to come’, ‘The middle is an anxious place—it is risky and unsettled, and therefore the place of vulnerability (i.e. far removed from established certainties); there is no end, no safe haven which, risky though the journey is, we can ultimately aim for’.²³⁶

Justice, in the Derridean sense, therefore requires that we recognise the singularity of each experience, and be open to learn from it. This will not happen within a set five-year time frame. Justice, in this sense, cannot be achieved in the present. It will always exist some time in the future. This sentiment is summarised in the context of transitional justice by Weinstein, where he suggests that rather than seeking closure through transitional justice, we accept that forgiveness and reconciliation are projects of the future. In the meantime, living together without physical violence may be enough.²³⁷ Justice ‘to come’ in this regard consists not of set endpoints and timeframes specified in law, but of a willingness to listen to each other in the hope that change will eventually happen. It may also involve stepping outside the ‘theatrical space’ of transitional justice that has dominated the debate so far. Conceiving justice in these terms encourages a more realistic assessment of the objectives of legacy mechanisms and the extent to which they can achieve those goals.

²³⁵ Mahlmann (n 224) 30 sums this dynamic up well when he states that ‘justice amounts, in Derrida’s view... to a unilateral relation with a person, to the obligation to respect and appreciate her uniqueness, her otherness’

²³⁶ Bankowski (n 93) 56.

²³⁷ Weinstein (n 177) 5.

CONCLUSION: THE IMPOSSIBILITY OF TRANSITIONAL JUSTICE?

This thesis has argued that from the turn of the century a new juridical concept of transitional justice has emerged. The emergence of this concept represents a performative event of considerable force in international law, the effect of which has been to create a 'theatrical space' within which efforts at peace-making play out.¹ Chapter Two outlined how diverse legal and political responses to war and conflict gave rise to the 'concept' of transitional justice that has been gradually instituted in law and policy. This new body of rules has created a bounded space within which transitional justice is implemented and evaluated. The creation of this 'theatrical space', it has been argued, represents a 'coup de force'² in which the role of politics, which had been the dominant force both nationally and internationally, was usurped by that of law.³ 'Transitional justice' represented a new system that could be contrasted with the corrupt or immoral system it replaced,⁴ a new way of thinking about justice in the aftermath of war or repression. In this way, the field of transitional justice holds itself apart from earlier (failed) models that were found wanting in terms of their compliance with set standards of justice.⁵ The exceptional nature of transitional justice was legitimised by the promise of a new beginning.⁶ Under the new normative model, it would no longer be necessary to trade justice against peace. Rather what was promised was a future in which peace would be based on justice and the rule of law.⁷ This thesis has explored the dominance of this new normative model of transitional justice, and its ability to deliver lasting change. Ultimately what is now suggested is that while lawyers must grapple with these questions of justice, if the model is to avoid becoming overly reliant on law and legal standards critical engagement with that law is also essential.

¹ Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Mark Dooley and Michael Hughes tr, Routledge 2001) 29.

² Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell and others (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992).

³ Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Law Journal* 69 (hereinafter 'Genealogy').

⁴ *ibid.* See also Costas Douzinas, 'Violence, Justice and Deconstruction' (2005) 6 *German Law Journal* 171.

⁵ *Genealogy* (n 3). This is the third stage of Teitel's genealogy.

⁶ This is discussed in more detail in Chapter 2

⁷ United Nations, 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies' (UN Doc S/2004/616, United Nations 2004).

The conclusion presents three reflections arising from the process of deconstructing transitional justice. The first is a reflection on the merits of adopting a critical approach to a field dominated by doctrine. It is argued that theory can open up new insights that can feed into policy and practice in this area. The second reflection concerns the circularity of violence and law, highlighting how this circularity undermines some of the core goals of transitional justice. Finally, the third reflection speaks to the title of the thesis, namely the idea that transitional justice is 'impossible'. It clarifies Derrida's understanding of impossible, and calls for greater openness in how 'justice' is conceptualised.

1. THE IMPORTANCE OF CRITIQUE IN TRANSITIONAL JUSTICE RESEARCH

It has been argued that existing mainstream approaches to transitional justice represent a desire for a determinate standard of justice against which the success of transitional justice can be measured.⁸ However this approach, it is suggested, introduces a polarized system of thinking about questions of justice in transition.⁹ The field itself is constructed around a number of binary oppositions, the most obvious of which is that of war and peace. This is the central organizing binary around which transitional justice discourses are constructed. The assumption inherent in this is that we are moving from a state of war (violence) to a state of peace (law) and that these are two distinct states that can be easily distinguished from each other. This encourages rigid distinctions in how we think about transitional justice. It dictates how and where the boundaries of the transitional space are drawn, thereby determining, for example, who is to be considered a victim, who should face prosecution, and what mechanisms can be legitimately used to pursue transitional justice.¹⁰ Therefore while we can measure objective indicators of reform, doctrinal and empirical methods are less able to account for the complexity of transitional politics. This is where critical engagement can help to encourage a more nuanced engagement with the concept of transitional justice and its goals that complements the task of evaluating claims. Deconstruction, it has been argued, can help expose the

⁸ Chapter 2

⁹ Chapter 2; See also Colm Campbell and Fionnuala Ní Aoláin, 'The Paradox of Transitions in Liberal Democracies' (2005) 27 *Human Rights Quarterly* 172.

¹⁰ Chapter 6.

dynamics of how we think about these questions. It challenges us to think beyond existing structures of thought rather than simply inverting them.

In transitional justice literature, the role of law has been re-conceptualised to recognize the distinct role played by law in times of political upheaval.¹¹ For example, Teitel's original conceptualisation of the role of law in transition was deliberately intended to replace the rigidity of traditional legalism with a more flexible and responsive model that recognised the necessary negotiation between law and politics in transition.¹² Yet, in recent years, the field of transitional justice has been dominated by a toolkit approach that subjects the singular demands of justice in transition to generalised rules, norms and imperatives. The assumption of this model is that the application of rules and programmes for action is a means for achieving justice. It allows for the consistent opposition of violence with law, thereby providing the foundation for a reliance on law as a tool of transition. What remains, therefore, is a binary structure of war and peace that assumes that the two are distinct and identifiable ways of being, and that movement from one to the other is possible. Law, under this conceptualisation, is the means by which we move from violence towards justice. However, deconstructing the nature of the relationship between violence and law reveals an altogether different dynamic, and one that casts considerable new light on some of the perennial problems of transitional justice. In particular it helps to provide a coherent framework for analysing *why* opposition to transitional justice arises. This is important because opposition and challenge arises for diverse reasons and in diverse geographical and political contexts. This thesis has discussed the example of Northern Ireland, where the opposition arises largely along party political lines. However there are other examples of challenge to the success of transitional justice. For example in South Africa challenge arises around on-going socio-economic divisions.¹³ In Rwanda tensions remain over local versus national and international responses to violence,¹⁴ and in Argentina the 'calculated' nature of

¹¹ Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000)

¹² Teitel (n 3).

¹³ Tsepo Madlingozi, 'Good Victim, Bad Victim: Apartheid's Beneficiaries, Victims and the Struggle for Social Justice' in Wessel Le Roux and Karin Van Marle (eds), *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (Pretoria University Law Press 2007).

¹⁴ Phil Clark, 'Negotiating Reconciliation in Rwanda: Popular Challenges to the Official Discourse of Post-Genocide National Unity' (2014) 8 *Journal of Intervention and State Building* 303

efforts at transitional justice continues to engender resistance.¹⁵ Rather than viewing each instance of opposition as a discrete obstacle to be overcome, analysing the structural conditions of transitional justice enables a deeper understanding of what connects these sites of opposition and how they could be addressed.

Rather than representing the relationship between violence and law as a linear progression from one to the other, in which success is measured by the extent to which we can demonstrate the opposition between violence and law, what emerges is a circular logic. Rather than viewing transitional justice as a linear progression from war to peace, with the peace agreement marking the break that enables that progression, the circular model reveals the immanence of violence to law. As discussed in Chapter Four, the success of political violence will lie in the extent to which it succeeds in securing *post hoc* legitimation through law.¹⁶ In this way the peace agreement also plays an important symbolic role. The peace agreement will make an implicit statement on the legitimacy of the violence, reflected in the extent to which the language of the agreement adopts particular narratives of the causes of conflict. As this is the moment from which the authority of law will derive, it is also the moment in which violence, both political and metaphysical, becomes inscribed into the heart of the legal regime that is created.¹⁷ Law is therefore not the impartial and objective arbiter of justice and cannot be clearly distinguished from violence. The act of naming a process as 'transitional justice' makes a clear statement that will set the terms on which transitional politics must be conducted.¹⁸ It sets limits on what can and cannot legitimately be contested. This raises significant questions over who decides, and according to what criteria, the content or narrative of transitional justice? Who sets the priorities? And what effect does this have on competing narratives? These questions are not just of rhetorical interest. Derrida highlights how the dominant power will be the one that manages to impose, and thus legitimate (or legalise), on a national or world stage the terminology, and thus the interpretation,

¹⁵ Claire Moon, 'Who'll pay reparations on my soul? Social control and social suffering in Argentina' (2012) 21 *Social and Legal Studies* 187; Noa Vaisman, 'Variations on Justice: Argentina's Pre- and Post- Transitional Justice and the Justice to Come' [2015] *Ethnos* <<http://dx.doi.org/10.1080/00141844.2015.1080746>> accessed 19 October 2015.

¹⁶ Chapter 5.

¹⁷ Force of Law (n 2).

¹⁸ Jacques Derrida, 'Devant La Loi' in Alan Udof (ed), *Kafka and the Contemporary Critical Performance* (Indiana University Press 1987) 128 (hereinafter 'Before the Law').

that best suits it in a given situation.¹⁹ As discussed in Chapter Five, this gives rise to practical difficulties with establishing a normative regime, such as transitional justice, that has the power to define and shape processes of social reform. Rather than maintaining a presence that is independent of politics or morality, the distinction between the legal field of transitional justice and the politics that it aims to transcend is revealed to be an illusion. Far from existing independently from history, politics and morality, transitional justice bears within it traces of all of these influences, each of which haunts it from within, and each of which has the potential to re-assert its presence.²⁰

The presence of these excluded traces within transitional justice speaks to the second reflection on the relationship between law and justice. A key goal of transitional justice is the guarantee of non-recurrence. By addressing the past it is argued that transitional justice helps prevent a recurrence of violence in the future. However, as discussed in the following section, an overreliance on law may undermine this goal.

2. TRANSITIONAL JUSTICE AS AUTOIMMUNITY

The next question to be addressed is why is deconstructing the relationship between law and politics in transitional justice important? Of course law is political, and of course war will be continued by other means. What has been proposed is that deconstructing this dynamic allows us to consider the deeper structures that transitional justice is built upon. To complete the cycle, what has happened is that, in telling the story of the conflict, one side comes to be privileged over the other. The boundaries of what is acceptable thought and action in transitional contexts has been set by the act of instituting law. This means that there will inevitably be those who are left outside the boundaries of acceptable opinion—those who reject the authority of the law and see themselves as oppressed within the new order. This dynamic was discussed in Chapter Five, with the example of the most recent wave of protest

¹⁹ Jacques Derrida, 'Autoimmunity: Real and Symbolic Suicides' in Giovanna Borradori (ed), *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (University of Chicago Press 2003) 85, 105.

²⁰ Jacques Derrida, 'Spectres of Marx' (1994) 15 *New Political Science* 31. This is demonstrated through on-going contestation of 'normative' claims in respect of dealing with the past, for example, whereby political interpretations of transitional justice continue to 'haunt' legal approaches. See Chapter 6 for discussion.

against decisions relating to flags and parades in Northern Ireland. However this dynamic applies not only to those who find themselves on the wrong side of history, but also to those who believe that transitional justice is not enough—that it is a means to diffuse more radical demands for justice.²¹ If rigid boundaries are imposed on how we discuss questions of transition, then access to the debate itself will be restricted to those who are able or willing to speak the language of transitional justice.²² As highlighted in Chapter Five, this potentially sets the scene for a recurrence of physical violence as a manifestation of disillusionment with the State.²³ Ironically, therefore, in relying on law to achieve political reform, the model of transitional justice risks reproducing and regenerating the patterns of conflict that it seeks to disarm. This is evident in the case of Northern Ireland where attitudes towards the ‘dealing with the past’ agenda continue to be divided along the unionist/nationalist political divide. Despite the attempt by the Belfast Agreement to create unity from diversity,²⁴ attitudes remain divided along traditional lines. These attitudes are perpetuated by the structure of transitional justice.²⁵ Ironically, in the quest to immunise society against a recurrence of violence, transitional justice adopts rigid structures which themselves are founded in violence. Derrida refers to this phenomenon as ‘auto-immunity’, whereby the structures adopted to address violence ultimately destroy the capacity of society to effectively respond to conflict by peaceful means.²⁶ The desire to achieve closure on past events, to reach a solution in the present that will safeguard the future, places boundaries on limits on the possibility of justice in these circumstances. Once the desired outcome of law becomes fixed and determinate, any responsiveness that would allow law to pursue alternative conceptions of justice is lost.²⁷

²¹ Rosemary Nagy, ‘Transitional Justice as Global Project: Critical Reflections’ (2008) 29 *Third World Quarterly* 275.

²² This in itself is a form of injustice for Force of Law (n 2).

²³ This occurs as that which is excluded remains trapped within the opposition, returning to haunt the dominant political community. See *Spectres of Marx* (n 20).

²⁴ See John Hume, ‘Ireland – The Healing Process’ (1998) 22 *Fordham International Law Journal* 1171.

²⁵ Curtis also notes this dynamic in the context of human rights in Northern Ireland. She highlights how rights talk ‘incorporated the logic and language of the local conflict rather than resituating local understandings of the conflict in terms of international law and norms. Jennifer Curtis, *Human Rights as War By Other Means: Peace Politics in Northern Ireland* (University of Pennsylvania Press 2014) 67.

²⁶ Autoimmunity (n 19).

²⁷ Jacques De Ville, ‘Sovereignty Without Sovereignty: Derrida’s Declarations of Independence’ (2008) 19 *Law and Critique* 87, 105.

However there is a risk in critiquing the use of law as a means of pursuing social change. If taken to its logical conclusion, a critique of the violence of law would entail a rejection of the idea of law as a means *towards* justice. Mahlmann identifies this as a paradox in Derrida's work. He suggests that while deconstruction intends 'radically to criticise violence', it may in the process delegitimize 'one of the more promising tools for curbing violence in the real world'.²⁸ For this reason, Derrida himself is clear that the 'impossibility' of justice is not a reason to eschew the use of law as a means of pursuing just ends.²⁹ In 'Force of Law' he states 'That justice exceeds law and calculation, that the unrepresentable exceeds the determinable cannot and should not serve as an alibi for staying out of juridico-political battles...'³⁰ Therefore it can be seen that Derrida does not reject the idea of law altogether. Indeed, it has been highlighted how deconstruction is an affirmative rather than a destructive force.³¹ It does not consist of dismantling institutions themselves, but rather 'structures within institutions that have become too rigid, or are dogmatic or which work as an obstacle to future research'.³² Deconstruction therefore opens up possibilities that have been suppressed by virtue of the dominance of one particular way of conceptualizing transitional justice. What is central is the ability to recognise the potentially coercive effects of law. Relying too heavily, or without question, on law and the inviolability of law can reduce it to an ultimately arbitrary standard. Where any particular concept, such as 'transitional justice', comes to be regarded as fixed, the risk is that the concept itself ceases to be subjected to scrutiny.³³ The unquestioning acceptance of norms becomes not only possible but commonplace. Looking beyond the opposition of violence and law, towards a more nuanced engagement with the relationship between the two, therefore helps us to avoid some of the risks inherent in relying too heavily on purely normative frameworks. Why deconstruction is useful, therefore, is that it provides a means by which to articulate some of these difficult issues in transitional justice - it provides an alternative

²⁸ Mathias Mahlmann, 'Law and Force: 20th Century Radical Legal Philosophy, Post Modernism and the Foundations of Law' (2003) 9 *Res Publica* 19, 33.

²⁹ Jacques Derrida, 'The Laws of Reflection: Nelson Mandela, In Admiration' in Jacques Derrida and Mustafa Tlili (eds), *For Nelson Mandela* (Seaver Books 1987) 18.

³⁰ Force of Law (n 2) 28.

³¹ Discussed in Chapter 3

³² Jacques Derrida and John D Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (Fordham 1997) (hereinafter 'Villanova Roundtable') 8.

³³ William Sokoloff, 'Between Justice and Legality: Derrida on Decision' (2005) 58 *Political Research Quarterly* 341.

framework for analysis that encourages on-going questioning of our methods and interrogation of the deeper assumptions on which the field is premised. It helps to explain the existence of dissent to seemingly universal goods, such as human rights and justice, and to engage with this dissent in a more productive manner. It also highlights the importance of an ethic of respect and recognition that can be used to ground practice. This is important if transitional justice as a field is to avoid becoming rigid and unresponsive.

Importantly, it is not suggested that we can break the circular logic of law. Rather, critical engagement with transitional justice research enables us to recognize this logic and to ask bigger questions about how we measure the success of transitional justice. The failure to acknowledge the political nature of the law is a form of metaphysical violence. However this is the violence that is immanent to the law. Any critique of violence must therefore 'recognise meaning in a violence that is not an accident arriving from outside the law'.³⁴ Rather, for Derrida, 'That which threatens law already belongs to it...'³⁵ Therefore the debate to be had is not how to avoid politicisation, but how to acknowledge the contested and ultimately violent nature of law. Derrida sums this up where he suggests that 'each advance in politicisation obliges one to reconsider, and so to reinterpret, the very foundations of law such as they had previously been calculated or delimited'.³⁶ In these terms, questioning the assumptions of law itself helps to reveal the hierarchical nature of meaning and the oppositional structure upon which law in transition is constructed. Exposing this opposition and the way in which it shapes our understanding of transitional justice is the crucial first step of deconstruction.³⁷ Rather than entrenching patterns of conflict by perpetuating a false distinction between violence and law, we should be thinking about ways of managing this tension in a way that does not simply repeat the circular logic of violence. This may ultimately mean being more open to non-legal strategies, and to expanding our definitions of 'justice' in transition. This leads to the final reflection on the relationship between law and justice in transition, namely that justice is only possible by eschewing legal certainty and embracing the undecideable.

³⁴ Force of Law (n 2) 35.

³⁵ *ibid.*

³⁶ *ibid* 28.

³⁷ Jacques Derrida, *Positions* (The Athlone Press, 1981) 41.

3. 'IMPOSSIBLE' IS NOT THE OPPOSITE OF 'POSSIBLE'

Despite the meteoric rise of transitional justice, it remains a relatively new concept. The implications of the performative force by which it emerged therefore remain unclear. Derrida acknowledges that the force of the emergence of related concepts such as 'crimes against humanity' or even 'human rights' can be seen either as 'an immense progress, an historic transformation' or alternatively as 'a concept still obscure in its limits, fragile in its foundations'.³⁸ This means that no authoritative judgment can be made one way or the other on the success of transitional justice. This judgment will come only with time. This therefore begs the question of why the thesis speaks of the 'impossibility' of transitional justice? The 'impossible' for Derrida is not the opposite of possible.³⁹ They do not denote two separate and fixed positions. Rather the structure of *différance* upon which meaning is constructed creates the conditions for the possible.⁴⁰ While we may never reach a determined outcome, an agreed 'truth' or a pure concept of 'justice', we nevertheless, through on-going deconstruction, strive towards justice, and in this *process* we make justice possible. In situations defined by political conflict and by competing narratives, placing too great an emphasis on the application of norms also absolves responsibility for openness to the 'other'. What this means for transitional justice is that, rather than emphasising legal certainty and avoiding the undecidable, justice requires on-going openness to the 'other'. The 'other' might be alternative political views of the merits of transitional justice. It might be conflicting interpretations of the morality of violence. It might be the victim from the opposing political community. However it manifests itself, we must remain open to the 'other' in the hope that one day there will be reconciliation. This is made possible through on-going negotiation between competing and oppositional narratives. In this way, when speaking of 'justice', an analogy can be drawn with hope. Hope keeps us moving forward. We cannot exorcise the past. It will always remain trapped as the excluded trace that must be suppressed. Its return is the spectre that haunts the present and the future.⁴¹ What we can and must do is to find a way to live with that past in a way that keeps us moving forward. This

³⁸ On Cosmopolitanism and Forgiveness (n 1) 30.

³⁹ See Jacques Derrida, *Monolingualism of the Other: or, The Prosthesis of Origin* (Patrick Mensah tr, Stanford University Press 1998).

⁴⁰ See Richard Beardsworth, *Derrida and the Political* (Routledge, 1996) 26.

⁴¹ Spectres of Marx (n 20).

is only possible through ongoing critique and recognition of the inherently political nature of the choices being made with respect to the contested past.

For Derrida, justice represents a call for more consequential change, ‘not simply in the naïve sense of calculated, deliberate and strategically controlled intervention, but in the sense of a maximum intensification in progress, in the name of neither a simple symptom nor simple cause’.⁴² Therefore, while justice can be used to orient juristic efforts,⁴³ it is not the fixed endpoint of law. Derrida suggested in ‘Force of Law’ that it was ‘foreseeable and desirable that studies of deconstructive style should culminate in the problematic of law and justice’.⁴⁴ It seems equally foreseeable and desirable that studies of transitional justice should culminate in deconstruction of the concepts of law and justice on which the field is founded. Deconstruction itself is a problematisation of the foundations of law, politics and morality. The thesis has demonstrated how questions of law, politics and morality are intimately linked in the context of transitional justice, to the extent that a rigid distinction between the concepts themselves can no longer withstand scrutiny. In transitional justice, the urge must be resisted to rely exclusively upon determinate frameworks of justice. Law should not be instrumentally subordinated to a determined outcome, but rather must remain open to the possibility of justice. Justice for Derrida is not simply a juridical or political concept, but opens up for the future the possibility of transformation, of re-casting or re-founding law and politics. The challenge to remain open to critical engagement is rooted in the idea of an infinite version of justice that is irreducible to law. It is in this on-going process of questioning that justice lies—in the openness to the other, the existence of whom is immanent to the idea of transition. In this way deconstruction is transitional justice.

⁴² Force of Law (n 2) 9.

⁴³ Petra Gehring, ‘The Jurisprudence of the “Force of Law”’ in Peter Goodrich et al (eds), *Derrida and Legal Philosophy* (Palgrave Macmillan 2008) 55, 64.

⁴⁴ Force of Law (n 2) 7.

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