

Fordham International Law Journal

Volume 26, Issue 4

2002

Article 7

Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic

Mary O'Rawe*

*

Copyright ©2002 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic

Mary O'Rawe

Abstract

This Article will chart the extent to which this phenomenon has been and is recurring in Northern Ireland since the period of the 1994 Irish Republican Army ("IRA") ceasefire. It will examine the dangers in underestimating the capacity of institutions, structures, and individuals to resist change. It will also explore the potential of such resistance to claw back gains that on the face of it have already been made in formal inter-party negotiations. In the process, the Article will seek to identify why real change in policing is both so important and so difficult in a society seeking to leave violent conflict behind. In Part I, the themes outlined above will be explored through surfacing the dialectic between an official police discourse, which tends to be organizationally-minded, managerialist, and reformist, and a more holistic policing discourse rooted firmly in notions of human rights, community, and the challenging of extant power relations within society. Part II will super-impose onto this framework, the particular complexities and needs of a society in transition. In Part III, the Article will explore, how, if at all, this new rhetoric evidenced a changed dynamic which led political parties in Northern Ireland to a degree of consensus on policing issues. In Part IV, the role of external intervention will be discussed through the prism of the Patten process and the Commission's eventual recommendations. Part V will note that scarcely before the ink was dry on the Patten Report, there were forces at work to claw back the parameters of the debate and hurl policing back into the party political argy-bargy, which had necessitated an independent commission in the first place. Part V will conclude that the post-Patten period, despite ushering in obvious and apparently extensive changes, still attests to the past being allowed to reassert itself in a new guise. Drawing on the preceding analysis, Part VI will attempt to draw some lessons from the Northern Ireland process that could also have resonance for other jurisdictions coping with transition.

TRANSITIONAL POLICING ARRANGEMENTS IN NORTHERN IRELAND: THE CAN'T AND THE WON'T OF THE CHANGE DIALECTIC

*Mary O'Rawe**

INTRODUCTION

The State policing model on which many police forces, including the Northern Irish police force, are based, is almost two centuries old.¹ The organizational structure on which this model is predicated is bureaucratic, hierarchical, inward-looking, essentially male-dominated, and based on the mechanics of command and control. One of the greatest global challenges facing police managers today is how to inculcate a culture of human rights into the heart of such organizations.

This challenge is all the more keenly felt in jurisdictions divided on the question of State legitimacy, as they seek to emerge from a period of violent conflict. Transition to a more peaceful and stable democracy is particularly difficult where policing structures have been used to shore up the State through the implementation of an extensive raft of counter-insurgency measures, many of them anathema to basic human rights principles.

In many ways a successful transition is premised on the attainment of a transformation in policing. The development of a sophisticated and inclusive process for agreeing and managing change is vital. This can determine whether a jurisdiction moves forward to a better place in terms of police legitimacy and com-

* Mary O'Rawe, Transitional Justice Institute, University of Ulster. The author graduated in 1990 with a first class honors degree in English and French Law from the University of Canterbury. She completed an LLM in Human Rights, Emergency Law and Discrimination at Queen's University, Belfast, before taking up practice at the Bar in Northern Ireland and later a lectureship at the University of Ulster. Since 1996, she has researched extensively in the field of policing and human rights, particularly in societies in transition. The author would like to thank Professors Fionnuala Ní Aoláin and Colm Campbell, also of the Transitional Justice Institute, for their helpful comments on earlier drafts of this Article. The author is also indebted to Maggie Beirne and Beverly Coulter for their assistance. All sources are on file with the author, unless otherwise noted.

1. Initially introduced in Ireland by Robert Peel in the early 1820s.

munity safety, or flounders in a morass of denial, defensiveness, and a refusal to let go of all that has held it back in the past.

State policing structures, especially in such a fragile transitional space, are singularly unequipped in and of themselves, firstly to recognize either the need for change or the extent to which change is required. They are not, in and of themselves, equipped to deal creatively and effectively with the implementation of that change. If policing is too important to be left to one organization, change in policing is even more deserving of a broader focus and ownership.

Paradoxically, it is precisely the old guard — those who have maintained and managed old-style policing — who view themselves as the rightful and most effective change masters. When no change is not an option, the literature² attests to a creeping tendency of police organizations to take ownership of a process which then tends to be managerial, technocratic, and reformist, rather than radical and transformative. In this, police organizations tend to be supported by politicians and civil servants, who share a narrow security analysis of the problems, and see change issues more in terms of modernization, professionalization, and cost-effectiveness than anything deeper, seedier, or more fundamentally challenging to the *status quo*. This, in turn, ensures that any change implemented does not stray too far outside traditional comfort zones and micro-management issues. The parameters of the debate are thereby narrowed and the gap between commitment and delivery allowed to widen.

This Article will chart the extent to which this phenomenon has been and is recurring in Northern Ireland since the period of the 1994 Irish Republican Army (“IRA”) ceasefire. It will examine the dangers in underestimating the capacity of institutions, structures, and individuals to resist change. It will also explore the potential of such resistance to claw back gains that on the face of it have already been made in formal inter-party negotiations.³ In the process, the Article will seek to identify why real change in policing is both so important and so difficult in a society seeking to leave violent conflict behind.

2. MARY O’RAWE & LINDA MOORE, *HUMAN RIGHTS ON DUTY: PRINCIPLES FOR BETTER POLICING — INTERNATIONAL LESSONS FOR NORTHERN IRELAND* (1997) [hereinafter *HUMAN RIGHTS ON DUTY*].

3. In this context, the process leading up to and including the Good Friday Agreement in 1998.

In Part I, the themes outlined above will be explored through surfacing the dialectic between an official police discourse, which tends to be organizationally-minded, managerialist, and reformist, and a more holistic policing discourse rooted firmly in notions of human rights, community, and the challenging of extant power relations within society. It will raise some general issues in terms of how such divergent narratives interface.

Part II will super-impose onto this framework, the particular complexities and needs of a society in transition. Through an examination of community (policing) and official (police) responses in Northern Ireland following the declaration of an IRA ceasefire in February 1994, a picture is built up of multiple opposing narratives competing for space. The legacy of conflict has not prevented fundamental problems of legitimacy being viewed by government as essentially management issues to be dealt with as such. The impact of a continuing tendency by government to engage with and privilege one (its own) narrative over others is deemed to contribute to community polarization and alienation in respect of policing. By 1996, the rhetoric was beginning to alter, but resistance to change was no less present. This will be charted through a change in government at Westminster and a breakdown in the paramilitary ceasefire to the Good Friday Agreement reached in multi-party negotiations in 1998.⁴

In Part III, the Article will explore, how, if at all, this new rhetoric evidenced a changed dynamic which led political parties in Northern Ireland to a degree of consensus on policing issues. By virtue of the Good Friday Agreement, parties with diametrically opposed views on the constitutional status of Northern Ireland articulated their shared view that policing structures must be “professional, effective and efficient, fair and impartial, free from partisan control; accountable, both under the law . . . and to the community . . . ; and operate . . . within a coherent and co-operative criminal justice system which conforms with human rights norms.”⁵ This agreement on the principles which

4. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, *available at* <http://www.nio.gov.uk/issues/agreelinks/agreement.htm> [hereinafter Good Friday Agreement].

5. *Id.*

should inform policing in Northern Ireland allowed Northern Irish society⁶ to commit to a process whereby an independent, international commission was charged to develop proposals for future policing arrangements. The months leading up to the establishment of the Independent Commission on Policing (“Patten Commission”) are, however, telling in terms of the extent to which a vision for change was truly shared. This period is also indicative of a lack of political will to move the change process forward in a truly transformative way. The continued privileging of official narratives is exposed as unhelpful and even dangerous in this key transitional moment.

In Part IV, the role of external intervention will be discussed through the prism of the Patten process and the Commission’s eventual recommendations. These stated categorically that the fundamental business of policing is human rights and that politics has no part to play in the development of policing solutions to policing problems. The Patten Report⁷ has been hailed as a blueprint for real and lasting policing change, not just in Northern Ireland, but elsewhere. While acknowledging much that is good about the Patten Report, the Article will analyze the extent to which it, and the broader Patten Commission process, contained the seeds of its own demise. This Part will conclude that the role of external parties can be critical to making the case for structural change. However, in order to function effectively and capitalize on their unique position at a key stage of a transition process, there is a need to build on any consensus which exists around their creation. In part, this requires that the capacity of structures and institutions (even those in theory signed up to the process) to resist or manipulate change not be underestimated. Change mechanisms need to be located in, and designed for, the specific experience of the post-conflict jurisdiction concerned. It is only through being attuned to the nuances of the specific context (both in time and in jurisdiction) in which they are working, that such bodies can engage in the critical role of helping that society shape consensus as to the way forward.

Part V will note that scarcely before the ink was dry on the

6. By means of a Referendum in Northern Ireland in which 71% voted to implement the Good Friday Agreement.

7. A NEW BEGINNING: POLICING IN NORTHERN IRELAND, THE REPORT OF THE INDEPENDENT COMMISSION ON POLICING FOR NORTHERN IRELAND (Sept. 1999) [hereinafter PATTEN REPORT].

Patten Report, there were forces at work to claw back the parameters of the debate and hurl policing back into the party political argy-bargy, which had necessitated an independent commission in the first place. The signs that this would happen were already there in the run-up to the establishment of the Patten Commission and in government action during its period of deliberation. However, one factor contributing to the replaying of old mistakes is deemed to be the process failure of the Patten Commission itself. The Commission either underestimated or ignored the need to build political and social consensus around the “transformation” it proposed. It failed to recognize the level of resistance there would be to its recommendations, and that it was ideally placed to pre-empt and counter that resistance in key areas. Rather than validate its conclusions or ground its recommendations firmly in areas where consensus existed or could be created, the Patten Commission “disbanded” itself only hours after its Report was laid before the public, leaving the old guard to resume command of the process.

Part V will conclude that the post-Patten period, despite ushering in obvious and apparently extensive changes, still attests to the past being allowed to reassert itself in a new guise. Not far below the surface rhetoric, it would appear that change is continuing to build on a false premise. This is exposed as likely to hinder, rather than help, the still fledgling peace process. The role of the international oversight commissioner proposed by the Patten Commission to monitor and copper-fasten the change process is examined in terms of its limitations in ushering in a transformation in policing in Northern Ireland. Some of the obstacles to new domestic accountability structures fulfilling their potential in terms of establishing new credibility and legitimacy for policing in Northern Ireland are also examined.

Drawing on the preceding analysis, Part VI will attempt to draw some lessons from the Northern Ireland process that could also have resonance for other jurisdictions coping with transition. It will posit some of the minimum principles and standards necessary to construct a blueprint for real transformation in policing, which engages with process as well as substance. This Part will suggest that there is potential, and indeed an urgency around the development of a holistic and independent human rights discourse on policing, which is not co-opted to serve a narrow political agenda. It will also highlight the need for ongoing

and effective external monitoring and oversight to avoid a false change scenario, packaged and presented as the finished product.

I. *THE ISSUES AND THE CHALLENGES — CAN THE POLICE DO POLICING?*

State policing everywhere is in crisis. Northern Ireland faces the same issues as police forces the world over — how to better represent, understand, partner and ensure safety to the community at large.

Various commentators⁸ have charted the trend in many western societies towards new public management and social market approaches to improving the efficiency of the police. These are characterized by a highly technocratic and managerialist discourse, which focuses quickly on micro-management issues and has the modernization and professionalization of “the police” as its endgame. Although the rhetoric of human rights may be used as part of this approach, often the language permeates no further than the glossy brochures on which it is printed. The danger here is that human rights actually become a further decoration or a new badge, co-opted in the preservation of much that is wrong with State policing.

This begs the question as to whether reform of dated police structures is really sufficient to ensure community safety in modern societies. The current annual police budget for Northern Ireland stands in the region of £647 million. The total law and order budget is closer to £1 billion. Given the vast amount of money poured into criminal justice structures, and the police in particular, it might be expected that the return, in terms of safer societies, would be palpable. This rarely appears to be the case. Fear of crime is manipulated and spiraling. Crime detection rates are poor at best.⁹ The stock response is often to suggest

8. *See e.g.*, CORE ISSUES IN POLICING (F. Leishman, B. Loveday & S. Savage, eds., 1996); J. CHAN, CHANGING POLICE CULTURE: POLICING IN A MULTI-CULTURAL SOCIETY (1997).

9. Crime detection rates are generally very low. (In Northern Ireland, the police-generated statistic currently stands around 27%, putting the Police Service of Northern Ireland (“PSNI”) in a favorable light vis-à-vis other United Kingdom (“UK”) police forces). Given the vast amounts of money poured into criminal justice systems, there are real issues as to how effective State policing structures are in ensuring either the protection of the community, or value for money. Some commentators argue that community safety needs to be understood and provided for in a much broader sense.

more resources for new improved police forces, as somehow providing the “answer to the problem.” The problem with the stock response is that it is rarely premised on any analysis of what “the problem” actually is.

According to Hillyard et al.:

research has consistently shown that “an ounce of prevention is worth a pound of cure.” One of the most successful ways to reduce anti-social behavior is to focus on family-based and pre-school programmes . . . [The United Kingdom (“UK”)] government is now committed to such an approach through the Sure Start programme which offers support to parents of poor children through a variety of different schemes.¹⁰ Northern Ireland’s allocation [2000-2001] is £2 million — 0.2% of the total law and order budget or just £300 000 more [sic] than the security and policing divisions will spend on computers, furniture and miscellaneous items.¹¹

Looking at such deeper underlying issues demonstrates that State police structures, on their own, may be inadequate responses to the challenge either of inculcating an organizational human rights culture or dramatically improving community safety. Focussing minds, money, and energy on the issue of “police reform” has the added disadvantage, particularly in a “divided” society, of distracting attention from the question that what is actually required to move society to a better and safer space, is transformation of “policing,” rather than reform of “the police”.

Modernization based on sound management principles has its place, but it does not follow that transformation will come about through modernization alone. Instead, there is a danger that a technocratic, managerialist discourse, which gives the surface appearance of extensive change, can permit those opposed to change at a more fundamental level to hijack the process and keep the focus narrow. If change in policing is too closely tied to notions of managerialism, much of the potential for true change

Money currently designated for a “police budget” might be better spent augmenting or enhancing alternative structures and strategies for community safety. See more generally the work of Clifford Shearing and Paddy Hillyard in this area.

10. Government initially envisaged that this programme should not apply to Northern Ireland.

11. P. HILLYARD, ET. AL, *THE CRIMINAL JUSTICE REVIEW — A RESPONSE* (2003).

is missed, with the change that does happen being based on a false premise that will ultimately hamper its effectiveness.

The “police” discourse, briefly outlined above, appears to acknowledge that a State police force can only be as effective as the measure of its legitimacy and standing within the community it polices. It accepts that this standing can be detrimentally affected by a host of factors. These can range from the incompetence, ineptitude, and incivility of individual police officers, through to the inadequacy or inappropriateness of systems, practices and leadership within the organization. However, a police-focused narrative generally fails to engage at a level, which coherently tackles serious abuse of powers, endemic corruption, and institutionalized racism, sexism or sectarianism at the heart of an organization. These are the ultimate, and all too frequently masked, indicators of illegitimate policing. They are the types of things, which continue to fester beneath any new broom, which fails to sweep under carpets or in dark nooks and crannies. They are the types of things, which can have a fundamental impact on any programme of change.

Incremental or even seemingly radical reform, which does not take account of the appropriateness of the structures in place to ensure that reform produces results, is inherently problematic. Surface level reform, which does not engage with fundamental issues of what is bad in police culture, will see that culture reassert itself. The experience of countries in transition¹² would appear to demonstrate that, for all sorts of reasons, a successful transition has to be premised on the attainment of a transformation in policing. This transformation necessitates a different, if occasionally overlapping, discourse from that traditionally employed by governments. Policing is about more than “the police” as an organization. Ultimately, it is about exploring and developing best practice to achieve community safety. It is about tackling the hard issues and occasionally thinking the unthinkable. It is about recognizing that real transformation in policing does not sit easily with a total focus on economic assessments of what constitutes core business and notions of performance-related pay.¹³ The essence of the police versus policing

12. See HUMAN RIGHTS ON DUTY *supra* n.2.

13. As proposed in the UK in the 1990s by the Sheehy Report on Police Responsibilities and Rewards.

dialectic can perhaps be viewed as the difference between the effective management of change and the management of effective change. Whether this dialectic is recognized is the first step to better policing in any jurisdiction.

II. *NORTHERN IRELAND — THE ISSUES AND THE CHALLENGES*

The change process in Northern Ireland mandates engagement with the fact that this jurisdiction is emerging from thirty years of violent political conflict. Given the bitterly contested space in which policing has occurred, the impact of violent conflict on the nature of that policing and vice versa, and the particular sensitivities and demands of a transition process have to be factored into any change equation. What Northern Ireland requires to meet the challenge of improved policing and enhanced community safety may, for these reasons, be slightly, if significantly, different from initiatives that might suit a more stable democracy, where respect for the rule of law is reasonably intact.

Even in a relatively consensual society, the drive towards professionalizing the police will never succeed if it fails to grapple with the historically-charged issues of political ownership, legitimacy, morale and alienation. This is all the more so where a community is divided on very many levels. The change process in Northern Ireland requires to engage in a very fundamental way with the fact that one section of the community has traditionally viewed the State police organization, the Royal Ulster Constabulary (“RUC”),¹⁴ as their force. Since its establishment, that police force has been recruited almost totally from the same section of the community, and has policed, by virtue of its political masters and its own internal sense of loyalty, virtually as the “armed wing of Unionism.” The change process has to factor in that police officers and their families have been badly traumatized by their experience of a conflict in which they have been styled “legitimate targets.” Many of their number¹⁵ have been

14. The name of the police force was changed from “Royal Ulster Constabulary” (“RUC”) to “Police Service of Northern Ireland” (“PSNI”) in November 2001. *See New Era For N. Ireland Policing*, CABLE NEWS NETWORK, Nov. 4, 2001, at <http://www.cnn.com/2001/world/europe/11/04/ruc.renamed/>.

15. Over 300 police officers have been killed and almost 9,000 injured.

killed or injured in a situation where they have viewed themselves for thirty years [as] “the bulwark between anarchy and order.”¹⁶ Although the RUC performed normal as well as security duties, their only conception of policing has been paramilitary. Backed up by an arsenal of repressive counter-terrorist powers, their experience of the conflict has too often filtered into other aspects of their “normal” role.

The change process in Northern Ireland must further deal with the legacy of another section of the community which feels alienated to a greater or lesser extent both from the police organization, and the State which it represents. This section of the community has seen its identity and aspirations delegitimized by a discriminatory regime which has viewed it as a “suspect community” — the enemy within. This part of the community has felt the hard edge of policing and been stripped of any faith it might have had in the administration of justice.

Just as there are competing narratives as to what the conflict was about, so too the multiple experiences of policing and being policed reflect and echo the broader societal issues. The change process in Northern Ireland must be contextualized within the frame of this historical legacy.

Instead, the process to date has tended to steer clear of the hard issues and is shot through with professional preening and managerial-speak. This is problematic in that it stymies a fundamental need in Northern Irish society to think out of boxes, to recast, re-vision, and reshape notions of what policing means and should mean.

Why should this be the case when governments and political parties alike have committed themselves to ensuring new policing arrangements, which command widespread support and meet basic principles of impartiality, accountability, and fair play? Why the gap between rhetoric and reality, between commitment to improved and acceptable policing arrangements and delivery of anything like the promise?

In part, this is premised on the privileging of official narratives. Sticking close to familiar notions of “modernization” and “professionalization” serves to tie the Police Service of Northern

16. Chief Constable Ronnie Flanagan, *Ulster: The Deal; Why I Want to See Real and Improved Police Changes*, BELFAST TELEGRAPH, Apr. 30, 1998, available at Lexis, News Library, Non-U.S. Newspapers File.

Ireland (“PSNI”)¹⁷ more closely into the broader UK police family — which in itself contains a narrative as to what the conflict was about and what the constitutional issues are and are not.¹⁸

The State conception of what should be delivered is still inherently tied into a desire to maintain centralized control of policing and the broader change process. Mistrust and fear of the community, and a feeling that the vagaries and demands of operationalizing policing are capable of being understood by the select few, continues to ensure that the “policed” are not viewed, for all the rhetoric, as equal partners in the policing project.

There is a lingering denial of the extent of change necessary to bridge the police/policing gap. Change to the extent demanded by “others” would require deconstruction of dearly held truths and assumptions and contribute to further fluidity and uncertainty in power relations. The sense that tried and tested methods should suffice to maintain the rule of law has persisted — which misses the point that the rule of law has been so badly damaged in Northern Ireland that the conditions for its very existence, here as in other transitional societies, need to be carefully crafted.¹⁹ To avoid this, government has deliberately chosen to “compartmentalize” issues,²⁰ narrowing the focus to deal in micro-management, rather than look at the big picture. For example, policing, emergency legislation, and the criminal justice system, rather than being examined in the round as part of the peace process following the Good Friday Agreement in 1998, were parceled out to three separate review bodies,²¹ who then made a virtue of not consulting with each other or sharing their findings. Parallel processes were thus set in place which, while obviously ripe sites for the cross-fertilization of ideas and the de-

17. The RUC’s name was changed in November 2001.

18. See CHRISTINE BELL, *HUMAN RIGHTS AND PEACE PROCESSES* (2000) (discussing “meta-conflict”).

19. As a banner currently attests on the road into the Nationalist village of Toomebridge: “Where those who make the law break the law in the name of the law, there is no law.”

20. For example, policing, emergency legislation, and the criminal justice process were parceled out to three separate bodies, which then made a virtue of not consulting with each other or sharing their findings. See *Review of the Criminal Justice System in Northern Ireland* (Mar. 2000), available at <http://www.nio.gov.uk>.

21. The main focus of this Article is the Independent Commission on Policing (the “Patten Commission”), which was set up in the wake of the Good Friday Agreement.

velopment of more joined up governance, continue to this day to operate in isolation one from the other.²² All of this has contributed to a climate of “false change”²³ — a range of scenarios, which appear on a surface level to be dynamic and vibrant, yet which miss the point that what is needed is not merely to reform a State police institution, but to transform the experience of policing for police and policed alike. All is fixed on “building for the future” without realizing that a past not properly laid to rest will provide a very unsteady foundation for the new project.

A. *The Legacy of the Past*

Debate around policing occupies highly contested ground in broader arguments over the legitimacy of the State itself. Yet, over the years, successive governments have failed to identify or research the extent to which a permanent “emergency” regime has impacted all levels of the criminal justice process and the administration of justice generally.²⁴ Instead, in the years from

22. For example, the Criminal Justice Review has provided for the development of Community Safety Committees, funded by the Northern Ireland Office, to tackle local policing issues in local areas. At the same time, as a result of Patten Commission recommendations, District Policing Partnerships have been separately recruited to look at local policing issues, but with no funds at their disposal (contrary to Patten’s view).

23. See Angela Hearty, *The Government of Memory: Public Inquiries and the Limits of Justice in Northern Ireland*, 26 *FORDHAM INT’L L.J.* 1148 (2003) (discussing this phenomenon in respect of the Bloody Sunday Tribunal).

24. This is despite a steady catalogue of wrongdoing by State actors forming the basis of concerns from a range of bodies and individuals, internationally and domestically. For instance, the use of lethal force by the security forces in disputed circumstances has received much attention over the years. See FIONNUALA NÍ AOLÁIN, *THE POLITICS OF FORCE* (2000). This provides evidence of failure after failure to adequately investigate or prosecute in such cases. Information relating to collusion by members of the security forces with Loyalist paramilitaries has consistently not been acknowledged or acted upon. Statistics on the differential deployment of plastic bullets against the Catholic/Nationalist/Republican population and more statistics on the thousands and thousands of people arrested each year under the Prevention of Terrorism Acts, held without access to a lawyer or their family for up to forty-eight hours and, in the vast majority of cases, released without charge after up to seven days in detention, attest to differential and partisan policing over many years. Criticisms by international bodies such as the United Nations Human Rights Committee and the European Committee for the Prevention of Torture on conditions in “holding centers” such as Castlereagh again raise issues around policing in an “emergency,” when that emergency is the norm. Reports by non-governmental organizations (“NGOs”) such as Amnesty International, Human Rights Watch, British Irish Rights Watch, the Pat Finucane Center and the Committee on the Administration of Justice (“CAJ”) all highlight how accountable and impartial policing has suffered in the government’s “fight against terrorism,” and how, rather than solve the problem, this had exacerbated the situation, fed a culture of

1922 to 1969, the situation of policing in Northern Ireland was debated once at Westminster. Even following the Cameron and Hunt Commissions, when Direct Rule was re-imposed in 1972, government continued to abdicate responsibility for ensuring representative policing in Northern Ireland. The notion of the RUC as a Protestant police force for a Protestant people was thus allowed to take hold in hearts and minds. Catholics never joined the force in any numbers, and Nationalists felt politically excluded. By the time Patten reported in 1999, 92% of the RUC was drawn solely from the Protestant, Unionist tradition. Coupled with the situation of conflict, which generally saw Catholics and Protestants take different sides on the constitutional question, a force drawn from the Protestant tradition in such numbers could not hope to police impartially or be perceived to do so. Particularly in working class areas, human rights abuses and harassment were part and parcel of a Nationalist experience of policing. The potential for over-policing of this community was further exacerbated by the continual existence of a wide range of "emergency" powers on the statute book. Little appeared to happen to sanction abuse when it occurred, leading to a situation where many Catholics viewed the police as being facilitated to act outside the law on many occasions. This had an obvious impact, not only on community relations, but the conflict itself.

A further legacy of the failure of government to engage at a courageous and creative level to break apart this dynamic was the damage being done to the rule of law. Legislation paved the way for policy and practices to complete the shoring up of a narrow security agenda. Rather than hold agents of the State effectively to account, successive governments have denied or ignored much wrongdoing and instead, allowed division to grow and fester.²⁵ In privileging an official discourse which denies State responsibility as a protagonist in the Northern Ireland conflict, government has failed police and the wider community alike. This failure in the proper administration of justice allowed police officers to be set up as "legitimate targets" for those

repression, and created more martyrs for "the cause." Various judgments of the European Court of Human Rights are further testament to breach of key aspects of the right to life, abuses in detention, and denial of the right to a fair trial among other things.

25. See Kieran McEvoy & John Morison, *Beyond the "Constitutional Moment": Law, Transition, and Peacemaking in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 961 (2003) (providing secureaucratic responses to conflict management).

with a grievance against the State or the organization. The stress and danger of such a position, coupled with broad powers permitted under emergency law, at the same time fuelled the mistrust that led to human rights abuses occurring and recurring. Meanwhile, those who criticized State or police action in this regard were dismissed and vilified as no friends of democracy.²⁶ The polarization around policing provides some insight into the difficulties inherent in any attempt to build peace in Northern Ireland.

B. *Ceasefires and Ceaseless Debate: 1994-1996*

Developments concerning aspects of policing had occurred in the period immediately prior to the 1994 cease-fires of the IRA and, later, the Combined Loyalist Military Command.²⁷ Although policing in Northern Ireland has frequently been the subject of reviews and reports,²⁸ most of these were premised on the maintenance of existing legislation, or their terms of reference were in some manner restricted to preserve as much as possible the *status quo*. This was the case despite the fact that those very laws or policies, which were not within the remit of inquiries into policing, may have been contributing to the problems in the first place.²⁹ The ceasefires brought their own impetus in terms of pushing policing center stage and demanding that policing be looked at in a more holistic manner. It soon became

26. In much the same way as those opposed to war in Iraq or other aspects of the U.S./UK War on Terror are currently dismissed as fellow travelers of terrorists or worse. This is a classic phenomenon and forms one manifestation of the denial strategy employed by States the world over to distance themselves from identification as players in a "dirty war."

27. The Northern Ireland Office ("NIO") published *Policing in the Community: Policing Structures in Northern Ireland* (1994), a discussion document about policing structures, and the Police Authority for Northern Ireland ("PANI") was considering a community consultation exercise.

28. See e.g., REPORT OF THE COMMISSION OF INQUIRY INTO DISTURBANCES IN NORTHERN IRELAND, 1969, cmnd. (N.Ir.) 532 (the CAMERON REPORT); REPORT OF THE ADVISORY COMMISSION ON POLICING IN NORTHERN IRELAND, 1969, cmnd. (N.Ir.) 535 (the HUNT REPORT); VIOLENCE AND CIVIL DISTURBANCES IN NORTHERN IRELAND IN 1969: REPORT OF TRIBUNAL OF INQUIRY, 1972, cmnd. 566 (the SCARMAN REPORT); REPORT OF THE BENNETT COMMITTEE, 1979, cmnd. 7497 (the BENNETT REPORT).

29. The PATTEN REPORT explicitly acknowledged, citing McGarry, J. and O. Leary, B. that "much of the dissatisfaction with policing in both loyalist and republican areas stems from the use of emergency powers." PATTEN Report, *supra* n.7, at 48. See also United Nations Human Rights Committee, *Human Rights at the Crossroads* (1995) for a critique of emergency oversight generally.

clear that, as in other transitional societies, the issue of police reform was one of the most contentious of the post-ceasefire political situation.³⁰ The years 1994-1995 saw a flurry of community activity around policing³¹ — conferences, community workshops, and linkages with other countries in terms of learning from their experiences of policing reform, all formed part of a very public dialogue on the future of policing in Northern Ireland. These various community conferences frequently were vehicles for the articulation of community concerns about policing. Unsurprisingly, they were mainly organized in Nationalist and Republican areas. However, it is important to note that Loyalist representatives were present at some of these³² and Loyalist criticism of the structure and practices of the RUC was heard increasingly in public fora. This dialogue at grassroots level highlighted the commonalities of experience of working class communities in both Catholic and Protestant areas. In so doing, the exchanges that took place helped cement the notion that change in policing was to the benefit of all communities. A Progressive Unionist Party (“PUP”) policy document on policing stated:

The long history of RUC actions and attitudes towards Catholic people has left a legacy of real bitterness and the Protestant community cannot hope to engage the Catholics in honest debate without an open admission of this reality (a reality not that hard to accept since the Protestant working-class

30. Only three days after the IRA's ceasefire began, Sinn Féin's President, Gerry Adams, had already called for a new police force. See IR. NEWS, Sept. 3, 1994, at 5.

31. These were the October 1994 Ardoyne Association Community Conference on Policing, entitled “*Policing, Crime and Punishment in West Belfast*” and held at the West Belfast Summer School; the November 1994 Belfast Community Forum on Policing Conference, entitled “*Policing in a New Society*,” and particularly the workshop, entitled “*Alternative Policing Workshop*,” organized by the Pat Finucane Center; and the January 1995 Conference on “*Young People and Policing in North and West Belfast*.”

32. In the aftermath of the cease-fires, vocal and persistent criticisms of the RUC emerged from Loyalists, if not for the first time, then perhaps in the most concerted and coherent fashion. This was clearly linked to the emergence of the Loyalist political parties, the UDP and the PUP, and their involvement in many grass-roots issues in Loyalist areas. Some Loyalist concerns involved allegations of harassment and heavy-handed policing methods. Just ten days after the IRA ceasefire, a delegation of Loyalist councilors met with RUC Assistant Chief Constable Stewart to discuss “their concerns about heavy-handed policing of loyalist areas following the IRA ceasefire.” IR. NEWS, Sept. 9, 1994, at 3.

often received similar attention from the RUC).³³

Neither the RUC nor the Northern Ireland Office ("NIO") took any part in this dialogue and not one of the events organized by various community organizations was attended by these bodies. The very public articulation of dissent juxtaposed with a "no engagement" policy retrenched defensive positions. It was soon apparent that the debate was congealing and hardening, not around the nature of what changes should occur, but whether any changes should occur at all. Traditional Unionist opinion rallied to the side of an unjustly maligned force, insisting that the only appropriate debate was no debate.

On November 15, 1994, the RUC published a full-page article in the national newspapers in which the then Chief Constable noted that much of the recent debate about restructuring the RUC is "inaccurate, ill-informed and shows little understanding of the operational and logistical realities of policing. Above all, it is entirely premature and, inevitably, damaging to the morale of this organization."³⁴ The sacrifice of the RUC featured prominently in statements dismissing or minimizing calls for reform. The heavy price paid by the force in the fight against terrorism was a feature of practically every major official statement on policing made during the post-ceasefire period. Several senior RUC officers publicly stressed their confidence in the RUC's ability and suggested that it was recognition, rather than reform, that the RUC deserved.

According to then Deputy Chief Constable Flanagan: "the calibre of men and women in the RUC is the equal of any in any policing organisation in the world. They have a commitment to service to the community and a commitment to sacrifice that I think has brought us to the position we're in now."³⁵ Many of these sentiments were summed up in Chief Constable Annesley's statement: "I do not accept the change argument. I do not believe that there is anything inherently wrong with the RUC that needs to be changed. I do not accept that the organisation is wrong and must be fixed." He continued by describing the RUC as "an outstanding professional police service . . . one of the best,

33. Progressive Unionist Party, *Submission to the Northern Ireland Office on Policing and Related Matters 1* (1995).

34. IR. NEWS, Nov. 15, 1994, at 5.

35. RTE Interview, *Policing in Northern Ireland* (Mar. 9, 1995).

if not the best in the world.”³⁶ This was not just a police view. John Wheeler, the Security Minister, later echoed this sentiment in his comment that “one of the most distasteful consequences of the ceasefires was the poking and prodding at the police service.”³⁷

In the face of this onslaught, the Republican campaign for disbandment became more trenchant in its insistence that the RUC were totally unacceptable as a force to police the peace. Government’s categoric denial of the profoundly shocking experience of policing attested to by a sizeable section of the community, was experienced as heaping insult upon injury. Meanwhile concerns regarding human rights abuse, cover up, and collusion were ongoing. In the month preceding the IRA ceasefire, the RUC told 146 Catholics in Belfast that Loyalist paramilitaries had obtained their personal details from police files.³⁸ Immediately after the cease-fires, inquests into the deaths of six people shot dead as part of an alleged “shoot-to-kill” policy had to be abandoned by the coroner, as he was unable to obtain vital evidence from the RUC concerning those incidents.³⁹

A false dichotomy was created with total support for the RUC on the one hand, and a refusal to countenance anything short of their disbandment on the other, being consistently vaunted as the sole options for those concerned with policing. This narrowed the space in which painful and difficult issues could be discussed in a constructive and meaningful way.

That is not to say that the RUC or other parties resisted every effort to promote debate or bring about change, but against the backdrop described above, all subsequent changes were stripped of much of their potential value. Rather than being viewed as tokens of good faith, the scaling down of some of the more visible aspects of security policing soon after the announcement of the cease-fires,⁴⁰ was characterized and per-

36. IR. NEWS, Jan. 13, 1995, at 1.

37. Speech to Annual Conference of Police Federation, Europa Hotel, Belfast (June 4, 1996).

38. IR. NEWS, Sept. 7, 1994, at 11.

39. IR. NEWS, Sept. 7, 1994, at 1.

40. Increasingly, officers began to patrol in cars rather than armored landrovers, and no longer wore flak jackets or carried long arms such as sub-machine guns (although sidearms continued to be worn). RUC patrols in most areas no longer relied on army support. Other measures included the removal of road barriers around some RUC barracks, with some resultant changes in road access and traffic flow. (Some de-

ceived by many as part of a cosmetic and surface level charm offensive. Even when the RUC made concerted efforts to improve relations with certain communities, when they began from 1995/1996 on to become a more visible presence at community events and in the media — putting forward their case and pointing to changes they had made and were contemplating in a way they had not previously done — this was viewed with a cynicism that government had helped to create. In the absence of some acknowledgment of the RUC's role in the conflict, these serious and lingering doubts could not be put to rest.

During this period, the RUC began a "Fundamental Review"⁴¹ of its structure and organization. The Police Authority of Northern Ireland ("PANI") commenced a major community consultation exercise⁴² and the NIO published a discussion document⁴³ and, subsequently, a White Paper,⁴⁴ on prospective changes in the structure of policing accountability and funding mechanisms.

Sinn Féin boycotted the PANI review as the one thing that continued to separate the official debate from its public counterpart. The official debate was much narrower in its scope, and

tails of these and other security measures were provided in a 1995 NIO booklet, *Building on the Peace in Northern Ireland*, published in response to criticism that the British government was dragging its feet in the peace process).

41. The review was conducted to account for three possible security scenarios. Scenario 1: a high level of paramilitary violence necessitating a high level of policing, with military support. Scenario 2: a greatly reduced level of paramilitary activity, with some forms of violence/disorder persisting, entailing a high level of policing, with military support available but much less publicly evident. Scenario 3: would see paramilitary organizations dismantled, and community relations improving. Policing in this environment would involve "a high quality, effective . . . service through the efficient use of resources." Full implementation of the entire list of recommendations would occur only in the context of a peaceful and stable environment, which would be equivalent to Scenario 3.

42. A total of 7,974 written submissions were made by various individuals and groups, mostly of the Unionist persuasion. Of these, 51% contained various suggestions on policing; 29% recommended there be no change in policing; 16% were complimentary of the RUC; 2% were complaints about the RUC; and 1% called for the RUC to be disbanded. It is not hard to see why Nationalists and Republicans felt excluded from the process when PANI made the following recommendations itself: the name should not be changed; the uniform should not be changed; and the badge of the force should not be changed. PANI made no recommendations under the specific category of a "neutral working environment."

43. NIO, *Policing in the Community: Policing Structures in Northern Ireland* (1994).

44. CAIN Web Service, *Foundations for Policing: Proposals for Policing Structures in Northern Ireland* (1996).

obviously highly committed to existing structures of policing. Official reports by and large prioritized a different set of issues, with a focus on managerialism and improving effectiveness.

The proposals arising from PANI's community consultation exercise were overshadowed by the proposals for reform of the tripartite structure⁴⁵ contained in the NIO's *Policing in the Community* discussion document and the *Foundations for Policing* White Paper. While attempting to improve accountability and effectiveness, the proposals here were essentially aimed at organizational efficiency, especially through the application of the principles of "total quality management" in an objective setting, planning, and the allocation of and responsibility for resources. The opportunity had been missed to engage with issues at a much deeper level.

The RUC's *Fundamental Review of Policing in Northern Ireland* is another case in point.⁴⁶ The review was conducted on the basis that the ceasefires and changed security environment afforded the RUC an opportunity "to consider the service it provided to the community and to assess what changes it might make to enhance the delivery of that service."⁴⁷ However, the review was constructed by senior command very much in terms of developing natural responses to a new environment, rather than giving credence to ill-conceived demands for change. It was clearly and deliberately pitched at an organizational rather than a more structural level, and was concerned with the *internal* structures of the RUC and the effectiveness of its organization and operations. The review did note that an effective police service had to be "responsive to the needs of the community at a local level" and that it "must set and meet the highest standards of behavior." However, it appears to have considered that inter-

45. A triangular approach to accountability policing placed the Secretary of State, the Chief Constable, and the Police Authority in the frame, with the Police Authority very much the poor relation.

46. When Patten finally reported, the RUC was keen to point out that many of the recommendations echoed those of their own fundamental review and would have happened even without Patten. Unfortunately, this also paved the way for cherry picking of the Patten recommendations.

47. RUC, *Fundamental Review of Policing in Northern Ireland* 1 (1996). The terms of the review were to establish what "constitutes a high quality policing service and how that service should be delivered to the whole community in Northern Ireland." Additionally, the review sought "to examine the type of structure, systems and resources needed to give optimum support to that service." *Id.*

nal quality management improvements would be more than adequate to these tasks. In keeping with the notion that the public could have little of merit to say on these matters, only a short summary of the review and its 189 recommendations was ever published.

The ending of the IRA ceasefire in February 1996, when the research for the *Fundamental Review* was almost complete, led to a re-evaluation of these recommendations to determine which, if any, could be implemented. The official decision was that most could not.⁴⁸

The lack of engagement with “fundamental” issues in the *Fundamental Review* simply underpins the broader official failure to capitalize on the opportunity presented by the ceasefires to “go deep” on the issue of policing. This failure to push out the boundaries and create safe space for “policing” as opposed to “police” issues to be played out, cannot but have contributed to the breakdown of the IRA ceasefire in 1996.

In May 1996, four months after the IRA’s seventeen-month-long ceasefire was abandoned, the Secretary of State outlined proposals for legislation that built on the initial proposals outlined in the 1994 discussion document *Policing in the Community*. This legislation was proceeded with in 1998, in what might be viewed as an unseemly rush to pre-empt Patten’s judgment on a number of issues, or at least to lay claim to basic legislative principles that would have to be worked back from, if Patten came out with anything too radical.

C. *Public Order and the Failure of the Charm Offensive: 1996-1998*

Along with the move towards legislation, the years leading up to the Good Friday Agreement are notable for grave failures in public order policing. This area of their role had always brought the RUC into conflict with different sections of the community and this conflict continued to be played out on the streets even while the peace process was ongoing.⁴⁹ Public order policing had long been identified as a drain on the RUC’s levels

48. Though moves were made towards flattening of rank structure and an element of decentralization.

49. Prior to 1985, public order incidents and issues largely involved the policing of Nationalists. This changed quite significantly following the signing of the Anglo-Irish Agreement in 1985.

of public support, and the cease-fires seemed to offer an opportunity for the RUC to escape the difficulties associated with that role. Protests surrounding the marching season of 1995 quickly corrected that view, and the RUC became embroiled in a lengthy series of confrontations surrounding the issue of whether Loyalist parades would be allowed to pass through predominantly Nationalist areas.⁵⁰ The policing of parade and protest offers a crucial insight into the extent to which policing on the ground in a post-conflict situation, for all the management reviews and discussion documents, will continue to be utterly shaped by a conflict-based militaristic approach to problems. Clear instances of serious RUC misconduct during these events elevated concerns over public order policing. The ending of the IRA's ceasefire in February 1996 resulted in a return to the security measures that had formerly characterized the RUC, and the widespread and serious disturbances that occurred during the 1996 marching season were indicative of how little things had moved on in terms of creating acceptable policing. Public order policing continued to be viewed as a public relations disaster for the RUC;⁵¹ yet, the factors contributing to this were still not fully acknowledged.

Instead, stated recognition of the harm done to police community relations, was still coupled with an attempt to minimize or deny the need for change at anything but a "modernization" level. The official narrative from this point on appropriates the idea, not that peace would be facilitated by changes in policing, but that peace was required for many changes to take place. Chief Constable Flanagan began to stress how open his organization was to change:

Few organizations I know have shown themselves to be more open to change or more spontaneously initiating of change from within. While we would caution against change. . . for the sake of change . . . we have no fear of real improving

50. *See e.g.*, COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *THE MISRULE OF LAW* (1996) for more detail.

51. The initial police decision to ban an Orange March down the Garvaghy Road in July was met with Loyalist protests that proved so alarming that the decision was reversed and the March pushed through. This sparked violent confrontations between Nationalists and the security forces (*see* documentation put together by CAJ in 1996 and the Pat Finucane Center in 1996). The Parades Commission currently has responsibility for deciding these matters, which at least now means that police are not left to police their own decisions.

change. What is needed first, of course, is a change in the environment in which we work.⁵²

This simply fuelled the strength of public feeling on all sides.

III. *PEACE NEGOTIATIONS AND THE PLACE OF POLICING*

Policing, ultimately, had to form a key strand in the multi-party negotiations in 1998. By this stage, government rhetoric around policing had also changed somewhat from previous years.⁵³ In the Good Friday Agreement itself, the language of human rights was adopted to allow previously polarized parties to speak to and hear each other. Different sections of society might have very different expectations or political agendas, but in terms of policing, there were many principles and common goals that could be agreed upon. The Good Friday Agreement used this language to recognize that policing is a highly emotive subject, invoking great hurt for many people, including police officers and their families.⁵⁴ The Good Friday Agreement further articulated the need for an independent commission⁵⁵ to put forward proposals on policing "designed . . . to ensure that policing arrangements, including composition, recruitment, training, culture, ethos and symbols are such that, in a new approach, Northern Ireland has a police service that can enjoy widespread support from, and is seen as an integral part of, the community as a whole."⁵⁶ This was based on the conclusion, noted by the Patten Commission, that "the issue of policing is at the heart of many of the problems that politicians have been unable to resolve in Northern Ireland; hence, the fact that we were asked to consider this question ourselves."⁵⁷ Acceptance of the need for outside assistance in moving the process forward in turn paved the way for an acceptance of the Patten Commission, probably unprecedented for any other body previously established by the government to look into policing matters. It is un-

52. BELFAST TELEGRAPH, Apr. 30, 1998.

53. See e.g., Stationery Office, Belfast, Principles for Policing (1998).

54. Good Friday Agreement, *supra* n.4, at 22.

55. Commission on the Administration of Justice, Submission to the Police Authority of Northern Ireland Consultation of the Future of Policing in Northern Ireland (1995) had called for an independent commission into policing. This was reiterated in the recommendations of HUMAN RIGHTS ON DUTY, *supra* n.2, in 1997.

56. Good Friday Agreement, *supra* n.4.

57. PATTEN REPORT, *supra* n.7, at 2.

fortunate, to say the least, that this acceptance, this lack of boycott by any of the parties to the peace process or by any section of society generally, was under-exploited to propel genuine change at an organizational and a much broader level. The basis of agreement, which underpinned Patten at this point, was a strength that both the Patten Commission and the government of the day ultimately underplayed and undersold.

A. Speaking the Language of Change but Preserving old Realities

Meanwhile, the government, unsurprisingly, was not a complete convert to human rights principles of transparency and accountability. There was very little consultation as to who the Commissioners might be. The Commissioners from Northern Ireland⁵⁸ were chosen on the basis not just of their integrity, but as representatives in some sense of the Unionist and Nationalist traditions.⁵⁹ It could be argued that this was necessary in a divided society to build confidence in the process. However, it equally underscores the tendency of government to present things in boxes, with the policing “problem” thereby characterized as a Catholic/Protestant thing rather than anything broader.

Nor should it go unnoticed that the government had been at pains to praise the RUC in the months following the Good Friday Agreement, and the Secretary of State chose a meeting of the Police Federation to announce who the Commissioners were.

All of these factors served to preserve old realities and perceptions at a moment when much could have been done to create a new and more fluid space for working through common agendas. Government actions at this point simultaneously ignored the possibility that widening the conversation might actually create the means of circumventing old debates.

The Commission itself was initially serviced by the Northern Ireland Office, despite its need to stake its independence from government at an early stage. The bodies that the Commission-

58. These were both men — as were the majority of the Commissioners. The gender make-up might be part of the reason that issues of gender representation were under-prioritized in the final Report.

59. Thus shoring up the very dichotomy that had to be broken down by the fledgling commission.

ers met in their initial induction/catch-up period were limited to official ones, such as the police and police authority. This was, for many of them, their first exposure to policing in Northern Ireland. That the “official version of events” was provided as their starting base and reference point was no accident. Nor should it be dismissed in terms of significance in how the policing problem was initially and influentially presented to them.

B. *The Procession Towards Patten*

Not content with having the pick and the ear of the Patten Commission from the beginning, early in the process Prime Minister, Tony Blair, and Secretary of State, Mo Mowlam, were quick to reassure Unionists and the Police Federation that there was no question of the RUC being disbanded. In thus pre-empting, circumscribing, or at least indicating to the Patten Commission that their process should remain within the limits of the “bearable” defined in terms of a narrow party political analysis, the message was clear: sacred cows were also alive and well. Rather than move to an era where the nettle of policing was finally grasped, whether or not this ultimately involved disbanding the RUC, the government signaled its preference for the maintenance of taboos. In doing so, it also signaled that everything was not necessarily on the table, and paved the way for future political deals to be done on the policing issue as part of an overall “peace package.”

In part, this speaks to a dichotomy and a fundamental flaw within the whole tenor of the rights agenda in both the Good Friday Agreement and the official discourse surrounding it. Human rights had been carved a little space in the rhetoric — but in ways that served to mask the fact that on the ground, it was still a case of *plus ça change*. Government still clung tenaciously to the notion that the RUC was a victim of circumstances, its main problem being its lack of representativeness. This, in turn, was seen solely through the lens of paramilitaries, intimidating young Catholics to the point where they felt unable to join this good and heroic force. While this certainly would be one aspect to be considered, the total emphasis on paramilitary intimidation as the sole factor, allowed government to distract attention from its own role and that of its agents in the conflict. While extolling the virtues of equality and dignity for all, polic-

ing reforms continued to be styled as potential concessions to Nationalists, with human rights viewed as bargaining chips, rather than as a framework to make Northern Ireland a more inclusive and vibrant democracy. The language was being spoken, but not necessarily understood. This double-speak and double-think has to be factored in as part of any transitional process where sands are shifting; yet, all parties are keen not to let go of too much ground. It is, however, important that it be recognized for what it is in order to ensure that old politics in slightly newer packaging are not reinserted center stage.

IV. *THE PATTEN REPORT: DEALING WITH POLICING OR A POLICE DEAL?*

In 1997,⁶⁰ the author was among others to argue for a fundamental re-think of the nature of State policing. As a society, Northern Ireland needed to reconceptualize the role played by the police in community safety. The whole notion of community safety⁶¹ itself required to be unpacked. Rather than have “the police” as the focus of debate, a broader conception of policing would allow spaces for all kinds of relationships to be built up. Thinking about priorities, projects, objectives, and activities in new ways had much of value to offer a divided society where many relationships, activities and spaces were characterized by the fear of “the other.” To truly transform this climate of fear and create a community where people felt respected, acknowledged and safe, all options should have been on the table — if only to discard them after informed discussion. In this way, Northern Ireland had the potential to really act as a blueprint for policing changes and new and exciting models of community safety. Despite Patten receiving 2,500 written submissions and holding public meetings attended by 10,000 people from every District Council area of Northern Ireland, despite focus groups, public attitude surveys, cultural audits and visits to every police station in Northern Ireland, that debate is still to be had.

A. *Patten, Human Rights and Community Safety*

The Patten Commission did try to engage with this dynamic at a certain level. When the Commission reported in September

60. See HUMAN RIGHTS ON DUTY, *supra* n.2.

61. See discussion *supra* Part I.

1999,⁶² the Report very firmly situated the debate in the area of community safety. It explicitly talked of “policing” as the issue rather than “the police,” and it claimed to have found policing, rather than political, solutions to policing problems.⁶³

According to Patten, the “fundamental purpose of policing should be . . . the protection and vindication of the human rights of all . . . There should be no conflict between human rights and policing. Policing means protecting human rights.”⁶⁴ The Report talked of the need for professional police officers to “adapt to a world where their own efforts are only part of the policing of a modern society,” and the need to “reorient their approach” to allow policing to become “a genuine partnership for peace on the streets with those who live, work and walk on those streets.”⁶⁵ Very clearly, the Report concluded that “holistic change of a fundamental nature” was necessary. This could not be seen as “a cluster of unconnected adjustments in policy that can be bolted or soldered onto the organization that already exists.”⁶⁶ This analysis was an important one in terms of a post-conflict society. The Patten Commission attempted to shift the focus from an organization, which excited everything from intense loyalty and pride, to equally intense fear and loathing. In so doing, the Report opened up some new spaces for thinking and acting.

The Report exhorted that politics should be taken out of policing in Northern Ireland. While this may have been naïve on one level, in that there will always be some element of politics inherently tied up with State policing, it sent a strong message to government that it should not fall into the trap of tying police reforms to political agendas, and that the changes that needed to be made were valid and vital in and of themselves, irrespective

62. PATTEN REPORT, *supra* n.7.

63. In this context, its recommendation to allow limited tax-raising powers at the district council level in order to help finance local policing needs, as identified by District Policing Partnership Boards, was quite insightful. The recommendation could have helped broaden notions of community safety in that the extra money could have been spent not necessarily on more police service delivery, but on diversionary projects, such as youth clubs. This recommendation was shelved amid scare mongering that money could be raised and used by paramilitaries for their own ends.

64. *Id.* at para 4.1

65. *Id.* at 3, para 1.5.

66. *Id.* at 5, para. 1.8.

of whether the Northern Ireland institutions survived or fell.⁶⁷ Patten's proposals were rooted firmly in principles of human rights aimed at improving the policing service for the whole of society.

However, even with this, the Patten Commission's attempt at conceptual analysis was either missed or ignored by the government in framing legislation designed to implement the Patten recommendations. In the event, there was almost an unseemly rush by government to do just what Patten counseled against — cherry-pick,⁶⁸ politicize the solutions, and use the delivery of changes as negotiation tactics in a wider political arena.

Either Patten had insufficiently made the case for "policing" as the notion to be grappled with, or the government was too wedded to traditional notions of State security to risk handing too much over to "the community." "Policing" was quickly replaced by "police" in the mouth of the media — or the two concepts were used interchangeably, as if they were the same. Symbolic issues of name change and flags were focused upon to the exclusion of some of the newer ideas and approaches — and the public debate regrouped into the same tired "Save our RUC/ Disband the SS/RUC" rut.

On receiving the Report, government first announced a two-month further consultation period. The Patten Commissioners had melted out of sight. There was no one left to explain or justify or build consensus around the proposals. They were left to stand or fall by themselves. The Commission had been tasked with finding means of encouraging widespread com-

67. *Id.* para. 1.10 (stating: "we have not tried to balance what may be politically acceptable to this group against what is reckoned to be acceptable to that."). PATTEN clearly sensed this would unravel the whole carefully crafted package.

68. For instance, the powers of the policing board to hold inquiries were circumscribed by so many caveats as to allow the Secretary of State to prevent any inquiry or investigation by the Board; the term-operational responsibility aimed at ensuring post-facto accountability from the Chief Constable was not put on a legislative footing; very few changes were made to the original 1998 legislation in terms of the Police Ombudsman's powers, and those there were made, actually served in places to dilute her powers still further; Councils were not given power to raise money for spending by the District Policing Partnership Boards ("DPPBs"), restyled DPPs; membership of both the Policing Board and DPPs was to be drawn from a narrower pool than Patten envisaged; Human Rights — the supposed core function of policing — received two mentions in the 2000 legislation: one in reference to the Human Rights Act 1998 and one in reference to the oath/declaration of office. Patten had recommended that all officers take the new oath. Legislation provided that only new recruits should take it.

munity support for policing arrangements.⁶⁹ In this, at least, they failed miserably.

Some of the blame for this being allowed to happen, when there was actually so much consensus within the community⁷⁰ for many of the recommendations articulated by Patten, must rest with the Patten Commission itself. Rather than contextualize its recommendations firmly in terms of what it had heard in its consultation process,⁷¹ rather than justify its conclusions by reference to what it had heard on the streets, in halls, from homes and offices, Patten chose to let the recommendations speak for themselves. In a society historically divided on so many issues, with government clearly desirous to maintain control over the "truth about policing," this was a dangerous strategy. The Commission was aware of the fact that much of its thinking would be conveyed to the public in Northern Ireland through the refracted index of Unionist, Loyalist, Nationalist and Republican media and spokespersons. The potential was always there that this would hive the debate back down the same blind alleys, that only what suited traditional agendas would be thrown out for general consumption. Given the fears and concerns and emotions around policing, and given the transitional context into which it was ushering its Report, the Commission should have invested some time in thinking how to make its transformation fly or at least how to ensure the foundations were strong enough to carry the edifice it wished to construct. The Commission's message might have been more fully heard and implemented if Commissioners themselves had opened up the spaces created by the Report to ownership by a wider section of society. Equality issues around gender and disability, for example, might have provided the gateway to more constructive discussion of what is meant by representative policing, why it is important, and how that might be achieved. The Report contained the seeds to situate policing in a more fluid context, to talk to a more consensual set of agendas, and to develop different understandings in place of fixed mindsets. Had the Commission provided for discussion of elements of its draft Report and looked at ways of building coalitions on the ground to take key elements forward,

69. Good Friday Agreement, *supra* n.3, at 23.

70. PATTEN REPORT, *supra* n.7, at paras. 3.19-3.23

71. Only two pages of the Report are devoted to the public consultation process.

it could have maintained control of the process at a very key stage. This would have made the backlash less credible and the erosion of key elements of Patten less inevitable.

B. Patten – the Lacunae

Patten, however, was also guilty of playing politics, and in doing so missed a strategic opportunity to link in and acknowledge the veracity and role played by the non-governmental (“NGO”) sector⁷² in the area of policing. This legitimization of the role of civil society at an important transitional moment could have carved out a more mainstream and central role for objective analysis during a difficult transitional period. For example, much of what is good about the Report and its principal focus on human rights, actually echoed the content and recommendations of the CAJ-commissioned work, *Human Rights on Duty*, but without acknowledging this. Individual commissioners were full of praise for the authors and the CAJ as to how helpful this work had been to them, but the fact that they did not feel able to acknowledge this publicly on the face of the Report speaks to a notion that the ideas would not “sell” if the source were revealed. From day one, the Report itself was feeding the misinformed notion that those who work credibly and consistently for human rights are not neutral or objective actors with something of value to offer the broader societal project. Rather than setting the record straight in terms of acknowledging constructive input from the NGO sector and civil society in general, the notion that the critics were somehow tainted was allowed to feed the same vilification dynamic which had polarized the debate for years. This transitional moment could have been used to legitimate credible work on human rights issues in a way that was not possible during the conflict. This could have given added impetus to breaking apart the notion that on an official level, for all the talk, human rights were still viewed as a means of providing sops to one community only. That this was not recognized evidences a failure to understand the political landscape into which the Commissioners were ushering their orphaned Report, or to follow the logic of human rights, written large in the Report, through to its necessary conclusions.

72. E.g. Amnesty International, the Human Rights Watch, and the Lawyers' Committee for Human Rights.

In not validating the role and potential role of societal guardians of human rights, the Patten Commission contributed to an atmosphere where many of the human rights gains in Patten were clawed back. Rather than pushing beyond the threshold that Patten provided, the energy of human rights organizations was spent reacting to what government was or was not doing. In time, the focus was so much on the nitty-gritty of trying to at least get the bulk of Patten implemented as a minimum, that this minimum became the endgame. Government had succeeded, even at this level, in narrowing the parameters of the debate from what they should have and could have been. This has resulted in it taking three years to bring legislation and policy sufficiently into line with Patten, and in that Sinn Féin taking its seats on the Policing Board might now be a possibility.

A starker example of the Commission bolstering an old State agenda is that the Report chose not to deal with the issue of emergency legislation, deferring an examination of such laws to another time and place. It could be argued that it is nearly impossible to put human rights at the heart of an organization when that same organization is given extraordinary powers to police in a paramilitary fashion. In the words of McGarry and O'Leary: "An emergency legal regime involving draconian powers inevitably produces excesses by members of the security forces. It may sow dragon's teeth rather than respect for the legal system."⁷³

Far from being something that could be placed in a different compartment, it could be argued that the laws, which give the police their authority, must themselves be audited for human rights compliance to be sure that any new beginnings for policing in Northern Ireland were given room to breathe. The interdependence of reform issues in the transitional context is particularly important to keep in mind given Hadden and Boyle's stark warning: "it is often the views of the security authorities on what should be permitted under emergency and related legislation that determine the law rather than the law which sets effective limits on what the security forces are permitted to do."⁷⁴

The Commission reported at a time when the major parties

73. JOHN MCGARRY & BRENDAN O'LEARY, *POLICING NORTHERN IRELAND: PROPOSALS FOR A NEW START* 78 (1994).

74. TOM HADDEN & KEVIN BOYLE, *NORTHERN IRELAND: THE CHOICE* 98 (1994).

to the Northern Ireland conflict were again on ceasefire. Although killing and brutality continued, it was not on the level of earlier years and certainly not to the extent that it could be said to constitute “a public emergency threatening the life of the [N]ation”.⁷⁵ Much of what alienated large sections of the population from the RUC hinged on the use and misuse of a so-called “emergency” regime, which has been in existence since the inception of the Northern Ireland State in the early 1920s. The Commissioners had heard this time and again in submissions from members of the public and their representatives. Yet, the Commission somehow could not find it in its heart to cross the line the government had drawn in setting up a separate review into “emergency” legislation. In failing to cross this line, the Commission, inadvertently or otherwise, put up a further barrier to the implementation of a new beginning to policing in Northern Ireland.

This tendency towards compartmentalization of issues that are interdependent is further exemplified by the Commission’s attitude to dealing with the past. The Report is quite clear that the Commission’s terms of reference were predicated on future rather than past policing arrangements in Northern Ireland. They were not a Truth Commission or Tribunal of Inquiry, though sometimes it seemed like that, as they heard horrific stories of abuse and ineptitude, from all sections of the community. However, they felt sufficiently convinced that past policing arrangements did not meet acceptable standards for the “new dispensation,” that they advocated a change in name, uniform, oath of allegiance/declaration of office, and substantial changes to structure, training and accountability mechanisms among other things. They talked about “bad apples” and institutional failings, but without examining the structure of the barrel itself. They said bad apples must be dealt with,⁷⁶ but further than this they did not go in terms of how and if such “bad apples” could be firstly identified, and secondly rehabilitated, never mind addressing their minds to the more challenging thesis, which begged the question of institutionalized sectarianism at the heart of the organization. Special Branch was named and shamed; the over-

75. A situation deemed necessary by Article 15 of the European Convention on Human Rights, to justify any form of governmental derogation from its obligations under international human rights law.

76. PATTEN REPORT, *supra* n.7, at para. 5.14.

sight of the Police Authority found sadly wanting; Hayes' recommendations for an Ombudsoffice once again championed — but was this enough to meet the accountability, legitimacy, and credibility deficit, which would stand resolutely in the way of the nascent plans of the Commission ever coming to fruition? Was there not a need to purge in some shape or form? Did past mistakes and wrongs and abuses not need to be at least acknowledged to ensure solid foundations for building trust in new arrangements? Other jurisdictions in transition have seen the need to put in place various mechanisms and processes aimed at lustration and truth recovery. In many places, various forms of truth commissions⁷⁷ have been set up. In some countries, there has been a clear desire to purge any new arrangements of those who have been involved in serious violations in the past.⁷⁸ Amnesties of one sort or another have often been applied.⁷⁹ Yet, one thing that all these jurisdictions share is a recognition that the past will not just go away and that it requires to be worked with. Those processes which have been most successful to date are those which have not sought to divorce truth processes from other reform and transformation issues during the transitional period, but viewed the situation holistically and recognized where lack of movement in one area would have serious consequences for the ability to move in others.⁸⁰

V. *POST-PATTEN PANIC AND THE RE-ESTABLISHING OF THE TRADITIONAL ORDER*

During the period of consultation on Patten, the debate returned pretty much to the level it had been at before the Patten Commission process intervened. There were emotive arguments around the symbols of policing. The media concentrated on the same divisive points of the debate. The RUC was awarded the

77. E.g., Chile, Argentina, and South Africa.

78. E.g., El Salvador.

79. E.g., South Africa, where amnesty was linked to full and frank co-operation with the Truth and Reconciliation Commission.

80. The new Chief Constable of the PSNI, Hugh Orde, has gone on record recently to speak to the need for some means of tackling unresolved cases in Northern Ireland in a more systematic way. The lack of some proper mechanism to progress quite a substantial number of cases, has led to difficulties in implementing other changes needed in policing. He is the first Chief Constable to recognize the potential for some credible, Northern Ireland-specific process, to help him do his job more effectively.

George Cross for gallantry. Government said nothing about those who had been victims of members of the same force.

In January 2002, the new Secretary of State, Peter Mandelson, announced the government's plans for the implementation of the Patten Report. Mandelson's statement was explicitly predicated on full support for the job the RUC had done over the previous thirty years. That Patten had not done this was a deliberate and very important strategy. The Patten Commission chose not to comment on the merit or the weight of allegations against the RUC, nor to heap fulsome praise upon the organization for a reason. It did not feel the need to do so, as it deemed its recommendations valid irrespective of whether the RUC were the "best police force in the world," institutionally sectarian and rotten through and through, or somewhere in between. Politically, this was probably quite astute but for one thing — the fact that where narratives compete, the government has always been very clear which truth should be prioritized. In this instance too, government simply moved back into its traditional space as if the Patten Commission process had never happened. Such are the dynamics of transition — shared understandings must be painstakingly built and consensus is hard won. Where sufficient attention is not paid to the need for parity of esteem at each stage in the process, old power politics will vie to reassert themselves. When this happens before a level playing field has been created, it is undoubtedly the old order that will seep back in to fill any spaces that may appear to exist.

Government's failure to move to a speedy implementation of the Patten package thereby consolidated ownership of the change process in the very bodies that had been responsible for policing prior to the Patten Report.⁸¹ The Northern Ireland Office set up a Patten Action team. The RUC also established a high-level change management team. The two spoke to each other (and the Police Authority) but to precious few others. The draft legislation and implementation plans, when they surfaced, looked like the work of the same people who had resisted much real change prior to the Patten Report — and indeed, they were.

81. This mirrors what happened with the London Metropolitan Police following the MacPherson Inquiry into the death of Stephen Lawrence.

A. *To Implement or to Claim to Implement . . . ?*

A "Policing Board" was legislated for what was essentially a "Police Board."⁸² The District Policing Partnerships, by which Patten had attempted to inject a further level of democratic accountability and a further sense of focus on policing as opposed to the police, bore little resemblance to what Patten envisaged. Most significantly, they were deliberately not given financial power to buy into improved policing services at the district level, whether from the police or elsewhere.⁸³ The Police Ombudsoffice, initially proposed by Maurice Hayes in 1997,⁸⁴ and legislated for prior to Patten in the Police (N. Ir.) Act 1998, continued to be tied very tightly into individual complaints by individ-

82. The Policing Board focused on holding an organization to account, rather than using a policing budget in a much broader way, with the RUC/PSNI being only one aspect of providing a policing service. As Patten stated: "The title 'Policing Board' is deliberate. We see the role of the new body as going beyond the supervision of the police service itself, extending to the wider issues of policing and the contributions that people and organizations other than the police can make towards public safety." PATTEN REPORT, *supra* n.7, at 29, para. 6.10.

83. Patten proposed that these be established at district level to further enhance the democratic process. Established as a Committee of each District Council, the Boards would be made up of elected and independent members.

The Boards should monitor the performance of the police in their districts as well as that of other protective agencies such as the fire service, environmental protection, public health, and consumer protection authorities . . . Like the Policing Board, the DPPBs should be encouraged to see policing in its widest sense, involving and consulting non-governmental organizations and community groups as well as statutory agencies.

PATTEN REPORT, *supra* n.7, at 35, para. 6.29. In particular, Patten recommended that Councils should have the power to raise and contribute initially up to three pence in the £ toward the improved policing of the district, which could enable the DPPB to purchase additional services from the police or other statutory agencies or from the private sector. *Id.* at 35, para. 6.33.

84. Maurice Hayes, The Stationary Office, Belfast, *A Police Ombudsman for Northern Ireland?* (1997) [hereinafter *A Police Ombudsman for Northern Ireland*]. The Ombudsoffice was envisaged as a wholly independent investigatory body for dealing with complaints against the police. These findings were fully endorsed by the Patten Commission: "this Commission as a whole fully aligns itself with Dr. Hayes' recommendations and believes that a fully independent Ombudsman operating as he envisaged in his report should be a most effective mechanism for holding the police accountable to the law." PATTEN REPORT, *supra* n.7, at 37, para. 6.41. *Id.* The Commission further called for "full implementation of his report." Given that legislation had already been passed to establish the office, this must be taken as signaling that the Police (N. Ir.) Act 1998 did not fully implement Hayes, as promised. The powers of the Ombudswoman have proved a key site of contention in terms of the push to have Patten fully implemented and the latest Police Bill arising from talks at Weston Park makes some concession to the need for this.

ual members of the public about individual officers as the way to accountability. The legislation which paved the way for these changes took the form of "Police" Acts.

In introducing the Police (N. Ir.) Bill 2000, government was keen to emphasize how this piece of legislation would implement both the letter and the spirit of Patten. Government constructed and clung to this fantasy,⁸⁵ despite irrefutable evidence that the legislation fell far short of Patten in very many respects. Even after extensive discussion and over 100 amendments, most of them substantive, the legislation still failed to convince either the SDLP or Sinn Féin to commit to taking their seats on the new Policing Board. This did not stop a NIO press statement in July 2000 from claiming: "government fulfils pledges on Patten."

Maggie Beirne, Research and Policy Director of the Committee on the Administration of Justice, commented in that organization's newsletter in September 2000: "If one were to believe the public pronouncements — the government supports Patten and is by and large doing all it can to translate Patten into legislative form . . . in the face of the usual intransigence of competing nationalist and unionist demands which makes progress so difficult."⁸⁶ However, as evidenced by the Good Friday Agreement and the Patten Report itself, human rights training, effective accountability, and a more diverse police service were aspirations shared by unionists and nationalists alike. "The legislation to date must create doubt as to whether these goals are genuinely shared by government and the policing establishment. If government does want to implement Patten, why at this very late stage, and having been forced to introduce more than fifty-two substantive changes, is it still resistant to a whole range of important safeguards that Patten called for? Why is it impossible to get a government agreement to include references in legislation to international human rights norms and standards beyond the Human Rights Act?⁸⁷ Why does government refuse to accept

85. See e.g., Peter Mandelson MP, Statement to Parliament during second reading of Police (NI) Bill 2000 (June 29, 2002).

86. *Policing in Northern Ireland — A Progress(?) Report*, JUST NEWS, Sept. 2000, at 2.

87. The Human Rights Act 1998, which incorporates the European Convention on Human Rights into domestic law, applies across the UK. In committing the RUC to uphold its principles, government was again asking no more than what was demanded of any police force in England and Wales. The transitional context and the need to restore respect for the rule of law were simply written out of the picture. Indeed, there was a sense, voiced by a government minister during the House of Lords Debate on the

that the Northern Ireland Human Rights Commission could have a useful role in advising on the guidance for public order equipment? Why are effective inquiry powers for the Policing Board consistently opposed? Why is the Secretary of State so adamant that the Police Ombudsperson cannot have the powers to investigate police policies and practices that Patten called for? Why was the appointment of the Oversight Commissioner so long delayed and why is his term of office so curtailed in the legislation? Not one of these issues could be said to divide Nationalists and Unionists, yet they clearly divide those who want to protect the police from external scrutiny and those who want to open the police up to greater such scrutiny.⁸⁸

The majority of Patten's 175 recommendations did not make it into legislation. They were dealt with by way of an implementation plan drawn up by the NIO. This implementation plan, not surprisingly, gave lead responsibility for auctioning many of the proposals to the Chief Constable and the NIO.⁸⁹ Even when this plan was reissued in 2001, lead responsibility for the Patten recommendations on community policing, normalization, and policing structures, for example, continued to be vested in the Chief Constable. Although reference to the responsibilities of the Policing Board did improve markedly between the two drafts, there was still much that could and should have been within the remit of the Board, rather than the Chief constable and the NIO. Given the very heated debate on the composition and role of the Board that had dogged government through the enactment of the Police (N. Ir.) Act 2000, one must assume that this was not an oversight. Instead, it appeared that the government did not foresee the Board having any major re-

Police (N. Ir.) Bill 2000, that making reference to international human rights standards on the face of the legislation "could cause unnecessary offence," as it might invite unwarranted comparison between the past behavior of the RUC doing "a difficult job, often in impossible circumstances" and appalling human rights abuses in other parts of the world.

88. Although the SDLP did eventually take their seats on the Policing Board, at the time of writing Sinn Féin have yet to do so. Changes to legislation aimed at redressing some of the issues pointed to in Maggie Beirne's article when the original legislation was before Parliament, are soon to come into effect. This may leave the way clear for Sinn Féin to come on board three years on. It begs the question, however, as to why these same amendments were so fiercely resisted in the first place.

89. This plan was revised after much lobbying in August 2001, but several problems identified in the first draft by human rights organizations, like the CAJ, were not resolved before re-issuing.

sponsibility in a number of areas, from creating an unarmed police force, to establishing a police appraisal system, to integrating the work of Special Branch more fully into the organization.

The role of Oversight Commissioner was even more pointedly played down in the two implementation plans. In a document over sixty-five pages long, government saw fit to refer to the existence of the function in only two places.⁹⁰ The main and only reference to make it into both versions of the plan referred to the need for the Commissioner to play a role in encouraging Catholic leaders to remove obstacles to their co-religionists serving in the police. Rather than being the catalyst to transformation envisaged by Patten, the implementation plan saw the Commissioner's major contribution as one of a public relations nature.

B. *Accountability from Without: The Office of Oversight Commissioner*

This attitude denigrates the potentially valuable contribution consistent, coherent, and effective outside scrutiny can make in ensuring an effective transition. Although the Patten Commissioners themselves left Northern Ireland very quickly, they did leave a legacy in terms of their recommendation that an Oversight Commissioner be appointed to copper-fasten the changes proposed and ensure a real and visible high-level scrutiny of the process. Patten had recommended that this person be appointed "as soon as possible" with responsibility for "supervising the implementation of our recommendations."⁹¹ The failure to appoint such a Commissioner until June 2000, months *after* the consultation process on Patten, and at a stage when legislation had been drafted and debated in Parliament and an implementation plan had been drawn up by civil servants, is one of the most disgraceful aspects of the post-Patten process.

By the time Tom Constantine⁹² was appointed, Patten was virtually unrecognizable in the draft legislation and implementation plan put forward by the government. Officialdom had repackaged Patten in their own image and likeness. Yet, it was the

90. Apart from those concerned with the setting up of the office.

91. PATTEN REPORT, *supra* n.7, at para. 19.4.

92. Tom Constantine, former head of the U.S. Drug Enforcement Agency, was selected as Oversight Commissioner in June 2000.

legislation and implementation plan that Constantine took as his brief. When it was pointed out to him⁹³ how valuable and indeed, necessary, it might be for him to consider how far draft legislation implementation plan fell short of truly implementing the Patten Report, he refused to contemplate this as coming within his remit. Essentially, his argument was that he had no democratic mandate to substitute his views for those of an elected legislature. On one level, his logic is quite proper and understandable. However, most of the maneuvering and sand-shifting that was going on, was at the level of the Executive and its advisors. The majority of MPs in a Westminster Parliament would not be familiar enough with the problems, or sufficiently concerned with the details, to either realize or to care about what was happening. Given the circumstances pertaining in Northern Ireland at that time, and the need not to allow the same traditional mistakes to be made, this attitude of the Oversight Commissioner actually impacted quite significantly on whether he would be able to provide true oversight of the Patten implementation process. If the legislation (though not the be-all and end-all, still a very significant tool in both symbolizing and effecting a new beginning and a break with the past) failed to grasp the nettle, if it did the cherry-picking thing that the Patten Commission had counseled against, and if the implementation plan did the same, then the whole nicely-packaged bundle was already being unraveled, and its impetus rendered impotent from the start. Government was sending out an important message in throwing the whole thing back into the party political arena and this could only stymie and frustrate a real and holistic process of change, capable of bringing the police and the policed along with it. The Oversight Commissioner was strategically well-placed to raise these issues and have them taken onboard. He could have alerted the legislature to a need for greater vigilance. He did neither. Rather than look at the vehicle for change in terms of its roadworthiness, Constantine preferred to leave both the design and the mechanics of the process in the same hands that had driven policing prior to the Patten Report. He saw his role as ensuring that these people did what they said they were going to do, not look behind that to see if what they said they were going to do was going to do it!

93. During an initial meeting with CAJ soon after his appointment.

In keeping with this same narrow reading of the situation, Constantine chose not to utilize a partnership approach to the oversight process. This could have drawn on local strengths and knowledge to complement international expertise and help test the feasibility of Patten's proposed partnership approach to policing generally. The Commissioner seemed to believe that outreach to the policed was important — but did not see it as impacting on his role. Instead, Tom Constantine gathered around him a cohort of white North American males with a combined 221 years policing experience behind them. This is certainly one part of an effective dynamic — but the process is poorer for assuming it can be an effective dynamic in and of itself. An expert “police” mindset was once again applied to a policing “problem,” with this team largely considering it unnecessary to meet on a regular basis with anyone other than the policing establishment. A partnership approach to oversight could have had real and symbolic value during this period of transition. The opportunity to capitalize on either aspect was missed.

Instead, in his second report,⁹⁴ the Oversight Commissioner set out 772 performance indicators developed by his team and “those individuals who will be subject to the monitoring process” and based on the 175 recommendations of the Patten Report. By involving the police and policing authorities but not the policed in the development of these indicators, this approach was unlikely to encourage the shared ownership of the policing project so valued by Patten. The oversight process set itself up to verify administrative compliance with each of the performance indicators. This would be followed up by “selection of a number of high priority recommendations . . . for in-depth analysis by personal evaluation and onsite field visits”⁹⁵ three times a year during the team's ten-day visits to Northern Ireland. This approach placed the process firmly in the professional managerialist policing position, with an Oversight Commissioner concerned with the need to tick boxes and move on. It did not bode well for the Commissioner's function, providing “an important impetus to the process of transformation,” rather than a “stocktaking function”.

94. OVERSIGHT COMMISSIONER, OVERSEEING THE PROPOSED REVISION OF THE POLICING SERVICE OF NORTHERN IRELAND (Sept. 12, 2001).

95. OVERSIGHT COMMISSIONER, OVERSEEING THE PROPOSED REVISION OF THE POLICING SERVICE OF NORTHERN IRELAND (Dec. 4, 2001).

This “tick box” and “compartmentalized” approach is further borne out by the allocation of responsibility for different recommendations to specific team members. For example, David Bayley is charged with responsibility for oversight of the human rights recommendations. These are referred to as “the Patten seven” among those responsible for change. While it is true that the first seven recommendations come under the heading of “Human Rights” in the Patten Report, there is a danger that a true inculcation of human rights into the whole process suffers as a result of this compartmentalization. The approach of the Oversight Office has perhaps contributed to just such a compartmentalization — putting things back in boxes, rather than helping us think out of boxes. In this, the oversight project mirrored in many ways what government and the police had been doing for years. The Oversight Commissioner took over the mantle, giving an “external” gloss to the same old dynamics. Change is undoubtedly happening. The Oversight Commissioner’s reports attest to that, as does the experience of police officers both driving, and subject to, that change.

However, the Oversight Commissioner’s latest report, while praising both the police service and the Policing Board for their dedication and commitment, highlighted a number of areas where change had not happened as fast or to the extent expected. The failure to more actively involve the community in the change process is not however highlighted as a possible cause of this. Instead, the press statement accompanying the Report concluded: “Recent surveys clearly demonstrate that the primary policing issues of the citizens of Northern Ireland are related to their concerns about drug trafficking, street violence, extensive community violence and punishment beatings.” Paradoxically, these are the same factors that can adversely affect the progress of implementing the Independent Commission’s recommendations.

Addressing these concerns requires a well-led, fully supported and professional Police Service. It is important at this critical juncture of the crime problem in Northern Ireland and the reforms in policing for the entire community to provide the necessary support.⁹⁶

This places the Oversight Commissioner firmly in the camp

96. OVERSIGHT COMMISSIONER REPORT (Dec. 2002).

which sees a changed environment as the means to more extensive police change. His statement provides just the latest example of an official willingness to blame the community, rather than engage with the issue of why full and fulsome support for the police is still not there.

C. *Accountability From Within — The Policing Board, Operational Responsibility, the Office of Police Ombudswoman and Policing Partnerships*

The stance of the Oversight Commissioner makes it even more important that domestic accountability structures are, and are seen to be, “of the community.” Particularly in a society in transition, there is a need to distance the police from identification with any one section of the community or any one political agenda. Effective oversight is, in the words of Hugh Orde, “not about cozy relationships.”⁹⁷ It is not about defending the police in the face of criticism, a misguided strategy much beloved of the erstwhile Police Authority of Northern Ireland. Not only are critics unconvinced by such an approach, but in the long run, it serves to delegitimize the very structures established to ensure as much transparency, openness, and accountability as possible. Effective oversight is about ensuring a broad societal stake in a democratic policing process. It is about providing accessible channels where concerns can be aired and accorded due weight. It is about the development and maintenance of systems, which hold police organizations effectively to account whether on the use of resources, the manner in which services are delivered, or the attitudes and actions of staff. If these systems themselves function in a broadly democratic, inclusive and open manner, and aggregate with other related systems around common human rights principles, the potential is there to do three things. Firstly, such systems can accord police their due place in ensuring community safety for all, and help facilitate learning on all sides from closer involvement of the community in the broader policing project. Secondly, those who would tend to support the police can be assured that a healthy dynamic exists to ensure that the police continue to perform their function in an atmosphere which is both supportive and challenging.

97. Hugh Orde, Speech at the SDLP conference on the Future of Policing, Wellington Park Hotel, Belfast (Mar. 2003).

Thirdly, and of particular importance in a transitional society, those who have historically felt alienated from the forces of “law and order” and indeed, the nature of that “law and order” itself, can begin to trust and ultimately become involved in the policing project on equal terms.

It was for these reasons that Patten recommended the substitution of PANI⁹⁸ by a new Policing Board, comprised of ten members of political parties and nine independents. This eventually came into being on November 4, 2001, and has recently produced its first policing plan under the Police (N. Ir.) Act 2000.⁹⁹ However, despite government feeling that its job is somehow done by virtue of providing such a structure, the Policing Board cannot be seen as the finished product in terms of establishing credible accountability systems. Although the Board does provide a great advance on what went before, it must be recognized that the establishment of such a Board is not an end in itself. It is only as innovative and dynamic as the measure of trust and the levels of real accountability that it can establish.

While vaunting the Board as the best example of its type anywhere in the world,¹⁰⁰ it has to be recognized that government is still being dragged kicking and screaming to the point of actually freeing the mechanism up to become as effective as it might be. For example, the Board’s composition lacks the diversity and pluralism that might have been hoped for. There are only two women members and many of the “independents” have clear party political affiliations. The majority of the independent appointments have a business background, with only one having had obvious involvement at local community level. Human rights groups, the media and trade unions are among

98. Reportedly, one of the last actions of PANI was to purchase 50,000 plastic bullets — enough to last at the current rate of usage for up to fifty years! The timing of the action clearly meant that the police would have access to this weapon for the foreseeable future. “It is interesting that at precisely the time that the government reassures the public that it is actively considering alternatives to plastic bullets [through the Steering Group on Plastic Bullets], the public purse is paying out major sums of money to purchase advance stocks of the weapon.” M. Beirne, *Agenda for Policing Change?*, *JUST News*, Nov. 2001. A further issue raised in this Article is that as accountability in terms of police use of plastic bullets has increased, the weapon comes to be used more and more by the army, acting in a supporting role to the police and not subject to equivalent scrutiny.

99. Northern Ireland Policing Board, *Policing Plan 2002-2005* (2002).

100. Reference is made to Peter Mandelson and various government ministers during passage of Police (N. Ir.) Bill 2000.

the key social sectors not represented. Already, in its short existence, there is evidence that the Board is being expected to act within the parameters of a restricted remit.¹⁰¹ The concept of “operational responsibility” proposed by Patten as a post-facto account-rendering mechanism that would trump the previous silence in respect of operational matters, has got somehow lost in the translation of the Policing Board into practice. Government’s veiled opposition to giving too much space and power to the Board must not be underestimated. The Board will need support and courage to be dynamic and proactive in carving out a much bigger space for itself in the accountability sphere than did its predecessor. Calling the Chief Constable to account in a previously forbidden sphere such as operations and the ubiquitous national security catch-all will be the test of the Board’s mettle. To fulfill its remit, a break with the past must be obvious to all.

Part of the long process of establishing credibility and trust will involve the Board incorporating, facilitating, and including voices not currently willing or able to be heard in this forum. This includes Sinn Féin, but is by no means restricted to them. This must happen despite and because of the fact that many of the changes the Board must presage in terms of conversations around policing are deemed in official discourse to already have happened by virtue of the Policing Board’s very existence. While providing the germ of much enhanced democratic oversight of policing, the Board needs to recognize the obstacles still to be surmounted.¹⁰² The danger is that it will become inward looking and defensive, or that the harping back to the “good old days” discourse will be allowed to predominate by virtue of its adherents shouting the loudest, and already being more than familiar with the same old tune.

The Board must build important relationships not only with the police and the broader community, but with other structures and mechanisms dealing in some measure with the issue of po-

101. This is evidenced, for example, in a trenchant refusal to concede to amendments to legislation, which would increase the Board’s powers to the level envisaged by Patten.

102. In the Board’s handling of the Omagh affair (see discussion *infra*), and in the unseemly sniping of some of its members at the appointment of the new Chief Constable, it would seem that party politics still seem to dictate levels of exchange on many issues.

licing. The compartmentalization of such bodies must be broken down. A historical official tendency not to cross artificially constructed lines must be banished. Overlapping and symbiotic relationships need to be built and enhanced among the many facets of the criminal justice system and beyond. Protocols, guidelines and working agreements germane to the issues and needs of Northern Irish society must be painstakingly worked out. The potential of the current peace process to succeed where others have failed is tied up in the recognition that, in this time of transition, things might need to be done differently in Northern Ireland than in the rest of the UK or Ireland.

D. *A Police Ombudswoman for Northern Ireland*

The beginnings of this process are evidenced in the establishment of an Ombudswoman to deal with complaints against the police. For many years, the issue of the police complaints system had been identified as a key area needing reform. This issue was a prominent theme in the policing debate, with a great many commentators¹⁰³ calling for the introduction of an independent complaints mechanism with significant powers.

Government had revisited the vexed issue twice since the 1970s, but its policy had been to tinker with the system and to establish structures and systems very much in keeping with the prevalent models in England and Wales. Again, the approach was technocratic and very little thought was given to the Northern Ireland context or its particular requirements in terms of civilian oversight of the police complaints system.

In 1995, the UK government commissioned Maurice Hayes¹⁰⁴ to conduct a review of the police complaints system in Northern Ireland and make recommendations for change. Hayes reported in 1997¹⁰⁵ to the new Labour Government that

103. See reports issued by CAJ in 1990 and 1993. See also HAMILTON, MOORE & TRIMBLE, CENTER FOR THE STUDY OF CONFLICT, *POLICING A DIVIDED SOCIETY: ISSUES AND PERCEPTIONS IN NORTHERN IRELAND* 149-50 (1995).

104. A former Ombudsman for Northern Ireland. His brief was to recommend changes that would attract both public and police confidence in the system, protect officers from malicious complaints, accommodate complaints about standards of service and policing policies, and offer a service that was accessible, efficient, and easy to use. Maurice Hayes has frequently commented that if the government had spent £3.50 at this stage to buy the CAJ publication on the issue, they could have saved themselves a lot of time and money.

105. *A Police Ombudsman for Northern Ireland*, *supra* n.84.

the system in place in Northern Ireland at that time was utterly failing to induce the public or police confidence necessary for its effective functioning. In its place, he proposed the institution of a Police Ombudsman for Northern Ireland to have much greater powers than the Independent Commission for Police Complaints, and to use these to take full responsibility for investigation and oversight of police complaints. Notably, he pointed out the flaws in a system in which a police force investigated complaints against its own members, particularly in a society where a section of the population completely distrusted the police force and where there was a particularly low substantiation rate,¹⁰⁶ even with “independent” oversight. Hayes drew on best practice in a number of other jurisdictions and built on the international trend¹⁰⁷ towards increased civilian involvement in this contentious area.

More specifically, Hayes recognized the need to locate his review of the complaints system squarely within the overall context of reform.¹⁰⁸ He stressed that “. . . no complaints system, however sophisticated, will compensate for failure to reach a satisfactory resolution of the broader questions of structure, management and political accountability.”¹⁰⁹

The Ombudsoffice proposed on the face of the Police (N. Ir.) Bill 1998 was virtually unrecognizable from the strong and independent model of Hayes. Key powers had been diluted or simply not provided. There was little that indicated that this office could provide the break from the past necessary to ensure this office would succeed where its predecessors had failed.¹¹⁰ It appeared that the government still clung to a policy of not want-

106. The rate was less than 1%, with no complaint of assault during the course of arrests under the Prevention of Terrorism Act ever established, despite vast sums of money paid out in civil damages in respect of just such allegations.

107. See A. GOLDSMITH, COMPLAINTS AGAINST THE POLICE: THE TREND TOWARDS EXTERNAL REVIEW (1991); C. Lewis, Unpublished PhD in Philosophy Thesis (1997).

108. At the time of his report, this included the NIO's efforts to change the tripartite accountability system and the RUC's *Fundamental Review of Policing*.

109. HAYES REPORT 2 (2000).

110. See Mary O'Rawe & Linda Moore, *Police Complaints in Northern Ireland: Leaving the Past Behind?*, in CIVILIAN OVERSIGHT OF POLICING: GOVERNANCE DEMOCRACY AND HUMAN RIGHTS (Andrew J. Goldsmith & Colleen Lewis eds., 2000) [hereinafter *Police Complaints in Northern Ireland*] for a more detailed discussion of government policy to “apply British solutions to Northern Irish problems.” Dr. Colleen Lewis has also pointed out the tendency of governments the world over to set up civilian oversight institutions to fail by allocating insufficient powers, resources, etc. . . This phenomenon

ing to do anything too differently in Northern Ireland even as it was breaking with precedent in giving Northern Ireland its own custom-designed police complaints system.

Patten fully endorsed the Hayes recommendations, by implication rejecting the 1998 legislation as an adequate enactment of what Hayes had proposed. The importance of this institution to the effective governance of Northern Ireland was recognized in Recommendation 38 of Patten.

Further powers were provided, after extensive lobbying, in the Police (N. Ir.) Act 2000, and new clauses are currently under discussion in the hope of improving her powers still further. It does, however, appear that the government is still resistant, and continuing to view enhanced powers to such bodies as concessions rather than what is necessary to ensure that the office succeeds.

The Ombudsoffice opened its doors on November 6, 2000. Again, much goodwill surrounded its establishment, though doubts continued to persist on all sides as to the extent to which it might signal a break with the past.¹¹¹ Though on a surface level very accepting of the new organization, a very negative police view of the Ombudsoffice also persists. This was perhaps evidenced most strongly in the Ombudsoffice's most controversial outing to date. This involved the use of the "own motion" powers contained in Section 55(6)(b) of the Police (N. Ir.) Act 1998. An investigation was conducted into the RUC handling of events around the Omagh bombing of August 15, 1998, in which thirty-one people, including two unborn children, were killed. The resulting report¹¹² raised serious concerns as to how RUC Special Branch had handled information given to them prior to the bombing, and how the investigation following the bombing had been hampered by the failure of Special Branch to hand over relevant information to the criminal investigation team. The report concluded, among other things, that the leadership of Sir Ronnie Flanagan, then Chief Constable, was flawed. This unleashed a huge backlash against the Ombudsoffice and its integ-

is due to a focus on a short term political agenda too placatory of police views and attitudes. Dr. Colleen Lewis, Address to IACOLE Conference, Virginia (Sept. 26, 1996).

111. Especially as a number of staff simply transferred from the old ICPC to the supposedly "all new" system. For a fuller discussion, see *Police Complaints in Northern Ireland*, *supra* n.110.

112. Dated December 12, 2001.

rity. The very existence of such a report created enormous controversy, with the Chief Constable denouncing its findings as unfair, and the Ombudswoman's investigation as less than rigorous. He claimed not to have been interviewed in relation to the Omagh investigation, or given a chance to respond prior to the report being published. Rather than accepting that mistakes were made and that systems were less than perfect, the Chief Constable's response was to state he would commit public suicide if the report's claims were true. Thus, in a time-honored tradition, the Chief Constable of the day attempted to deflect attention from the shortcomings of his force and to point the finger at the Ombudswoman for her failure to understand how the police have to operate in the face of a terrorist threat. Amid intense personal and professional vilification of the Ombudswoman, the Police Association launched judicial review proceedings aimed at declaring the Omagh report null and void. These were eventually dropped only in January 2003, and the findings of the Omagh report vindicated. By this time, the media had lost interest in the story and the damage visited on the credibility of the office by months of constant haranguing had already taken its toll.

The lessons of this whole affair are salutary. They point to a degree of discomfort and simmering anger about a change process, which on a surface level is accepted. The backlash against change partly contests what the Good Friday Agreement stands for, and continues the fight as to what the conflict was about. It is very much in keeping with a society in transition that institutional power cleavages within that society feel the need to flex their respective muscles as the old, the new, and the not-so-new vie to amass control of a fluid situation post-conflict. In such transitional spaces, a lot of power seems "up for grabs." The extent to which this is truly the case is the extent to which government proactively supports its new improved systems in the face of traditional loyalties and allegiances. The Policing Board and the Secretary of State are certainly not beyond criticism in how they responded to the very public controversy created by the report. There should have been mechanisms put in place to verify the accuracy or otherwise of the Ombudswoman's findings at the earliest juncture. The Government and the Policing Board would then have been in a position to stand over her recommendations where they related to preventing similar occurrences in

the future. Although a number of recommendations were eventually acted upon, in many ways, the Ombudswoman was allowed to be isolated and fight her own corner. This does not contribute to public faith in the process. It can only detract from faith in the Ombudswoman herself, when the very Government which set up the office appears less than willing to ensure its effectiveness.

Another myth exposed by the Omagh controversy is the degree of acceptance around a notion of change that goes right to the heart of the policing establishment. The events, as they unfolded, provide real evidence of how difficult it is (despite the rhetoric of management, professionalism and openness to the new dispensation) for the PSNI to change.

E. District Policing Partnerships and Community Safety Committees

A third strand to the Patten Report's accountability framework was the creation of District Policing Partnership Boards.¹¹³ These were intended to take democratic participation in policing to the most local of levels. Partnership is another of the buzzwords of the change process that the police claim to have taken to heart. Prior to Patten, the existence of Community Police Liaison Committees in certain areas was what the police pointed to as evidence that they did, indeed, have such partnerships with the community. Traditionally, however, Community Police Liaison Committees ("CPLCs") had widely been considered as little more than talking shops, and very few Nationalists would have considered being part of such structures.¹¹⁴ The Hayes Report on police complaints suggested that CPLCs should be more involved in monitoring police behavior. Hayes felt that a strengthened accountability framework might both see them function more effectively, and generate possibly greater support for them as a result. Patten, though not arguing that existing CPLCs should be disbanded, felt that in and of themselves, they could never provide a solution to the local democratic accountability deficit. However, while advocating that district partnership bodies be set up as part of local council structures, Patten

113. Now legislated for as District Policing Partnerships ("DPPS") under the Police (N. Ir.) Act 2000.

114. The Social Democratic Labor Party described them as "essentially RUC public relations activities" that "cannot by any stretch of the imagination be regarded as a basis for accountable policing."

stopped short of advocating that these should be anything other than consultative and advisory. There was one useful and innovative function they might have served in terms of broadening the community safety agenda. Patten advocated that they be financed to spend some money on policing initiatives other than the police. This function was deemed a bridge going too far by government, and was never provided to them. Already, it appears that the recruitment drive has appealed to a fairly narrow section of Northern Irish society with few applications from women, young people or Nationalists, for example. This said, a policy decision appears to have been taken by the Policing Board to appoint women, and particularly Catholic women, when they did apply. This has resulted in 30% of the membership of the DPPs throughout Northern Ireland being women.

In the power politics that will continue to play out around policing, it is important that DPPs (and indeed the Policing Board) do not see themselves as the sole and only authentic voice of the community in respect of policing. It is incumbent on such bodies not to be a barrier to dialogue or to view themselves as having all the answers. History has shown the dangers of allowing elites to exist where policing is concerned. To really signal change, such bodies need to be a conduit and a facilitator of voices other than those of their own members. If they do not do this, another level of bureaucracy is provided, another box is ticked, and we move on with more systems but not necessarily an open and credible process. Such bodies must also be wary of sticking too closely to the official line if they, themselves, are to help usher in a transformation so contested by officialdom.

Alongside these fora, operating in a parallel universe, are Community Safety Committees, which have been established as a result not of Patten, but of the Criminal Justice Review. The existence of these two sets of bodies attests to the continuing desire to keep issues compartmentalized. The NIO retains much more control of this latter process — and it is here that funds seem to be available to spend on community safety initiatives approved by the powers that be. The acronyms may change, but the same bodies maintain control of the process and the purse strings. The narrative of policing change is still being dictated by government at very many levels.

Whatever the practical and policy explanations for such an approach, the fact remains. If government is truly serious about

a holistic approach to change, groups involved in community safety at a local level provide a key area where cross-fertilization of ideas, expertise and co-operation needs to take place. The longer these bodies are allowed or facilitated to operate in isolation, the stronger the sense of their own individual identities will be. Turf wars based on a reluctance to give up territory or encroach on that of others are a more likely outcome of such a policy, than increased and inclusive community safety for all. If they do not relate successfully to and with each other, DPPs and Community Safety Committees will have less chance of working in real and inclusive partnership with the broader voluntary and private sector.

A police view expressed several times in the past few months¹¹⁵ is that communities are being provided with every opportunity to engage with the police. If they choose not to do so, if they fail to come on board, then they can expect “old style” policing. There is not yet a sense within the organization that outreach to the marginalized and facilitation of dissent comprise a key strand of partnership-building. Nor is there yet a voiced recognition that “old style” policing may well have something to do with why a number of people may still be very unsure about giving credence to partnerships that have not yet proved their worth.

F. *Change Management or Stage Management?*

All this is not to say that there has not been change. For the RUC, now PSNI,¹¹⁶ in particular, the pace of that change has seemed very fast, to the extent where officers can still arrive into work one morning to discover that their job specification has completely changed or does not exist anymore. Organizational systems and structures are very much in flux, and ineffective internal communication systems do little to reassure employees that their concerns about change are taken seriously or even understood. Many in the force see the changes as the result of pandering to politicians and feel that rather than politics being taken out of policing, it has been put center-stage, sometimes in

115. The view was expressed by several participants and trainers at observed sessions of the Course for All throughout Northern Ireland, held in February/March of 2003.

116. Since November 4, 2001.

direct opposition to the effective carrying out of their policing role.¹¹⁷ The force has effectively downsized, with many officers taking early retirement and generous severance packages recommended by the Patten Commission.¹¹⁸ This, with an established time-limited procedure for 50:50 recruitment of Catholics and Protestants, the high rate of sickness-related absence, and the fact that hundreds of posts have still not yet been civilianized, has contributed to a consistent police refrain that the organization is dangerously overstretched and under-resourced at this difficult time.¹¹⁹

The police have not been idle as regards pushing change forward in keeping with the phenomenon pointed to in the Introduction. They have carved out a high degree of process ownership through the establishment of committees and working groups and change implementation teams. There have been training and development strategies, community partnership documents and paperwork galore. There have been conferences on human rights, ethnic minorities and young people. There have been trips hither and thither with the policing board to look at new models and different plans. There has been a toning down in the stridency of security measures. Castlereagh and other holding centers have been closed. Fixed checkpoints and security presences have been removed. The training has changed. A human rights legal advisor has been appointed.¹²⁰ The uniform has changed, the badge has changed. The name has changed. A new Code of Ethics is in place and the public relations companies have been employed. Here, too, we get into problems, because while all this has been happening, a lot has stayed the same. Special Branch remains unreformed. Consultation and partnership have remained on a very police understood level. And the cynical might say, the whole exercise has been one of re-branding, rather than substantive change. Heck,

117. Concerns raised by participants during observed training sessions in February/March 2003.

118. The RUC numbered 8,489 when replaced by the PSNI. In 2001, the number of regular officers was 7,810. Prior to 1970, the RUC had never exceeded 3,500. Patten recommended a full time force of 7,500 as adequate to police Northern Ireland.

119. The full-time RUC Reserve, which Patten recommended should be disbanded, is still in existence to meet the perceived deficit elsewhere.

120. In October 2001.

they have even won awards for rebranding the RUC as PSNI.¹²¹ It is by no means a case of the emperor's new clothes, but pretty stitching is not any guarantee of a garment that will wear well. In fact, it can be argued that pretty packaging can actually be dangerous if it serves to distract from the content and substance of change.

Already, we're exporting our brand — look at our training, our selection process, our this and our that — with little regard for whether we've got it right or not. Meanwhile, everyone is encouraged to get on board and give support, without any realization that how the change is owned, managed, and packaged has a very significant impact on whether people feel able and enabled to get on board.

VI. TOWARDS A BETTER TRANSITIONAL BLUEPRINT

Whether change has been managed effectively to date very much depends on what is wanted from that change. Northern Ireland is in a position where government and police are exasperated by calls for more and more changes. As far as they are concerned, change is in hand and much has already been accomplished. In many ways, human rights can provide both an important tool in evaluating change to date, and a means of achieving and verifying change, which still needs to occur. However, there is a sense in which Northern Irish society has not yet fully aggregated around a coherent human rights discourse, which can only be used to build legitimacy if it is not co-opted for narrow political ends.

A. *Human Rights — Can the Discourse be Made Real?*

NGOs have criticized the RUC in the strongest terms over the years,¹²² and international bodies such as the U.N. Committee on the Rights of the Child,¹²³ the European Court of Human

121. Weber-Shandwick recently won the Public Relations Institute of Ireland Prize for their rebranding of the RUC.

122. See e.g., Amnesty International, *Political Killings in Northern Ireland*, EUR/45/01/94 (1994); HUMAN RIGHTS WATCH, *TO SERVE WITHOUT FAVOR: POLICING, HUMAN RIGHTS, AND ACCOUNTABILITY IN NORTHERN IRELAND* (May 1997). See also COMMITTEE ON THE ADMINISTRATION OF JUSTICE (1988); *POLICE ACCOUNTABILITY IN NORTHERN IRELAND* (1990); *CAUSE FOR COMPLAINT: THE SYSTEM FOR DEALING WITH POLICE COMPLAINTS IN NORTHERN IRELAND* (1992).

123. See e.g., Consideration of Reports Submitted by States Parties Under Article 44

Rights,¹²⁴ and the U.N. Committee Against Torture¹²⁵ have found the UK wanting in terms of policing Northern Ireland. Largely, constructive recommendations went ignored and report after report was left to gather dust on shelves in the offices of Whitehall. The Good Friday Agreement provided an opportunity for government to write these concerns into the discourse in a way that recognized their potential to provide better policing for all.

Transitional societies need to recognize the tendency of government to compartmentalize issues for good reasons and bad. In particular, the Northern Ireland experience would indicate the folly of trying to deal with policing in a vacuum or in the context of a security led agenda.

Human rights can provide a valuable tool to mobilize consensus around changes for the good of the police and the policed alike. There are a number of international conventions¹²⁶ devoted to instilling minimum standards of behavior at the heart of State governance. There is also a growing number of documents which are police-specific.¹²⁷ These speak to the principles of legitimacy, transparency, accountability, proportionality, and necessity. Case law from the European Court of Human Rights, notably *Kelly v. UK*,¹²⁸ and a range of related cases dealing with a State's duties in respect of the right to life, take the process a stage further in spelling out key obligations in terms of investigation, information, independence etc., which must inform police

of the Convention, U.N. Committee on the Rights of the Child, 8th Sess., U.N. Doc. CRC/C/15/Add. 34 (1995).

124. *See e.g.*, Ireland v. UK, 2 Eur. Ct. H.R. (Ser. A) 25 (1978); Brogan and others v. UK, 11 Eur. Ct. H.R. (Ser. A) 117 (1988); Murray v. UK, 222 Eur. Ct. H.R. 29 (1994).

125. *See e.g.*, Report of the Committee Against Torture, U.N. GAOR Committee Against Torture, 20th Sess., Supp. No. 44, U.N. Doc. A/53/44 (1998).

126. These are, for instance, the European Convention on Human Rights, and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, etc.

127. From the U.N. Code of Conduct for Law Enforcement to the European Declaration on the Police 2000.

128. McCann and Others v. UK, Judgment of Sept. 27, 1995, Series A, no. 324; Kaya v. Turkey, Judgment of Feb. 19, 1998, REP. OF JUDGMENTS AND DEC. 1998-I; Kelly and Others v. UK, Judgment of May 4, 2001; Shanaghan v. UK, Judgment of May 4, 2001; McKerr v. UK, Judgment of May 4, 2001; Hugh Jordan v. UK, Judgment of May 4, 2001; No. 37715/97, [Sec. 3], Judgment of May 4, 2001; McShane v. UK, Judgment of May 28, 2002.

practice in order to bring it into line with international human rights obligations.

For example, where a person is deprived of his or her life, of necessity there must be "some form of effective official investigation."¹²⁹ The essential purpose of the investigation is "to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility."

The investigation must also be categorized by

a sufficient degree of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.

The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved . . . to the extent necessary to safeguard his or her legitimate interests.¹³⁰

The State's obligations cannot be satisfied merely by awarding damages.¹³¹ In the course of such judgments, the Court has laid down clear and practical guidance for dealing with issues of police practice, and has spoken of a need to stop ignoring past abuses. Such narratives must be given their place in transitional societies in a way which does not see them compromised or co-opted for short term political advantage.

In order to prevent this happening, transformation in policing necessitates some process of truth recovery. This requires a safe space in which all stories can be told but more than this, there needs to be public and official acknowledgement of the different truths experienced by different people. International obligations require, as a minimum, that States undertake an effective and prompt investigation process into establishing those truths. This is all the more important where official discourse has been bound up with denial of real experience. Official discourse in Northern Ireland has, too often, allowed one "truth" or one version of events to be prioritized and accorded more respect. This dominant truth has, historically, admitted no space

129. *McCann v. UK*, at para. 161; *Kaya v. Turkey*, at para. 105; *Kelly v. UK*, at para. 94; *Shanaghan v. UK*, at para. 88; *Jordan v. UK*, at para. 105; *McKerr v. UK*, at para. 111; *McShane v. UK*, at para. 94.

130. *Kelly v. UK*, at para. 98; *Shanaghan v. UK*, at para. 92; *Jordan v. UK*, at para. 109; *McShane v. UK*, at para. 98.

131. *Jordan v. UK*, at para. 115.

for victims who do not conform to the “model” laid down. This allows a hierarchy of victimhood to flourish and gets in the way of real healing and real transformation.

[Unresolved] cases represent an enormous accountability gap for the State. The story about these cases is a missing narrative about the role of the State during the conflict itself. It is not evident that the incremental reforms to investigative processes in Northern Ireland will be capable of delivering a legal vehicle sufficient to voice that narrative.¹³²

A comprehensive and effective strategy for the transformation of policing must be approached and dealt with at a number of levels, with intertwining and parallel aspects. It must recognize that a society in transition has different needs at different times. It must similarly recognize that there are basic societal issues which must be addressed as part of creating a climate for victims’ needs to be met — and that part of this involves respecting international human rights norms aimed at preventing such tragedies from occurring again. What is clear, however, is that truth and justice cannot be left out of the equation or seen as an add-on. Peace will only come through legitimacy. Legitimacy needs to be created, and any strategy and delivery around policing needs to both acknowledge this and work towards its creation. As Professor Ní Aoláin has stated:

“The State must lead the response with imagination and openness . . . [I]f the State seeks to escape or minimize its past, it will inevitably meet it again. A vehicle for exposing and examining the past is required. Without it, the long list of unresolved . . . cases will continue to linger at the margins of political debate and legal process, stymieing the capacity of all such systems to move forward.¹³³

B. *Key factors and Principles to be Considered in the Transitional Space*

Firstly, creating legitimacy in policing is the key to any peace process. Given the historical legacy of any conflict, this will necessitate a transformation in policing, rather than modernization or professionalization of a police force. Transformation

132. Fionnuala Ní Aoláin, *Truth Telling, Accountability and the Right to Life in Northern Ireland*, 5 EUR. H.R. L. REV. 572, 588 (2002).

133. *Id.* at 590.

must involve holistic, inclusive and coherent processes capable of building human rights values and practices into the heart of policing arrangements. A primary question should be what society wants and expects from policing and whether dated and hierarchical command and control structures are capable of delivering on this.

It must be clearly recognized that organizational police structures are both particularly resistant to change, and particularly masterful at masking that resistance. It must similarly be recognized that governments are not neutral brokers in peace processes, but have their own agenda, which on one level is respectful of the status quo, but can also be intensely territorial and defensive. The tendency to compartmentalize issues or engage in a technocratic discourse is an aspect of a defensive strategy that will ultimately undermine change and which must be acknowledged and resisted.

Even when gains have apparently been made or agreements reached, it is important not to underestimate the potential of official resistance to reclaim or reshape the debate within narrower parameters. Human rights must not be allowed to be co-opted as part of this discourse or used as bargaining chips in political negotiations.

It can be difficult, if not impossible, for domestic actors to effectively challenge this dynamic. Often, this is because they have been cast in the role of peace wreckers. External input at this stage can play a vital role in building political will and broader societal and police consensus around change issues. The constructive contribution of civil society must be facilitated and validated where possible.

International actors must not underestimate their potential capacity, or, once engaged, their responsibility to move the change process forward in a way which prevents the old order from reasserting itself. The legacies of the past must be acknowledged and truth recovery facilitated as part of the overall process.

Change processes and new structures must be owned by all. The facilitation of inclusivity and real accountability and transparency must be the project of new bodies set up in the area. These bodies should have policing, rather than the police, as their focus. Inter-related issues must be seen and addressed as

such. Conversations about policing must be broadened out into a much wider discussion of community safety.

CONCLUSION

Despite the Good Friday Agreement¹³⁴ and the report of an International Commission¹³⁵ on the future of policing, experience in Northern Ireland attests to the continuance of a government (and police) tendency not to move too much outside readily identifiable parameters. Tried and tested comfort zones are preferred to the leaps of faith necessary to make this process fulfill its true potential in terms of moving toward policing rooted firmly in the principles and practice of human rights.

A technocratic police discourse shaped by a narrow band of securocrats essentially continues to dominate what could and should be a transformatory moment for policing in Northern Ireland. This is one reason why, three years after the recommendations of the Patten Commission, we are still in a situation where Sinn Féin will not take its seats on the Policing Board; where Catholics are still not applying to the PSNI in the numbers necessary to make the 50:50 quota scheme work effectively;¹³⁶ where huge improvements are needed in respect of training; where Special Branch has not been reformed; where annual rates of sick leave still amount to over twenty days per officer; where allegations of police collusion with Loyalist paramilitaries still rancor; and where the legislative Assembly of Northern Ireland is enjoying a still further period of suspension.

Policing is the key to unlocking many of the conflict issues that have paralyzed Northern Ireland since its inception in 1922. The Patten Commission is the most recent and perhaps, to date, the best government-sponsored attempt to break apart the dichotomies that have prevented real movement here. However,

134. Voted for by 71% of the population of Northern Ireland in a referendum in 1998.

135. The Independent Commission set up on foot of the Good Friday Agreement 1998 and which became known as the Patten Commission.

136. One recent recruit class had thirty-four students when it should have had forty-eight. Thirty-two Catholics to date have not taken up places, meaning that thirty-two further places have been forfeited as a result. Currently, there appears to be a 35% rate of application from Catholics. According to Joe Stewart, PSNI Senior Director of Human Resources, although short of the 50% target, this compares favorably with the 19% application rate to the RUC. Recruitment is currently handled by the external consultants, Consensia.

the factors which have sought either to deny, ignore, or minimize the role of the police in the exacerbation of violent disorder in this part of the world, are still in the ascendancy.

The government still appears to privilege a managerialist and technocratic response based on a narrow discourse, which acknowledges police but not policing as the issue to be engaged with. Any attempt to challenge police violence and abuse of rights through pointing to structural issues and making linkages with State policy on "emergency" powers is dismissed. The government and police analysis continues to see the sacrifice of members of the RUC/PSNI¹³⁷ either as a reason in itself, or a smokescreen to resist changes viewed as too intrusive. This is evidenced by continued reference to the force as, if not perfect, then blameless, courageous, impartial, professional, and/or the best police force in the world¹³⁸ at every possible juncture.¹³⁹

Meanwhile, because no creative processes have been put in place to deal with the past, because unresolved cases continue to fester, the State continues to fear too close a partnership with the community in the area of policing. It is still clinging valiantly to any myth which allows it to distance itself from identification as a player in the conflict.¹⁴⁰ Its desire to maintain the illusion of "holding the ring" in a two-dimensional paradigm serves to disguise or justify its continued inaction in response to serious misconduct by members of the security forces and to deflect attention away from heavy-handed or otherwise inappropriate government responses to paramilitary violence. This does not excite confidence in the newness of policing arrangements. Instead, it

137. With 302 officers having lost their lives and 8,326 injured.

138. Former Chief Constable, Hugh Annesley, described his force as "an outstanding professional police service . . . one of the best if not the best in the world." *IR. NEWS*, Jan. 13, 1995, at 1.

139. For a recent example, see Ian Paisley MP during the second reading of Police (N. Ir.) Bill on December 15, 1997, stating that "the RUC is second to no other force in its professionalism, fairness and impartiality . . . I do not believe that any police force in Europe is more open or accountable." *Hansard* 79 (1997). See also Ken Magennis MP during the same debate, berating the Minister of State for his failure to provide "clear and unequivocal recognition" of the fact that "no other police force in the civilized western world has a better record than the RUC." *Id.* at 62. This was despite Adam Ingram having several times paid tribute to the RUC in the strongest terms throughout the course of his own speech.

140. For further discussion of this phenomenon, see STANLEY COHEN, *MINERVA CENTER FOR HUMAN RIGHTS, DENIAL AND ACKNOWLEDGEMENT: THE IMPACT OF INFORMATION ABOUT HUMAN RIGHTS* (1995).

allows an explosive legitimacy crisis to linger, ignored and biding its time at the margins of a fragile peace process.

While this cannot continue, it is difficult to create a truly safe space for community development and peace-building. Viewing policing change through the lens of human rights, indicates that society needs to move beyond the marginalization of dissent and engage with issues of change at a deeper level.

What is clear from the preceding analysis, particularly for any society in transition from violent conflict, is that transformation of policing must be taken and worked towards as a given. False change is damaging to the entire peace-building exercise, but will ultimately self-perpetuate unless a range of factors are present, acknowledged and engaged with. Firstly, there needs to be a fundamental reconception of notions of policing and human rights, which is holistic, inclusive, and visionary. This must be premised on a recognition of the damage done to the Rule of Law during political conflict,¹⁴¹ the role of competing discourses, and a clear understanding of change management issues, processes and dynamics. Additionally, unless real political will and creative energy are channeled into dealing with the past and shoring up accountability and legitimacy for the future, the prize of effective and efficient policing will remain elusive. Finally, the police/policing dialectic must be broken apart in a way which acknowledges the need for both discourses, but does not allow narrow security needs to dictate the pace or the means of change. Northern Ireland may not yet have the definitive blueprint – but its experience certainly has lessons for others.

141. See RALPH CRAWSHAW, BARRY DEVLIN & TOM WILLIAMSON, *HUMAN RIGHTS AND POLICING: STANDARDS FOR GOOD BEHAVIOR AND A STRATEGY FOR CHANGE* 123 (1998).

Law breaking by law enforcers is destructive of the rule of law and a uniquely pernicious form of social disorder. When it occurs as part of a police response to conflict, disorder or social tension, its destructive and pernicious effects are magnified, for it can aggravate the discontent which led to the disorder in the first place and it can drive more people to take part in disorder. It can create extremists out of moderates and criminals out of law abiding citizens.

Id. at 123.