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ARTICLE

DESIGNING SYSTEMS FOR ACHIEVING JUSTICE AFTER A PEACE AGREEMENT: NORTHERN IRELAND'S STRUGGLE WITH THE PAST

JACQUELINE NOLAN-HALEY*

INTRODUCTION

In the seventeen years since the Good Friday/Belfast Agreement (the “Agreement”) was signed, much has happened in Northern Ireland that would not have seemed possible in the years of violence leading up to the Agreement. Adversaries are governing together—a former IRA commander shared power in the Northern Ireland Assembly with the leader of the Ulster Democratic Unionist Party who once wrote that the Agreement was “a reprehensible deal[,] . . . an insult to the victims of terrorism and . . . a two-fingered salute to the democratic community of Northern Ireland.”¹ Paramilitaries on both sides of the divide surrendered their guns, prisoners were released, and policing practices improved. It now looks as if peace is moving forward. But in reality, there is a paradoxical state of affairs. On the one hand, Northern Ireland is advancing towards a peaceful regime after three decades of violence and seemingly intractable conflict.² On the other, there is considerable fragility in civil society where “conflict is still very present on the ground,”³ walls still separate sectarian communities,⁴

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1. Ian R. K. Paisley, *Peace Agreement—Or Last Piece in a Sellout Agreement*, 22 FORDHAM INT'L L.J. 1273, 1319 (1999).

2. A visible sign of this transformation was the decision to host the G8 summit in Northern Ireland in 2013.

3. Ariel Heifetz Knobel, *A Paradoxical Peace in Northern Ireland*, 26 PRAXIS: THE FLETCHER J. OF HUM. SECURITY 89 (2011); see also Joshua Keating, *After Decades of Peace, the Situation in Northern Ireland is Looking Extremely Fragile*, SLATE (Sept. 29, 2015, 4:00 PM), http://www.slate.com/blogs/the_slatest/2015/09/29/after_decades_of_peace_the_situation_in_northern_ireland_is_looking_extremely.html.

4. Ari Shapiro, *For Northern Ireland, Wounds from ‘The Troubles’ Are Still Raw*, NAT'L PUB. RADIO (Nov. 28, 2014, 2:30 PM), <http://www.npr.org/sections/parallels/2014/11/28/3671830>

paramilitaries still intimidate people,⁵ and parades can precipitate serious rioting.⁶ In the view of one former political leader, the Agreement's "spirit of generosity [has] evaporated: 'Everyone is back in their silos.'"⁷

During this post-conflict era, there are multiple contested issues in Northern Ireland that are rooted in the fundamental question of how to remember the legacy of the past,⁸ a past which continues to have a destabilizing effect on the present.⁹ The challenges are daunting in the face of apparent political paralysis and lack of trust between unionist and nationalist leaders. How can we recover truth and make peace with the past? How can we determine whose narratives count when it comes to recovering truth? How can we determine the identity of victims and how to care for them?¹⁰ How can we address the aftermath of conflict and trauma-related illness?

Contentious issues manifest themselves in disputes related to flags and parades, policing, truth recovery, human rights, and the needs of victims. There has been much debate but not much progress about the way forward in recovering truth.¹¹ In this regard, there is a tension, not unfamiliar in transitional countries, between the goals of justice and reconciliation.¹² For many victims, there is an urgent need for justice, and justice means truth.¹³

05/for-northern-ireland-wounds-from-the-troubles-are-still-raw. In Belfast these walls encourage tourism but they are still there. *See id.*

5. Steven McCaffrey, *North Paramilitaries Forcing Hundreds from Homes Every Year*, IRISH TIMES (June 25, 2015, 1:00 PM), <http://www.irishtimes.com/news/crime-and-law/north-paramilitaries-forcing-hundreds-from-homes-every-year-1.2261985>.

6. *See* Michael Hamilton & Dominic Bryan, *Deepening Democracy? Dispute System Design and the Mediation of Contested Parades in Northern Ireland*, 22 OHIO ST. J. ON DISP. RESOL. 133, 147–53 (2006). Many Catholics view Protestant parades as triumphalistic. Mohammed Aly Sergie, *The Northern Ireland Peace Process*, COUNC. ON FOREIGN REL. (Feb. 3, 2014), <http://www.cfr.org/peace-conflict-and-human-rights/northern-ireland-peace-process/p31552>.

7. Allan Leonard, *National Reconciliation: "Patriotism is not enough"*, N. IR. FOUND. (Feb. 19, 2015), <http://northernireland.foundation/2015/02/20/national-reconciliation-patriotism-is-not-enough>; *see also* Eamonn McCann, *The Troubles Are Back*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/05/opinion/the-troubles-are-back.html>.

8. *See* Baroness Nuala O'Loan, *Dealing with the Past*, Address at Queen's University Belfast (May 28, 2015), <http://www.qub.ac.uk/research-centres/isctsj/filestore/Filetoupload.507149.en.pdf>; President Michael Higgins, '1916 and the Ethics of Memory' Address at the Glencree Centre for Peace and Reconciliation (June 27, 2015), <http://www.president.ie/en/media-library/speeches/1916-and-the-ethics-of-memory>.

9. KIERAN MCEVOY, *MAKING PEACE WITH THE PAST: OPTIONS FOR TRUTH RECOVERY REGARDING CONFLICT IN AND ABOUT NORTHERN IRELAND*, vii (2006).

10. HAASS-O'SULLIVAN NEGOTIATIONS PROPOSAL, *infra* note 52.

11. Steven McCaffery, *Should truth be separated from reconciliation?*, THE DETAIL (May 20, 2013), <http://www.thedetail.tv/articles/should-truth-be-separated-from-reconciliation>.

12. Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 766 (2003); RUTI G. TEITAL, *TRANSITIONAL JUSTICE* (2000); Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, in *POST-CONFLICT JUSTICE 201* (M. Cherif Bassiouni ed., 2002).

13. Patricia Lundy & Bill Rolston, *Redress for Past Harms? Official Apologies in Northern Ireland*, 20 INT'L J. HUM. RIGHTS 104, 117 (2015) ("[F]or many victims of state violence, justice often equates with 'truth.'").

Witnesses have died, memories have faded with the passage of time, and victims believe that it is critical to obtain information from aging perpetrators.¹⁴ Many families of victims in Northern Ireland strongly support an international, independent truth commission.¹⁵ Yet some political parties voice strong opposition to any truth recovery process.¹⁶ Still, others question whether truth and reconciliation should function as a binary process or whether truth should be separated from reconciliation.¹⁷ In short, there is not a strong base of support for a truth recovery process.¹⁸

Several scholars have examined Northern Ireland's legal and political post-conflict developments through the lens of transitional justice,¹⁹ a term that refers to the ways in which countries emerging from violent conflict deal with past human rights abuses²⁰ and try to achieve justice and reconciliation.²¹ More recently, the Northern Ireland Human Rights Commission has proposed that a transitional justice approach be adopted in dealing with the legacy of the past.²²

The current fragility of the Northern Ireland peace process offers an opportunity to consider these transitional justice events from a dispute systems design ("DSD") perspective.²³ So far, in designing systems to address disputes related to remembering the past, Northern Ireland has taken an unstructured, eclectic approach. It has employed both rights-based and in-

14. NORTHERN IRELAND HUMAN RIGHTS COMMISSION, ANNUAL REPORTS AND ACCOUNTS 2011–12 (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246547/0490.pdf.

15. Press Release, Relatives for Justice, Victims Groups Unite to Call for Truth Commission (April 20, 1991), <http://relativesforjustice.com/victims-groups-unite-to-call-for-truth-commission>.

16. See generally Cheryl Lawther, *Denial, Silence and the Politics of the Past: Unpicking the Opposition to Truth Recovery in Northern Ireland*, 7 INT'L J. TRANSITIONAL JUST. 157 (2013) (discussing Unionist opposition).

17. McCaffrey, *supra* note 11.

18. *Dealing with Northern Ireland's Past: Towards a Transitional Justice Approach*, N. IR. HUM. RTS. COMM'N, 13 (2013), http://www.nihrc.org/uploads/publications/NIHRC_Transitional_Justice_Report.pdf.

19. See, e.g., Colm Campbell & Fionnuala Ni Aolain, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 871, 883 (2003).

20. See generally Christine Bell, *Dealing with the Past in Northern Ireland*, 26 FORDHAM INT'L L.J. 1095 (2002) (discussing a piecemeal approach).

21. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 145 (2009). The United Nations offers a framework with four pillars of transitional justice: justice, truth, reparation, and guarantees of non-repetition. Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.

22. *Dealing with Northern Ireland's Past*, *supra* note 18.

23. See generally Andrea Schneider, *The Intersection of Dispute System Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289 (2009); see generally CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996); Lisa Blomgren Amsler, Janet K. Martinez & Stephanie E. Smith, *Christina Merchant and the State of Dispute System Design*, 33 CONFLICT RESOL. Q. S7 (Winter 2015).

terest-based models,²⁴ with a mix of processes ranging from commissions, fact-finding bodies, independent review panels, and public inquiries to public dialogues and prosecutions. But still, no official truth recovery system is in place, and there is no official reconciliation mechanism. Instead, there is peace without reconciliation.

In an address last year at Queens University in Belfast, Northern Ireland's first Police Ombudsperson, Nuala O'Loan, bemoaned the fact that although other countries emerging from violent conflict have been able to find solutions to dealing with the past, Northern Ireland has not. Why, she asked, "is dealing with the past such a difficult issue for Northern Ireland?"²⁵ Reflecting on that question, I will argue in this Article that the ongoing, unstructured model for dealing with the legacy of the past has not worked in Northern Ireland, where distrust among divided communities is common. Instead of the current eclectic approach, I propose a more comprehensive, structured regime using DSD principles. These principles provide the opportunity for an independent, participatory framework that can help to build trust and then to guide and facilitate a sustainable truth recovery and reconciliation process.

Following the Introduction, this Article proceeds in two parts. Part I discusses the Agreement's attempt to plant the seeds of peace, political stability, and reconciliation. It describes multiple efforts for dealing with the legacy of the past since the passage of the Agreement, demonstrating an eclectic approach with several different truth recovery projects and efforts at reconciliation. Finally, it notes the absence of a truth commission and suggests that possible reasons for this omission are lack of trust and cooperation between all stakeholders. Part II considers how DSD principles could be implemented within the context of a transitional justice regime such as Northern Ireland. Using the lens of the Historical Enquiries Team, one of the many structures put in place to deal with the legacy of the past, it demonstrates how adherence to DSD principles could have made a positive difference in that failed truth recovery effort. Finally, it discusses the challenges of implementing DSD principles in dealing with the legacy of the past—the difficulty of reaching a consensus on identifying goals, the inadequacy of available resources, and most critical, the lack of trust among and between all the stakeholders.

I. EFFORTS TO DEAL WITH THE LEGACY OF THE PAST: AN UNSTRUCTURED APPROACH WITH WEAK RESULTS

This Part describes the many different attempts to deal with the legacy of the past in Northern Ireland since the passage of the Agreement. These efforts include regimes for truth recovery as well as proposals to promote

24. See, e.g., Bell, *supra* note 20, at 1106.

25. O'Loan, *supra* note 8, at 3.

reconciliation through public apologies, cross-border dialogue, and specific agreements. Next, it discusses the absence of a truth commission caused in part by distrust and lack of cooperation of all stakeholders.

A. *Good Friday Agreement: Planting the Seeds of Peace, Political Stability, and Reconciliation*

The Good Friday/Belfast Agreement,²⁶ reached in 1998, ended a period of political violence in Northern Ireland referred to as “the Troubles.”²⁷ During this time, over 3,600 people were killed,²⁸ at least 40,000 were injured, and an unknown number simply vanished. The latter group remains today among the population referred to as the “Disappeared.”²⁹ The purpose of the Agreement was to create a consensual framework for the future governance of a deeply divided, sectarian state.³⁰ Every aspect of the Agreement required the consent of both communities.³¹

The Agreement did not guarantee the long-term durability of peace, a politically stable state, or reconciliation between divided societies. Instead, it made these goals possible,³² providing for a new internal governance structure of Northern Ireland, a North/South Ministerial Council, and plans for a British-Irish Agreement to promote bilateral cooperation between the British and Irish governments. With respect to constitutional issues, it recognized that the people of Northern Ireland and the Republic of Ireland must both agree to a United Ireland by majority consent before it could take place. There were provisions for human rights, decommissioning of weapons, security, release of prisoners, and an independent commission to recommend future policing structures.³³ Unlike peace agreements resulting

26. This represented an agreement among eight Northern Ireland political parties and an agreement by the British and Irish governments. See *The Belfast Agreement* (Apr. 10, 1998), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

27. The Troubles date from about 1968. See *id.*; see also TIM PAT COOGAN, *THE TROUBLES: IRELAND'S ORDEAL AND THE SEARCH FOR PEACE* (2002).

28. See DAVID MCKITTRICK, SEAMUS KELTERS, BRIAN FEENEY & CHRIS THORNTON, *LOST LIVES* 1481 (1999).

29. This term refers to those individuals who were murdered and disappeared by the IRA between 1972 and 1981. McEVOY, *supra* note 9, at 61; see also Ian Cobain, *Disappeared but not Forgotten: the Grim Secrets the IRA Could Not Bury*, *THE GUARDIAN* (May 10, 2014), <http://www.theguardian.com/uk-news/2014/may/10/disappeared-ira-troubles-northern-ireland>; Patrick Rad-den Keefe, *Where the Bodies are Buried*, *NEW YORKER* (Mar. 16, 2015), <http://www.newyorker.com/magazine/2015/03/16/where-the-bodies-are-buried>.

30. John Bruton, *Why Decommissioning is a Real Issue*, 22 *FORDHAM INT'L L.J.* 1200 (1999).

31. *Id.*

32. George J. Mitchell, *Toward Peace in Northern Ireland*, 22 *FORDHAM INT'L L.J.* 1136, 1139 (1999).

33. The St. Andrews Agreement, signed in 2006, completed some of the unfinished business of the Good Friday/Belfast Agreement and implemented it. This agreement was between the British and Irish governments and the political parties in Northern Ireland, including the Democratic Unionist Party, which had opposed the Good Friday/Belfast Agreement. It restored the Northern

from violent conflicts in other countries, there was no provision for dealing with transitional justice issues related to the past.³⁴ Noticeably absent in the Agreement was any design for recovering the truth about what happened during the Troubles, nor was there any plan for promoting reconciliation in what remained a divided society.

B. Dealing with the Past: an Eclectic Approach with Multiple Models

1. Truth Recovery Efforts: an Amalgam of Structural Mechanisms—Commissions, Public Inquiries, and Investigations

There has been no shortage of truth recovery efforts in Northern Ireland. At the same time, however, there has been no comprehensive approach to managing the challenges presented by these efforts. Multiple mechanisms have been put in place to determine the truth of what happened during the Troubles and to begin a healing process that could foster reconciliation.³⁵ In the absence of any clear mandate from the Agreement, Northern Ireland adopted an eclectic approach and engaged in assorted truth recovery efforts. Both public and private initiatives have been involved in this project.³⁶ A commission was formed to deal with the Disappeared.³⁷ Public inquiries were conducted to investigate major tragedies, such as the Bloody Sunday massacre in Derry³⁸ and the killing of solicitor Patrick Finucane.³⁹ The Police Service of Northern Ireland (“PSNI”) established two systems: (1) the Office of Police Ombudsman to investigate allegations of police wrongdoing⁴⁰ and (2) the Historical Enquiries Team to re-examine unsolved murders committed during the Troubles. Finally, non-governmental organizations (“NGOs”) became actively involved in accounting for vic-

Ireland Assembly and created a Northern Ireland Executive. NORTHERN IRELAND (ST. ANDREW’S AGREEMENT) ACT 2006, <http://cain.ulst.ac.uk/hms0/nistandrewsact221106.pdf>.

34. Bell, *supra* note 20, at 1096.

35. See McEVOY, *supra* note 9, at 41–66 (discussing a number of truth-recovery initiatives).

36. See generally McEVOY, *supra* note 9 (offering overview of unofficial truth-recovery initiatives).

37. See *id.*

38. On January 30, 1972, British security forces killed thirteen people at a civil rights demonstration in Derry. See RICHARD NORTON-TAYLOR, BLOODY SUNDAY: SCENES FROM THE SAVILLE INQUIRY (2005).

39. On February 12, 1989, two masked gunmen entered the home of 38-year-old Belfast solicitor, Patrick Finucane, and murdered him in front of his wife and three children. Sir John Stevens, *Stevens Inquiry: Overview and Recommendations*, CAIN WEB SERVICE (Apr. 17, 2003), <http://cain.ulst.ac.uk/issues/violence/docs/stevens3/stevens3summary.pdf> (claims of collusion between the RUC and Loyalists paramilitaries). See generally Molly R. Murphy, *Northern Ireland Policing Reform and the Intimidation of Defense Lawyers*, 68 *FORDHAM L. REV.* 1877 (2000).

40. POLICE OMBUDSMAN FOR NORTHERN IRELAND, <https://www.policeombudsman.org>.

tims' lives, searching for ways of healing,⁴¹ and fostering dialogue between ex-prisoners.⁴²

Transitional justice scholar Professor Christine Bell assesses these early initiatives dealing with the legacy of the past and labels them as "piecemeal."⁴³ Nevertheless, she acknowledges that this may have been the most appropriate approach given the context and culture of the conflict.⁴⁴ According to Bell, a deficiency of the piecemeal approach in Northern Ireland is the failure to move towards an accepted social narrative of the conflict's causes and consequences.⁴⁵

2. *Reports: Recommendations, Options, and Proposals for Dealing with the Past*

In addition to the structural mechanisms put in place to deal with the legacy of the past, there has been a voluminous output of written documents from both the private and public sector. The following reports offer a range of recommendations and proposals for both truth recovery and reconciliation processes.

a. *Healing Through Remembering (2002):*⁴⁶

This report is a product of the Healing Through Remembering Project ("Project") that began in December 2000. Working with multiple stakeholders, organizations, politicians, and individuals, the Project attempts to engage with the difficult issues of the past related to truth-telling and healing. The report emphasized the importance of sustaining processes for remembering, reflecting, informing, and educating. Toward this end, it offered six recommendations for dealing with the legacy of the past: a collective storytelling and archiving process, a day of reflection, a permanent living memorial museum, acknowledgement and truth recovery, a Healing Through Remembering initiative, and a network of commemoration and remembering projects.⁴⁷

41. In 2008, the Commission for Victims and Survivors ("CVS") was created with the goal of advancing peace, reconciliation and justice. The CVS was oriented towards victim-based healing urged that structures be set up to deal with the past that went beyond the HET and the Police Ombudsman. It urged that truth examination and a commitment to deal with the past be at the forefront of government activity. COMMISSION FOR VICTIMS AND SURVIVORS, <http://www.cvsni.org/index.php/about-us>.

42. JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* 67 (1997).

43. Bell, *supra* note 20, at 1097.

44. *Id.* at 1098.

45. *Id.* at 1144.

46. HEALING THROUGH REMEMBERING, http://www.healingthroughremembering.org/about_us/history.

47. *Id.*

b. *Making Peace with the Past: Options for truth recovery regarding the conflict in and about Northern Ireland (2006)*:⁴⁸

This comprehensive report is also associated with the Healing Through Remembering Project, specifically the Sub Group on Truth Recovery and Acknowledgement.⁴⁹ Written by Queens University professor Kieran McEvoy, the report notes that there has been a “disproportional media focus on the option of a truth commission and in particular, on the South African Truth and Reconciliation Commission.”⁵⁰ As an alternative, it proposed five options for dealing with the past: (1) draw a line under the past, an option which has been described as the “do nothing else” approach and continue with the patchwork of processes that already existed, (2) conduct internal organizational investigations, (3) undergo community-based “bottom-up” truth recovery efforts, (4) form a truth recovery commission, or (5) form a commission of historical clarification that would provide a definitive, official historical account of the conflict.

c. *Consultative Group on the Past (2009)*:

A report issued by the Consultative Group on the Past, established by former U.K. Prime Minister Tony Blair, recommended that a Legacy (Truth) Commission be established for Northern Ireland that would address the need for reconciliation, truth recovery, and justice. It designed a framework for a truth commission that has been criticized for its lack of transparency and for focusing on the language of forgetting. The independence of the group has also been questioned by some because it was the Secretary of State who made all the appointments to the group.⁵¹

d. *Haass-O’Sullivan Negotiations Proposal*:⁵²

In 2013, the Panel of Parties in the Northern Ireland Executive was established to address disputes that had not been resolved by the peace process including the issue of how to deal with the legacy of the past. The panel brought together representatives from Northern Ireland’s major political parties and was co-chaired by former American diplomat Richard N. Haass, president of the Council on Foreign Relations. The panel held consultations with several hundred individuals representing civil society groups

48. McEvoy, *supra* note 9.

49. Members of this diverse group included “people from loyalist, republican, British Army, and police backgrounds, as well as individuals from different faith backgrounds, victims groups [sic], academics, and community activists.” *Id.* at vii.

50. *Id.* at ii.

51. Aoife Duffy, *A Truth Commission for Northern Ireland*, 4 INT’L J. OF TRANSITIONAL JUST. 26, 27 (2010).

52. HAASS-O’SULLIVAN NEGOTIATIONS PROPOSAL (2013), <http://www.northernireland.gov.uk/haass.pdf>.

across Northern Ireland. The final draft proposal called for a (1) new organization that would deal with the legacy of the past⁵³ and (2) full acknowledgement of responsibility to further the goal of reconciliation.⁵⁴ However, it failed to gain acceptance by all political parties,⁵⁵ some of whom were concerned about unresolved issues related to flags and parades.⁵⁶

3. *Absence of a Truth Commission: Lack of Trust and Cooperation by All Stakeholders*

Missing from the array of efforts to deal with the legacy of the past is a formal truth recovery mechanism, such as a truth commission. This is a well-known, yet contestable, method of dealing with the past that has been employed by several other countries during transitional justice regimes.⁵⁷ The absence of a truth commission is not due to a lack of knowledge. As Northern Ireland began its search for ways to deal with the legacy of hurt and hatred from the past, it consulted with representatives from South Africa. The Deputy Chairman of the South African Truth and Reconciliation Commission visited Northern Ireland and issued an extensive report, outlining the similarities and differences between South Africa and Northern Ireland.⁵⁸ One significant difference between the two countries—which, according to the report, could not be overemphasized—was the difference between the nature and role of the state in South Africa and Northern Ireland.⁵⁹ A new state had emerged in South Africa while Northern Ireland would have the same state that would have to be engaged in any truth recovery process.⁶⁰

Why is there no truth commission for Northern Ireland?⁶¹ One reason for the absence of a truth commission may be the almost universal distrust

53. The new institution, the Historical Investigations Unit, would be empowered to conduct Article 2-compliant reviews and investigations and, where appropriate, refer cases to the Public Prosecution Service. *Id.* at 25–26.

54. The report noted that, “[t]o advance reconciliation and healing at both the individual and societal levels, acknowledgements should be more than apologies.” *Id.* at 23.

55. Kristin Archick, *Northern Ireland: The Peace Process*, CONG. RESEARCH SERV., at 11 (2015), <http://fas.org/sgp/crs/row/RS21333.pdf>.

56. *Richard Haass talks: Final proposal document published*, BBC (Dec. 31, 2013), <http://www.bbc.com/news/uk-northern-ireland-25560886>.

57. See, e.g., BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT (Nigel Biggar ed., 2003); Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 HUM. RTS. Q. 1 (2001).

58. *All Truth is Bitter: A Report of the Visit of Doctor Alex Boraine, Deputy Chairman of the South African Truth and Reconciliation Commission to Northern Ireland*, CAIN WEB SERVICE (1999), <http://cain.ulst.ac.uk/issues/victims/docs/alltruthisbitter99.pdf>.

59. *Id.* at 21.

60. See *supra* text accompanying note 49.

61. See Brandon Hamber, *Conclusion: A Truth Commission for Northern Ireland?*, <http://www.brandonhamber.com/publications/Chap%207%20%20SA%20&%20NI%20Brandon%20Hamber.pdf>; Patricia Lundy & Mark McGovern, *Attitudes Towards a Truth Commission for Northern Ireland in Relation to Party Political Affiliation*, 22 IRISH POL. STUD. 321 (2007).

of any groups who had been involved in the conflict to direct a truth recovery process.⁶² Thus, the authors of *Making Peace with the Past* state that “any truth recovery mechanism or process must be, and be accepted as, independent of the state, combatant groups, political parties, civil society, and economic interests.”⁶³ A second reason for the lack of a truth commission may be a perception by some parties that not all stakeholders are cooperating and participating in the effort to recover the truth about the Troubles. This has led to reluctance to participate by potentially cooperative stakeholders. The comments of one Republican party representative reflect the ongoing doubts and suspicions that impede truth recovery:

It is quite evident there will be no republicans going forward into a process where from the very beginning it is accepted that the British government isn't going to present their piece of the mosaic. The truth is . . . all of the truth – it can't be some of it.⁶⁴

4. *Reconciliation Efforts: Public Apologies, Cross-Border Dialogue, and Negotiated Agreements*

Just as the Agreement failed to deal with the challenge of truth recovery, follow-up agreements also failed to deal with the need to promote reconciliation in the divided society of Northern Ireland.⁶⁵ In recent years, however, there has been a more concerted effort to promote reconciliation through public apologies,⁶⁶ cross-border dialogue, and negotiated agreements. The most recent efforts are described in the following sections.⁶⁷

62. Lundy & McGovern, *supra* note 61, at 331.

63. McEvoy, *supra* note 9, at vii.

64. McCaffery, *supra* note 11.

65. Ryan Gawn, *Still Shackled by the Past: Truth and Recovery in Northern Ireland*, THE PEACE AND CONFLICT REV., <http://www.review.upeace.org/index.cfm?opcion=0&ejemplar=13&entrada=72> (discussing a follow-up program called the “Programme for Government”).

66. *Dealing with Northern Ireland's Past*, *supra* note 18, at 9 (describing the UK government's public apology for the killings that occurred in Derry/Londonderry in January 1972 and Prime Minister David Cameron's apology to the Finucane family in 2011 and again in 2012 for the state collusion in the murder of Pat Finucane).

67. “We in this island are involved in a new kind of symbolic migration – from peace to true reconciliation. In the peace process, we have been engaged in one of the most ambitious and far-reaching political projects of our time.” President Michael Higgins, British Council Annual Lecture at Queens University Belfast (Oct. 30, 2012), <http://www.president.ie/en/media-library/speeches/president-delivers-the-2012-british-council-annual-lecture-queens-universit>.

- a. *Proposed Agreement among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests: Flags and Emblems and Contending with the Past (2013)*⁶⁸

This proposed agreement, also referred to as the Haass-O’Sullivan Negotiations,⁶⁹ addressed contentious issues related to flags and parades and urged all parties involved with such disputes to engage in “sustained and meaningful dialogue as a matter of priority and with due regard for the rights and responsibilities of all sides.”⁷⁰ It also focused on the goal of advancing reconciliation and healing, noting that the burden of the past rests on those who acted outside the rule of law. The proposed agreement encouraged public acknowledgement of violent actions that should go beyond apologies. It noted that saying sorry is not enough, and it encouraged individuals, groups, and governments to collaborate on statements of acknowledgement that included acceptance of responsibility and sincere expressions of remorse for having caused pain and injury.⁷¹

- b. *Stormont House Agreement (2014)*⁷²

This agreement between the British and Irish governments and majority of political parties that constitute the Northern Ireland Executive responded to the ongoing conflicts that continued after the Good Friday Agreement. It provided for dealing with the past and contentious issues related to flags and parades by proposing that a Commission on Flags, Identity, Culture and Tradition be established. Reconciliation was a key provision. The agreement established a framework for a reconciliation process, providing that a group be established to oversee archives and information recovery and promoting reconciliation as a key goal. Guiding principles to which the participants agreed are: promoting reconciliation; upholding the rule of law; acknowledging the suffering of victims and survivors; facilitating the pursuit of justice and information recovery; compliance with human rights; and balance, transparency, fairness and equity.⁷³

- c. *Glencree Dialogue (2015)*

In June 2015, I had the privilege of participating in a cross-border dialogue at the Glencree Centre for Peace and Reconciliation that focused on

68. See HAASS-O’SULLIVAN NEGOTIATIONS PROPOSAL, *supra* note 52.

69. See *supra* text accompanying notes 52–56.

70. HAASS-O’SULLIVAN NEGOTIATIONS PROPOSAL, *supra* note 52, at 8.

71. *Id.*

72. See Hazel Armstrong & Paul Bowers, *Northern Ireland: Stormont House Agreement update*, HOUSE OF COMMONS LIBR. (Aug. 18, 2015), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7284>.

73. *Id.* at 8–9.

the theme “1916 and the Ethics of Memory.”⁷⁴ Participants gathered to consider the challenge of how to reflect on the legacy of the 1916 uprising in Ireland.⁷⁵ Listening to the thoughtful voices of participants, who included former paramilitaries as well as government officials, it became apparent to me that the legacy of the recent Troubles was driving much of the discussion. In a powerful address, the President of Ireland, Michael Higgins, while emphasizing the critical importance of reconciliation as part of dealing with the past, was quite explicit in maintaining that truth recovery was a condition precedent to reconciliation:

As we contemplate what must happen to enable us to deal with the past in Northern Ireland, there are difficult conversations to be had, difficult acknowledgements to be made about wrongdoing by state and non-state actors, reparations to be made for injuries suffered, and ultimately acceptance of the realities about which people still hesitate to speak but which are manifest in cases like Bloody Sunday, in the recovery of the bodies of the Disappeared, stolen from their families, savagely murdered and secretly buried. It must happen if we are to be reconciled as a people.⁷⁶

II. DISPUTE SYSTEMS DESIGN IN NORTHERN IRELAND: A PARTICIPATORY FRAMEWORK TO GUIDE AND FACILITATE TRUTH RECOVERY AND RECONCILIATION

DSD principles offer a comprehensive and structured approach for creating a regime to deal with the legacy of the past in Northern Ireland. In developing a roadmap for a truth recovery and reconciliation system, the questions are straightforward: What are the goals sought to be achieved? Who are the stakeholders, and what are their goals and interests?⁷⁷ What structures are available? What resources are available? What accountability is provided? Who has control over the design of the system?⁷⁸ Important values of transparency, procedural fairness, legitimacy, and trust are implicated in these questions.

In applying DSD principles within the context of a transitional justice regime, Professors Stephanie Smith and Janet Martinez identify some key

74. Higgins, *supra* note 8.

75. The uprising, also referred to as the Easter Rising or Easter Rebellion, occurred in April 1916 in Dublin. Fifteen Irishmen were executed at the Kilmainham jail in Dublin by the British military. See PETER DE ROSA, *REBELS: THE IRISH RISING OF 1916* (Doubleday, 1991); TIM PAT COOGAN, MICHAEL COLLINS: *THE MAN WHO MADE IRELAND* (Roberts Rinehart Publishers, 1996) (1992).

76. Higgins, *supra* note 8.

77. NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 69–84 (Wolters Kluwer Law & Business, 2013).

78. Lisa B. Bingham, *Mandatory Arbitration: Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 L. & CONTEMP. PROBS. 221 (2004). See generally Lisa B. Bingham et al., *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 375 (2007).

questions confronting policymakers. A critical issue is whether the system designers seek justice, reconciliation, or a combination of the two. Will designers create one process or multiple processes to pursue these goals? Smith and Martinez warn that failure to include relevant stakeholders can result in a lack of justice and fairness and be a recipe for disaster.⁷⁹

Part of the contemporary conflict in Northern Ireland over how to remember the legacy of the past is based on differing views of how DSD principles should be implemented. The longstanding debate over what structures should be in place to recover truth and achieve reconciliation is illustrative of this conflict. Working from the assumption that justice requires truth and that reconciliation promotes healing,⁸⁰ groups with different interests have lined up along the sectarian divide. One political party has argued that the reconciliation process could progress if it were separated from the search for truth about what happened during the Troubles. According to a representative of the Sinn Fein party, “As long as they remain a binary process, then one can’t go forward without the other.”⁸¹ On the other hand, a well-known victims group claims that reconciliation in the absence of truth amounts to impunity: “[I]t is like putting a roof on the house, before building the walls.”⁸² Moreover, Professor Christine Bell challenges the assumption that reconciliation promotes healing: “Expecting victims to give up retributive desires in favour [sic] of reconciling narratives may not contribute to their ‘healing’ at all.”⁸³ The debate continues to polarize the divided communities.

The following section examines a failed effort by the police service to deal with the legacy of the past and discusses how attention to the inclusion principles of DSD could have made a positive difference in the outcome. The Historical Enquiries Team (“HET”) was set up by the police service in Northern Ireland to re-examine unsolved murders committed during the Troubles and to respond to families’ needs for information. The failure to include the families of victims in the design of the process and the lack of transparency and accountability ultimately resulted in a lack of trust and the ultimate demise of the process. Finally, this section discusses the challenges affecting the implementation of DSD principles in designing structures to deal with the legacy of the past. Lack of consensus on what goals are necessary or desirable, insufficient resources to support these goals, and weak levels of trust among stakeholders have impeded successful implementation of DSD principles.

79. Smith & Martinez, *supra* note 21, at 162.

80. DAVID BLOOMFIELD ET AL., RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 19 (International Institute for Democracy and Electoral Assistance, 2003).

81. McCaffery, *supra* note 11.

82. *Id.*

83. Bell, *supra* note 20, at 1141; *see also* Ellen Waldman, *Restorative Justice and the Pre-Conditions for Grace: Taking Victim’s Needs Seriously*, 9 CARDOZO J. CONFLICT RESOL. 91 (2007).

A. *Rise and Fall of the Historical Enquiries Team: Failed Legitimacy*

One of the structures put in place to deal with the legacy of the past was the HET, which before its demise was described as a “distinctive process” in international policing.⁸⁴ The HET was established by the British government as part of a series of reform measures it had put in place in order to comply with Article 2 of the European Convention on Human Rights.⁸⁵ In 2001, the European Court of Human Rights found the UK government to be in breach of Article 2 (Right to Life) in several cases related to the Troubles, where a critical issue was the police’s inadequate investigation of police shootings.⁸⁶

The HET was ultimately set up by the PSNI in 2005 as a special police unit to re-examine unsolved murders committed during the Troubles—specifically, conflict-related deaths that occurred between 1969 and 1998 that did not directly involve the police as a perpetrator. Some NGOs were consulted as it was set up. The HET’s purpose was to respond to families’ needs for micro-level information, to have answers to what the Secretary of State described as “simple questions about the death of their loved ones,”⁸⁷ and to bring closure to conflict-related deaths.⁸⁸ It was staffed by retired police officers from Northern Ireland and from police services across the United Kingdom. Some NGOs actively engaged with HET by bringing cases to it and by representing clients.⁸⁹

As part of its work, the HET interviewed soldiers and, in some cases, offered apologies to the families of the victims.⁹⁰ Professor Patricia Lundy reports that the decision to offer or decline an apology in fatal shooting cases relied on HET investigations that were deeply flawed.⁹¹ Many families wondered: Who received apologies, and who did not? What was the reasoning?

In an empirical study of the HET’s operations published in 2009, Lundy concluded that despite its efforts to demonstrate independence and impartiality to all community groups, the result was otherwise: “at every stage of the process, independence and integrity appear to have been compromised.”⁹² The HET was criticized for its over-reliance on police corpo-

84. Patricia Lundy, *Can the Past Be Policed?: Lessons from the Historical Enquiries Team Northern Ireland*, 11 J.L. & SOC. CHALLENGES 109, 111 (2009).

85. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2, 213 U.N.T.S. 221.

86. See, e.g., Christine Bell & Johanna Keenan, *Lost on the Way Home? The Right to Life in Northern Ireland*, 32 J.L. & Soc’y 68, 75–77, 86 (2005).

87. Gawn, *supra* note 65.

88. Lundy, *supra* note 84, at 161.

89. *Id.* at 121.

90. Lundy & Rolston, *supra* note 13, at 113–14.

91. *Id.* at 116.

92. Lundy, *supra* note 84, at 126.

rate memory, the absence of competing memories and alternative voices,⁹³ its failure to reinvestigate cases,⁹⁴ lack of information given to victims,⁹⁵ and questionable transparency on several issues.⁹⁶ The use of RUC officers throughout the process contributed to perceptions of bias and conflict of interest.⁹⁷ The Report argued that in order for a truth recovery process to gain legitimacy from the community at large, it needed to be separated from policing.⁹⁸

In July 2013, a highly critical report of the HET raised public policy concerns about the manner in which the agency carried out its mandate. It appeared that inequality of treatment was embedded in the system,⁹⁹ as the report found that the HET treated deaths in which there was state involvement differently from cases where state actors were not involved.¹⁰⁰ The Northern Ireland Police Board announced its lack of confidence in the leadership of the HET,¹⁰¹ and the PSNI announced that due to financial issues,¹⁰² the HET would be discontinued and its work taken up by the Legacy Investigative Branch of the PSNI.¹⁰³ Unlike the arms-length HET, the Legacy Investigations Branch is fully integrated into the PSNI. It is not surprising that a number of concerns have been expressed about public confidence and the independence and accountability of the most recent entity assigned with the responsibility of conducting truth recovery investigations.¹⁰⁴

93. *Id.* at 169.

94. *Id.*

95. Lundy & Rolston, *supra* note 13, at 112.

96. Lundy, *supra* note 84, at 143, 153. These include the criteria applied at any stage of the process at which a decision can be made to stop an investigation and the issues of identifying or tracing soldiers as suspects and/or eyewitnesses.

97. Lundy, *supra* note 84, at 167.

98. *Id.* at 168. This recommendation was made in light of a Northern Ireland survey that found “almost universal distrust” of allowing any groups that had been involved in the conflict to be responsible for managing a truth recovery process.

99. *Id.* at 137.

100. HMIC, Inspections of the Police Service of Northern Ireland (last visited Apr. 1, 2016), <https://www.justiceinspectorates.gov.uk/hmic/our-work/specialist-inspections/inspections-of-the-police-service-of-northern-ireland/>.

101. BBC News, *NI Policing Board Declares ‘Do Confidence’ in HET* (July 4, 2013), <http://www.bbc.com/news/uk-northern-ireland-23181060>.

102. Claire Cromie, *PSNI Cuts 300 Jobs and Axes Historical Enquiries Team*, BELFAST TELEGRAPH (Sep. 30, 2014), <http://www.belfasttelegraph.co.uk/news/northern-ireland/psni-cuts-300-jobs-and-axes-historical-enquiries-team-30626460.html> (describing budget cuts that required the discontinuance of the HET).

103. *New PSNI unit to investigate Northern Ireland’s past*, BBC NEWS (Dec. 04, 2014), <http://www.bbc.com/news/uk-northern-ireland-30330751>.

104. A historical investigations unit independent of the police was proposed in the Stormont House Agreement but budget issues related to welfare reform have slowed down the process of implementing that proposal. Colletta Smith, *HMIC concern over accountability of PSNI’s Legacy Investigations Branch*, BBC NEWS (June 24, 2015), www.bbc.com/news/uk-northern-ireland-33248848.

B. How DSD Principles Could Have Made a Difference: Preventing Multiple Deficiencies in Procedural Justice

Recalling some basic DSD questions can help shed light on how DSD principles could have made a difference with the HET or with developing any system to deal with the legacy of the past in Northern Ireland. Who had control over the design of the HET? Who were the stakeholders? What were their goals and interests?

The British government and the PSNI had control over the design of the HET system. Yet, the stakeholders included not just the British government, British soldiers, and police officers, but also the families of victims. In fact, the families of victims were major stakeholders in this truth recovery process. While there was some consultation with a few NGOs, there is no evidence that the voices of victims' families were heard or included in any significant way during the design stage.

One of the major goals of the HET was to provide families with information about the death of their loved ones and to answer their questions. As part of participating in the HET process, several families requested apologies. While some families received them, others did not. No reasons were given. This information gap raises questions about legitimacy and transparency.

Procedural justice studies shed light on the importance of fairness in creating a dispute resolution system¹⁰⁵ and the inclusion of stakeholders in the design of a process.¹⁰⁶ These studies show that parties are likely to find a decision-making process fair if they had the opportunity to share what was important to them (voice),¹⁰⁷ if they received respectful treatment from the decision-maker,¹⁰⁸ if they were treated in an even-handed way,¹⁰⁹ and if they had some level of trust in the decision-maker.¹¹⁰

105. E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 218 (Melvin J. Lerner ed., 1988) (1948).

106. Lisa B. Bingham, *Mandatory Arbitration: Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 L. & CONTEMP. PROBS. 221, 222 (2004); see also Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 38 (2010) (describing how the failure of the Special Court for Sierra Leoneans to include Sierra Leoneans in the design process led to its failure to win support from its natural allies).

107. E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 218 (Melvin J. Lerner ed., 1988) (1948); Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L. J. 473, 488 (2010). See generally Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDU. 49 (2004).

108. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 122 (2000).

109. Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664 (2007).

110. *Id.* at 671.

Applying the findings of procedural justice studies, it is likely that if the families of victims thought the HET system was procedurally just, they would have been more amenable to accepting the HET truth recovery process, respecting it, and believing in its legitimacy. With few exceptions, if the families had been treated respectfully, they might have had greater trust in the process.¹¹¹ But the HET was flawed by multiple deficiencies in procedural justice. It failed to include major stakeholders in the design of the process, and it failed to satisfy their interests. There was no transparency on the issue of who received apologies and no accountability for carrying out the HET mandate to reinvestigate cases. Families of victims lacked confidence in the HET due to perceived lack of independence of the police. Without sufficient transparency, accountability, and legitimacy, there was a complete shutdown of trust. In short, the HET failed to move forward the process of truth recovery.

C. Challenges in Implementing DSD Principles: Filling the Multiple Voids

Three major deficiencies prevent the successful implementation of DSD principles in dealing with the legacy of the past in Northern Ireland.

1. Lack of Consensus Regarding Goals

One of the challenges in implementing DSD principles in Northern Ireland's transitional justice regime is reaching a consensus on a strategic approach to achieving goals. While there is general agreement about the need to deal with the legacy of the past, there is no consensus on what approach to take or whose narrative of events controls the thinking and policy that goes into the design of that project. Moreover, there is no consensus on whether reconciliation needs to be a part of truth recovery efforts. Achieving consensus will require active engagement by representatives of all stakeholders.¹¹²

2. Lack of Resources

A second DSD challenge relates to the availability of resources. Establishing a mechanism for truth recovery has costs, and these costs need to be measured against competing fiscal concerns. This is a critical issue, as outside funders have pulled back financial resources that once flooded Northern Ireland after the Agreement was signed,¹¹³ and domestic budget

111. Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 861 (1998) (suggesting that there is a greater likelihood of compliance with the law when it is considered to be legitimate).

112. Marianna Hernandez Crespo, *From Noise to Music: The Potential of the Multi-Door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America*, 2012 J. DISP. RESOL. 336, 372 (2012).

113. O'Loan, *supra* note 8.

problems persist.¹¹⁴ Should money be spent for victims who need wheelchairs or to monitor unruly sectarian parades?¹¹⁵

3. *Lack of Trust*

Finally, trust is a key missing element which needs to be either discovered or recovered. Lack of trust has been a prominent feature of the Northern Ireland landscape long before the Troubles.¹¹⁶ It is by no means, however, a deficiency limited to Northern Ireland. Lack of trust is consistent with identity-based conflicts which are rooted in the past. It is a problem encountered in many post-conflict regimes. And this is where our field of dispute resolution has been deficient. We have not developed adequate responses for dealing with conflicts rooted in the past. Frequently, mediation is considered the default process.¹¹⁷ But much of traditional mediation and other conflict-resolution thinking, at least in the United States, is not inclined to focus very much on the past. Mediation is considered a forward-looking process that does not try to place any blame for past harmful events.¹¹⁸ This is problematic when the goal is to recover the truth about the past. It is possible, however, that more consideration of transformative and narrative models of mediation might be useful in helping parties engage with the past and restore relationships.¹¹⁹

CONCLUSION

The truth recovery process thus far has been fragmented with no overarching plan or comprehensive structure.¹²⁰ Official state-directed efforts co-exist with unofficial private efforts. Funding comes and goes. Programs

114. Claire Cromie, *Budget 2015: Northern Ireland Reaction*, BELFAST TELEGRAPH (Aug. 7, 2015), <http://www.belfasttelegraph.co.uk/news/northern-ireland/budget-2015-northern-ireland-reaction-31361989.html> (comments of the Sinn Fein party); *Northern Ireland Economy: New Kind of Trouble*, ECONOMIST (Jan. 24, 2015), <http://www.economist.com/news/britain/21640334-guns-mostly-silent-ulster-can-begin-deal-its-lamentable-economy-new-kind>.

115. O'Loan, *supra* note 8.

116. *See generally* TIM PAT COOGAN, *THE TROUBLES: IRELAND'S ORDEAL AND THE SEARCH FOR PEACE* (Palgrave 2002).

117. *See, e.g.*, Seamus Dunn & Jacqueline Nolan-Haley, *Conflict in Northern Ireland after the Good Friday Agreement*, 22 *FORDHAM INT'L L.J.* 1372, 1378 (1999).

118. *See* CHRISTOPHER MOORE, *THE MEDIATION PROCESS* 393 (3rd ed., rev. 2003). He notes that:

Much of current mediation thinking, and the views of many practitioners, posit that mediation is a forward-looking process, one that does not strive to place blame for past negative or harmful events and one that strives to solve immediate problems so that parties' interests and future relationships are positively met and redefined.

See also Barbara Tint, *History, Memory, and Intractable Conflict*, 27 *CONFLICT RESOL. Q.* 239, 247 (2010). *But see* JAY ROTHMAN, *RESOLVING IDENTITY-BASED CONFLICT: IN NATIONS, ORGANIZATIONS, AND COMMUNITIES* (Jossey-Bass Inc., Publishers 1997) (discussing the importance of looking to the past in identity-based conflict).

119. Michael Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 *OHIO ST. J. DISP. RESOL.* 321, 334 (2007).

120. Lundy, *supra* note 84, at 119.

rise and fall.¹²¹ As several scholars have observed, the current unstructured approach to dealing with the past is not working for Northern Ireland.¹²² In the meantime, the past continues to have a destabilizing effect on the present.

As new approaches are considered in designing a truth recovery system with traction, all signs point toward independence as a critical value in the design.¹²³ Independence does not necessarily mean neutrality. It is not even clear to what extent DSD is a neutral activity¹²⁴ or whether neutrality is possible in a country such as Northern Ireland.¹²⁵ But with independence, a sustainable truth recovery process is possible. The divided communities in Northern Ireland can begin to build trust—the missing link in earlier efforts to recover truth. Within an atmosphere of trust, DSD principles have breathing space and are able to offer a participatory framework for guiding the development of a sustainable truth recovery model. Without trust, no amount of creative process design will achieve that goal.

In imagining how DSD principles can help to build trust, there are more questions than answers. Given so many past attempts at truth recovery, it takes a certain degree of courage and hope to believe that a process can be designed with transparency, legitimacy, and a framework for reconciliation. Identifying and then including representatives of *all* stakeholders in the design of an independent truth recovery process is a good place to begin.

121. See *supra* text accompanying notes 77–103 (discussion of the HET).

122. See Written Submission from Kieran McEvoy et al., to Dr. Richard Haass, Dr. Meghan O’Sullivan and the Panel of Parties, *Dealing with the Past in Northern Ireland: Amnesties, Prosecutions and the Public Interest* (March 2015), <http://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2014/10/Amnesties-Prosecutions-and-Public-Interest-Submission-to-Haass-7-Oct1.pdf>.

123. See, e.g., *All Truth is Bitter*, *supra* note 58, at 21: “It is clear that any new process of truth telling must be accepted as legitimate by all Northern Ireland traditions, must be seen to be independent and must have sufficient authority to conduct its proceedings in a way which reinforces it’s [sic] independence.”

124. Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should (Not) Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195 (2009) (asking whether DSD is a neutral activity).

125. In 1996, I had the privilege of conducting mediation training in Northern Ireland with my colleague and former Dean, Professor John Feerick. When we stressed the importance of neutrality, one participant stated: “A car in neutral isn’t going anywhere. No one in Northern Ireland is neutral.” See Dunn & Nolan-Haley, *supra* note 117, at 1385.