BINGHAM CENTRE FOR THE RULE OF LAW

Northern Ireland Troubles (Legacy and Reconciliation) Bill: A Rule of Law Analysis

Dr Ronan Cormacain, 23rd May 2022

BIICL
British Institute of International and Comparative Law

Executive Summary

The Northern Ireland Troubles (Legacy and Reconciliation) Bill has its Second Reading in the House of Commons on Tuesday 24th May 2022.

The Bill seeks to radically change the process around investigations, prosecutions, inquests and court cases dealing with violent crimes connected with the Troubles. It establishes the Independent Commission for Reconciliation and Information Recovery (the ICRIR).

It allows immunity from prosecution to be granted to anyone who has committed a serious Troubles-related offence. Immunity from prosecution undermines the principle that we are all subject to the law. The bar for getting immunity is low and could reward appalling conduct, with no recognition of the harm it has done. Worst of all, the voice of the victim is completely ignored.

It prohibits civil claims connected to the Troubles, and inquests into deaths arising out of the Troubles. It prohibits most criminal enforcement, unless that enforcement is first authorised by the ICRIR. Shutting down inquests, civil cases and criminal enforcement is a denial of the ability of a person to have their rights vindicated in a court. It undermines the centuries old injunction of Magna Carta that we will deny justice to no-one.

It prohibits the Police Ombudsman from investigating complaints about the police connected with the Troubles. This undermines the duty to investigate deaths under the European Convention on Human Rights and undermines the Rule of Law.

Within the detail of the Bill there are provisions which have the effect of granting significant privileges to the state and state actors which are not available to non-state actors. This undermines the Rule of Law principle of equality before the law.

Some of these Rule of Law defects may be capable of being mitigated by the work of the ICRIR. At this stage it is not possible to be dogmatic about the effectiveness of the ICRIR procedures. However, there are significant Rule of Law weaknesses within the Bill governing its functions. At heart, a review function is being substituted for proper police and judicial investigatory and adjudicatory functions.

Although legislative consent motions are envisaged for some aspects of this Bill, it is not clear whether such a motion will be sought for the provisions on immunity from prosecution. If this is not done, it would breach the Sewel Convention that Westminster does not interfere in devolved matters.

The proposals in this Bill are not supported by: nationalists, republicans, unionists, loyalists and the ever-increasing non-aligned section of the community in Northern Ireland. This Bill does not take into account the wishes of the people of Northern Ireland. The process of making this Bill undermines the Rule of Law by being neither accountable nor democratic.

About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. The project is being led by Dr Ronan Cormacain. This Report has been written by Dr Ronan Cormacain.

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Introduction

The Northern Ireland Troubles (Legacy and Reconciliation) Bill will have its second reading in the House of Commons on Tuesday 24th May 2022. The Bill is the latest attempt to deal with the difficult legacy of Northern Ireland's past. In particular, how to deliver peace, justice and reconciliation when considering the crimes committed by paramilitaries and state actors during what has become known as the Troubles. There have been attempts to deal with this aspect of the peace process in the Good Friday Agreement, and more recently in the Stormont House Agreement. However, achieving resolution has proved impossible so far, and no final agreement has been reached between the parties in Northern Ireland, or the British and Irish Governments.

This Bill is the British Government's plan to deal with that legacy. It does not arise out of the agreement of the political parties in Northern Ireland, nor as a result of agreement with the Irish Government. One contemporary driver of the policy is the prosecution of UK service personnel for crimes committed in Northern Ireland during the Troubles. Brandon Lewis MP, Secretary of State for Northern Ireland has stated that the Bill "will also deliver on our commitment to veterans who served in Northern Ireland".[1] The Bill follows the precedent set out in the Overseas Operations (Service Personnel and Veterans) Act 2021 of imposing substantial restrictions on the prosecution of service personnel, and on civil claims arising out of military conflicts.

The overall thrust of the Bill is to channel all investigations, prosecutions, civil claims, inquests and police complaints arising out of the Troubles away from the police and existing statutory bodies and into a new body, the Independent Commission for Reconciliation and Information Recovery. One of the most controversial aspects of the Bill is likely to be the grant of immunity from prosecution to those responsible for serious Troubles-related crimes.

What does the Bill do?

The Independent Commission for Reconciliation and Information Recovery

The Bill establishes a new Independent Commission for Reconciliation and Information Recovery (referred to in the Bill as the ICRIR).[2] In outline, the Commission takes over all of the investigatory functions currently exercised in relation to Troubles-related crimes.

Officers of the ICRIR have the powers of police constables.[3] The ICRIR can require people to attend to give evidence and also to produce documents.[4]

The ICRIR has the power to carry out reviews of all Troubles-related deaths and other harmful conduct related to the Troubles. A request for a review may be made by various organs of the state, as well as by a victim, or by a family member of a victim. Requests must be made within 5 years of the ICRIR becoming operational. The ICRIR must publish all reports where a person has requested a review.[5]

Immunity from prosecution

The immunity requests panel of the ICRIR has a duty to grant a person immunity from prosecution if three conditions are met. Immunity from prosecution may not be revoked.[6] Immunity may be general (all offences within a description determined by the panel) or specific (offences identified by the panel).[7]

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[1] Northern Ireland Secretary Brandon Lewis - Statement following Queen's Speech 2022 (10 May 2022). Available at https://www.gov.uk/government/news/northern-ireland-secretary-brandon-lewis-statement-following-queens-speech-2022
[2] Clause 2.
[3] Clause 6.
[4] Clause 14.
[5] Clause 15.
[6] Clause 18(14).
[7] Clause 18.

A person may not seek immunity if they are currently being prosecuted for a Troubles-related offence, or if they have a conviction for a relevant Troubles-related offence.[8] Subject to limited exceptions, a request for immunity most be made within 5 years of the ICRIR becoming operational.[9] In determining whether the person has given a true account, the panel must consider other information in their possession,[10] but is not obliged to seek information from any other person.[11]

Information for prosecutors

The ICRIR may refer conduct to a prosecutor if it considers that an offence has been committed.[12] If a referral is made, the ICRIR must give the prosecutor such information as the ICRIR considers appropriate. The prosecutor may request additional information from the ICRIR, and the ICRIR must provide that additional information so far as it is practicable for it to obtain that information.[13]

Historical record

The ICRIR is to produce an historical record of all Troubles-related deaths,[14] which must be published.[15]

Prohibition of criminal investigations

Once this law comes into force "no criminal investigation of any Troubles-related offence may be continued or begun" (although this does not prevent the ICRIR exercising its functions).[16] Police forces in the UK must inform the Secretary of State of all Troubles-related investigations they are carrying out.

Restrictions and prohibitions of criminal enforcement action

If a person has been granted immunity, no criminal enforcement action may be taken against that person.[17]

If a person has not been granted immunity, criminal enforcement action may only be taken if the ICRIR has referred the conduct to a prosecutor.[18]

If the offence is not a serious Troubles-related offence, or connected to a serious offence, no criminal enforcement action may be taken.[19]

But this does not prevent investigations or prosecutions if the prosecution has commenced before these clauses come into force.[20]

Prohibition of civil claims

No civil claims in respect of Troubles-related incidents may be brought. If a civil claim is brought after 17 May 2022, it cannot continue.

Prohibitions of inquests

New inquests into Troubles-related deaths are prohibited.[21] Existing inquests must stop, unless they are at an advanced stage.[22] Coroners are one of the organs of state who may request the ICRIR to review a Troubles-related death.[23]

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[8] Clause 19(1)
[9] Clause 19(2).
[10] Clause 20(2).
[11] Clause 20(4).
[12] Clause 22.
[13] Clause 22(3)(c)(i).
[14] Clause 23.
[15] Clause 24.
[16] Clause 33.
[17] Clause 34
[18] Clause 35.
[19] Clause 36
[20] Clause 37.
[21] Clause 39 (new section 16C of the Coroners Act (Northern Ireland) 1959).
[22] Clause 39, new section 16A of the 1959 Act).
[23] Clause 9(6).

Prohibition of police complaints

After this law comes into force, there is no power for the Police Ombudsman to investigate a complaint made about the police if the complaint relates to conduct forming part of the Troubles.[24]

Memorialisation of the Troubles

There is an obligation to set in train a process for memorialising the Troubles, including to collect oral histories, secure academic research, carry out a Troubles-related work programme and establish an advisory forum (which includes representatives of victims and survivors).[25]

The principle of legality - everyone is subject to the law

Tom Bingham's overarching encapsulation of the Rule of Law is that

> "All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws … publicly administered in the courts."[26]

AV Dicey, the Victorian jurist, said the Rule of Law comprises three aspects

> (a) no-one can be penalised save in accordance with established law,
>
> (b) no-one is above the law, and that everyone, no matter their status, is subject to the law,
>
> (c) constitutional rights are "the result of judicial decisions determining the rights of private persons in particular cases brought before the courts". [27]

These ideas are reflected in the concept of the principle of legality, as set out in the Venice Commission, Rule of Law Checklist.[28]

The outworking of this is the uncontroversial standard practice whereby if a crime is committed, the police investigate and charge, the prosecution authorities prosecute, and the courts determine guilt and then issue a sentence. Legal accountability for the commission of crimes is the bedrock upon which the edifice of our entire criminal justice system is built.

Immunity from prosecution and the principle of legality

Clause 18 strikes at the heart of the principle of legality. If a person committed a serious Troubles-related crime, and they satisfy the three conditions, they must be granted immunity from prosecution. This is a startling proposition. If an IRA member planted a bomb in a town centre which killed and maimed, they can be granted immunity from prosecution. If a UVF member broke into a house and murdered a man in front of his family, they can be granted immunity from prosecution. If a solider shot dead a civilian in cold blood, they can be granted immunity from prosecution.

If this Bill is enacted then not everyone is subject to the law. People who have committed some of the most heinous of crimes will be immune from the law.

The conditions for the grant of immunity

It is worthwhile examining the detail of the conditions for the grant of immunity, both for what they contain and what they do not contain.

The starting point is that this is not a discretionary power, but a mandatory duty. If the conditions are met, then the ICRIR "must grant" the person immunity.[29] There is no room for weighing up competing factors, or taking a nuanced decision. It is an automatic outcome.

The three conditions are:

1. the person has requested immunity,

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[24] Clause 40.
[25] Part 4 of the Bill.
[26] Tom Bingham, *The Rule of Law* (Penguin 2011)
[27] AV Dicey, *Introduction to the Study of the Law of the Constitution* (1897)
[28] Venice Commission, *The Rule of Law Checklist* (Council of Europe, 2016)
[29] Clause 18(1).

2. the person has given an account (not necessarily to the ICRIR) of their conduct which is true to the best of their knowledge, and
3. that conduct would expose the person to risk of prosecution for a serious Troubles-related offence.[30]

The second condition is not that the person tells the truth, it is that their account is true to the best of the person's knowledge and belief. This is subjective, not objective truth. This could very easily lead to a self-serving and partial version of events being given, without being challenged. It is hard to think of an ordinary criminal trial where the criteria for the defendant getting preferential treatment, is simply the defendant's subjective version of the truth.

It also is instructive to see what is not included.

There is no requirement for the person's account to be accurate, complete or fulsome. The person could simply say "I shot X", or "I planted a bomb in town centre Y". By itself, this satisfies the condition.

There is no requirement to consider the gravity of the offence. In every single case within the criminal justice system, the gravity of the offence will be an important consideration in the process. The history of the Troubles in Northern Ireland is littered with appalling crimes. But the severity of these crimes is not a factor in the grant of immunity.

There is no consideration of any contrition (or lack of contrition) on the part of the person, nothing about factors in mitigation, nothing about regret, apology, or even recognition of the damage caused by the crime. If the person says "I abducted and tortured X, and I was right to do so", or "I beat up X because of their religion" then the person is entitled to immunity. Their attitude towards their crime is not a relevant factor.

Perhaps the most glaring absence is the complete lack of consideration for the voice of the victim. **There is literally no role for the victim in the immunity from prosecution process**. There is a role for victims in the general review process, but not in the immunity decision process. It would take a heart of stone not to be moved by the painful stories of victims of the Troubles. But their voice has literally no weight in the decision to let the perpetrators get away with their crimes.

Immunity from prosecution seriously undermines the principle that we are all subject to the law. The bar for getting immunity is low and could reward appalling conduct, with no recognition of the harm it has done. Worst of all, the voice of the victim is completely ignored.

Vindication of rights in a court

A right is worthless unless there is a way to vindicate that right, to have a hearing in a court, to enforce and secure that right. This is explicit in Tom Bingham's description that the Rule of Law requires that laws be "publicly administered in the courts". The oldest formulation of this right is set out in our Rule of Law lodestone, Magna Carta

> "we will not deny or defer to any man either justice or right'.[31]

This provision of Magna Carta is still on our statute book. It is impossible to square Magna Carta with many provisions of this Bill.

Prohibition of civil claims

Turning first to the prohibition on civil claims:

> "A relevant Troubles-related civil action may not be brought on or after the day on which this section comes into force."[32]

[30] Clause 18.
[31] Magna Carta 1215, section 29.
[32] Clause 38(2).

This provision explicitly covers wrongful death proceedings under the fatal accidents legislation, as well as all claims under tort law.[33] New civil claims against the state, the army, or persons accused of terrorist killings are prohibited.

The importance of these civil cases should not be underestimated, as sometimes they have been the only way for victims and survivors to achieve any sort of justice. For example, one of the most celebrated rulings of Sir Declan Morgan, Lord Chief Justice of Northern Ireland, was his ruling finding four named individuals responsible for the Omagh terrorist bomb. One victims' campaigner said "we have proven that if the criminal justice system is not capable of delivering some justice at least civil law is."[34] This Bill prohibits redress via civil law. This is the very essence of denial of justice, the refusal of the right to bring a case before a court.

Prohibition of inquests

Next, there is the prohibition on inquests. Unless an inquest has already started and is at an advanced stage

> "a coroner must not progress the conduct of the inquest".[35]

Furthermore, after these provisions come into force

> "(a) a coroner must not decide to hold an inquest into any death that resulted directly from the Troubles, and
>
> (b) the Attorney General or Advocate General for Northern Ireland must not give a direction … for the conduct of an inquest into any death that resulted directly from the Troubles."[36]

Current inquests must be discontinued and new inquests are banned. The most senior Law Officer in Northern Ireland and the most senior Law Officer in England and Wales (who is automatically the Advocate General for Northern Ireland) are both prohibited from requesting an inquest.

As with civil cases, inquests are sometimes the only way that victims can achieve justice in Northern Ireland. The current Lady Chief Justice of Northern Ireland, Lady Siobhan Keegan, sitting as a coroner, ruled on the Ballymurphy killings. Her findings were that members of the British Army had killed ten innocent civilians, without justification, in breach of Article 2 of the European Convention on Human Rights. In addition, there had not been an effective investigation into the killings at the time they took place.[37] The victims of the Ballymurphy killings had been denied justice for 50 years. Their family members had lived with the false claim that their dead relatives had been involved in terrorist activity when they where shot. The inquest illuminated the truth and vindicated them. This Bill would prohibit this type of inquest. Once again, this is the very essence of denial of justice, the refusal of the right to hold the state to account in a court for the death of a loved one.

Prohibition of criminal enforcement

There is to be no criminal investigation of any Troubles-related offence, no prosecutions if a person has been granted immunity. If a Troubles-related offence isn't serious, there is to be no criminal enforcement. Even if no immunity has been granted, the only route to criminal enforcement is if the ICRIR refers the matter to the prosecution authorities.

As with the prohibition of civil cases and inquests, this prohibition closes down the possibility of people vindicating their rights in court. It denies victims their chance to be heard. It removes the crucial forum of the courts as a place that can uncover the truth and deliver justice.

Shutting down inquests, civil cases and criminal enforcement is a complete denial of the ability of a person to have their rights vindicated in a court. It is completely at odds with the centuries old injunction of Magna Carta that we will deny justice to no-one.

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[33] Clause 38(5).
[34] See for example report in The Independent, "Omagh bomb legal victory: The men behind worst atrocity of the Troubles" (9 June 2009)
[35] Clause 40, new section 16A(2) of the Coroners Act (Northern Ireland) 1959.
[36] Clause 40, new section 16C of the Coroners Act (Northern Ireland) 1959.
[37] *In the matter of a series of deaths that occurred in August 1971 at Ballymurphy, West Belfast* (11 May 2021).

Right to life and Article 2 of the European Convention on Human Rights

Tom Bingham includes adequate legal protection for human rights within the concept of the Rule of Law. Within the Government's current proposals to reform the Human Rights Act 1998, there is no suggestion that we leave the European Convention on Human Rights.

Article 2 of the ECHR protects the right to life. There are a number of components within this right: the state must not take the life of a person, the state is under a positive duty to safeguard life, and the state is under a duty to investigate deaths, in particular where it is the use of force by the state which has resulted in the death.[38]

It is hard to see how the prohibition on inquests, the prohibition on criminal enforcement and the grant of immunity from prosecution are compatible with the requirements of Article 2. These provisions have been described above and are not repeated here. The question of whether the establishment of the ICRIR makes up for these prohibitions is discussed further below.

The Government have provided a substantial human rights memorandum to go alongside this Bill. In our next report, we will engage with the detail of that memorandum and more fully examine the human rights dimensions of this Bill.

Prohibition of complaints against the police

One aspect of the duty to investigate can be fulfilled by a proper investigation into the actions of the police. Investigations of police conduct also provide the valuable function of holding the police to account.

Under this Bill, the jurisdiction of the Police Ombudsman to investigate complaints about the police in relation to the Troubles is removed.[39] Furthermore, where there is an existing complaint, the Chief Constable, the Board, the Director of Public Prosecutions and the Department of Justice is to cease to deal with any complaint referred to it before this Bill comes into operation.

The Police Ombudsman has had a key role in delivering justice for victims of crime and in holding the forces of the state to account. For example, in February of this year, the Ombudsman delivered a report which identified significant investigative and intelligence failures, and "collusive behaviours" by the RUC in relation to a series of murders and attempted murders by the loyalist paramilitaries in south Belfast in the 1990s.[40] The work of the Ombudsman has been key in providing much-needed accountability and giving some succour to the victims of state abuses.

Prohibiting the Ombudsman from investigating complaints about the police undermines the duty to investigate deaths and undermines the Rule of Law.

Equality before the law – differential treatment for agents of the state

The Rule of Law requires equal treatment before the law. Tom Bingham said

> The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

Benchmark D of the Venice Commission Rule of Law Checklist concerns equality before the law and the principle of non-discrimination.

This important general principle has a particular manifestation in military law.

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[38] *McCann v United Kingdom* (1996) EHRR 97.
[39] Clause 40.
[40] Police Ombudsman for Northern Ireland, *Investigation into police handling of loyalist paramilitary murders and attempted murders in South Belfast in the period 1990 to 1998* (February 2022)

Military law principle that ordinary law applies equally to soldiers

When it comes to the armed forces, there is a long-standing principle of military law that soldiers are subject to the ordinary criminal law. They are to be treated no differently from any other citizen. The modern restatement of this principle is contained in s. 42 of the Armed Forces Act 2006. Section 42 provides that a person subject to service discipline commits an offence if the person does anything which is punishable under the law of England and Wales, or if it was done in England or Wales, would be so punishable. The context may be different and the procedure may be different, but soldiers are as liable for their crimes as anyone else.

In written evidence to Parliament, Martin Hemming, a former Government lawyer at the MoD stated

> [service personnel] are bound by the criminal law of England and Wales wherever in the world they are serving. There is no special treatment or dispensation for Service personnel. If they break the criminal law, they can face the consequences in court just like any other citizen.[41]

An even more authoritative statement is contained in Halsbury's Laws of England

> It is one of the cardinal features of the law of England that a person does not, by enlisting in . . . the armed forces, thereby cease to be a citizen, so as to deprive him of his rights or exempt him from his liabilities under the ordinary law of the land.

This is an important principle, and one of which Lord Lloyd was rightfully proud, speaking in the House of Lords in a debate on chain of command in the armed forces when he said

> In a free country there is not and cannot be one law for soldiers and another for citizens. I believe that all noble and gallant Lords who have made such powerful speeches today would accept that basic point. Indeed, we frequently boast of the fact that our soldiers are citizens in uniform.[42]

Dicey specifically mentions soldiers in his exposition on the Rule of Law, stating that "all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (generally speaking) escape thereby from the duties of an ordinary citizen".[43]

Preferential treatment for the state and its agents in the Bill

The Bill ostensibly applies in equal measure to everyone, fulfilling the requirement of military law that members of the armed forces are treated in the same way as everyone else if they have committed a crime.

However, there are three areas of the Bill which undermine equal treatment, and give privileged rights to the state, or agents of the state.

<u>No review which duplicates a previous investigation, unless necessary</u>

There is a provision in the Bill which states that the ICRIR, in deciding what steps are necessary in carrying out a review,

> in particular, must ensure that the ICRIR does not do anything which duplicates any aspect of the previous investigation unless, in the ICRIR's view, the duplication is necessary.[44]

The history of investigations carried out where the state was the perpetrator of alleged unlawful action is troubled. The original investigation (the Widgery Report) of Bloody Sunday (when British soldiers killed 13 unarmed civilians) is now widely accepted to have been a whitewash. This failure to properly investigate was only remedied when the Saville Tribunal reported. In the inquest into the Ballymurphy killings, the coroner found that the original investigation "was entirely inadequate". The many

[41] UK Armed Forces Personnel and the Legal Framework For Future Operations, Written Evidence to Defence Select Committee, Session 2013-2014, available at https://publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/futureops/law17.htm
[42] Hansard House of Lords, 14 July 2005 Vol 673 Col 1251
[43] Ibid, page 115.
[44] Clause 13(5).

repeated investigations, reviews, inquiries etc into state actions have been necessary because of the lack of willingness to properly investigate these actions at the time.

However, despite the well documented history of inadequate investigations of state abuses, the ICRIR is prohibited from doing anything which duplicates any previous investigation, unless the duplication is "necessary". There is nothing in this to take into account the inadequacy of previous flawed investigations. The bar is set very high at the level of necessity, rather than it being reasonable or appropriate to do so. This provision privileges the state and state actors and restricts full and proper investigations into their actions.

Acceptability of previous accounts

In seeking immunity, it is not required that the person give an account to the ICRIR. Instead, all that is necessary is that the ICRIR is in possession of an account given by the person. The account can be given either directly to the ICRIR or to some other person.[45] This seems designed to give preference to state actors. If there has been an allegation of misconduct on the part of state forces, then there is likely to have been some sort of statement given by those state forces, for example to military police. As has been set out above, the adequacy of many of these investigations is questionable. However, the state actor can still point to that account and rely upon it without having to answer direct questions from the ICRIR. This privilege is unlikely to be accessible by non-state actors.

National security exemption

The Bill prohibits the ICRIR from doing anything which

> "would risk prejudicing, or would prejudice, the national security interests of the United Kingdom."[46]

Some of the worst state abuses in the Troubles have been carried out in the name of national security. For example, to this day, the Government is still resisting calls for a full inquiry into the murder of Belfast solicitor Pat Finucane, despite widespread evidence as set out in the de Silva report of extensive state collaboration with the loyalist paramilitaries who carried out the murder. There is no procedure in place in the Bill for weighing up national security concerns, or dealing with them in a confidential manner. Instead, even if there is a risk of prejudicing national security, the ICRIR cannot act. This is another example of a clear privilege being given to the state, which does not respect equality before the law.

This very week the Government fought the BBC to keep secret the abuses of an MI5 informant operating in the UK.[47] Notwithstanding the serious violence the informant had meted out to two women, in the name of "national security" the Government resisted any information at all being made public. The provisions in this Bill bake in this national security exemption with no possibility of it being waived.

In an oft-cited judgment, the American Judge Jackson said

> I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[48]

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[45] Clause 18(4).
[46] Clause 4(1)(a)
[47] Daniel De Simone "How the state tried to silence my abusive agent expose" (BBC News, 22 May 2022) available at https://www.bbc.co.uk/news/uk-61528286
[48] *Railway Express Agency Inc v New York* 336 US 106, 112-113 (1949)

In apologising for the conduct of the state on Bloody Sunday, David Cameron, as Prime Minister said that "you do not defend the British Army by defending the indefensible. We do not honour all those who have served with such distinction in keeping the peace and upholding the rule of law in Northern Ireland by hiding from the truth."[49]

This Bill grants significant privileges to the state and state actors which are not available to non-state actors. This undermines the Rule of Law principle of equality before the law.

Does the establishment of the ICRIR make up for some of these Rule of Law defects?

The establishment of the ICRIR cannot make up for the damage done to the principle of legality by virtue of the immunity provisions. But could the exercise of its functions make up for some of the other Rule of Law defects, in particular the vindication of rights in a court and the right to life under Article 2 of the European Convention on Human Rights?

It is difficult to give a definite answer to this question on the basis of the provisions in the Bill, as so much will depend on how the ICRIR will work in practice. In particular, we do not know the budget for the ICRIR, nor how many and what calibre of staff it will have. We cannot know how it will go about the exercise of its functions. What follows is therefore a list of the factors which will influence the effectiveness of the ICRIR in upholding and promoting the Rule of Law.

Factors enhancing the Rule of Law

The ICRIR has the power to review all deaths and other serious crimes in relation to the Troubles. This is an important power and it has the potential to provide proper investigation, accountability, justice, vindication, and respect for the needs of victims.

Officers of the ICRIR have the same powers as police officers in carrying out their reviews.[50]

There is a duty on official bodies to make full disclosure to the ICRIR.[51]

Victims (close family members of a deceased person) have the right to seek a review of a death.[52]

Victims have the right to seek a review of the conduct that caused them serious harm.[53]

The ICRIR has various powers to require persons to attend, give evidence and produce documents or other things,[54] and it has powers to enforce this.[55]

These are important provisions and do have the potential to enable ICRIR to uphold the Rule of Law.

Factors undermining the Rule of Law

The function of the ICRIR is not to "investigate" only to "review". A review is qualitatively weaker than an investigation.

Unlike the standard model for policing in the case of a serious crime, there is a power to review, not a duty.

Unlike a civil case, victims and survivors will not be running cases, but relying upon the ICRIR to make all decisions.

Unlike inquests, there will be no public hearings, no well-worn procedures for involving multiple parties, no rights for individuals to have legal representation, no formalised role for victims.

There is no power to take evidence on oath.

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[49] House of Commons Hansard 15 June 2010 Vol 511 Col 789.
[50] Clause 6.
[51] Clause 5.
[52] Clause 9.
[53] Clause 10.
[54] Clause 14
[55] Schedule 4.

There is no facility for cross-examination or independent verification or questioning of those submitting evidence to the ICRIR. There is not the challenge function that court proceedings allow for.

The process of reviews will not be transparent and open to the public. For example, if the ICRIR considers that publication of certain information in a report would not be "in the public interest"[56], then that information will not be published, and no-one will know (or be able to challenge) what is excluded from a report.

These factors significantly undermine the Rule of Law and seriously weaken any claim that the establishment of the ICRIR will make up for the denial of the other procedures.

At this stage it is not possible to be dogmatic about the effectiveness of the ICRIR procedures. However, there are significant Rule of Law weaknesses within the Bill governing its functions. At heart, a review function is being substituted for proper police and judicial investigatory and adjudicatory functions.

Compliance with constitutional norms

The Sewel Convention requires that the Westminster Parliament will not normally legislate for matters that are within the competence of the devolved jurisdictions. Policing and justice have been within the competence of the Northern Ireland Assembly since 2010. This is a convention, and not a strict rule, and Westminster does occasionally legislate for devolved matters. When it does occur, it is usually in the context of a UK wide Bill, which also affects Northern Ireland. This Bill is unusual as it deals solely with Northern Ireland. But this does not, in itself, breach constitutional norms.

In either case, the Sewel Convention is respected if the devolved legislature passes what is known as a legislative consent motion. This is a motion, passed by the Northern Ireland Assembly, stating that it consents to Westminster enacting a Bill on a devolved matter. This is relatively uncommon, but perfectly constitutionally appropriate.

There are two issues arising out of this. Firstly, given the antipathy towards these proposals by every single political party in Northern Ireland, it is unclear what is the point of introducing a Bill into Westminster with zero political chances (at the moment) of it gaining a legislative consent motion. It would seriously undermine constitutional norms if this Bill were passed without such a motion.

Secondly, there is a point of detail about what precisely would be sought in a legislative consent motion. In the Explanatory Notes, it is stated that a motion will be sought for:

> the limitations of civil proceedings, criminal proceedings and inquests; the release of prisoners; the establishment of the ICRIR; the reviewing and reporting functions of the ICRIR; and the provisions regarding memorialising the Troubles.[57]

This is a relatively comprehensive list, but it does not include the phrase "immunity from prosecution". It may be that this is a technical oversight, and that immunity is thought to be included within the general functions of the ICRIR. However, given the critical importance of this provision, it is important to confirm this point in Parliament.

A very useful question to ask in 2nd Reading is therefore – "will a legislative consent motion be sought for the provisions of this Bill dealing with immunity from prosecution?"

Accountable and inclusive law-making process

Benchmark A5 of the Venice Commission Rule of Law Checklist requires that the process for making laws is "transparent, accountable, inclusive and democratic".

The Explanatory Notes to the Bill refer to the consultation process on the Stormont House Agreement and state that the Bill "builds on the principles and other aspects of the Stormont House Agreement

[56] Clause 15(8).
[57] Explanatory Notes, paragraph 10.

principles".[58] This gives the impression that this Bill is a result of a process of engagement and agreement with people and politicians in Northern Ireland, which it is not.

There is close to zero support for this Bill in Northern Ireland. No political party has endorsed it, nor have any civil society organisations supported it. The Bingham Centre hosted an event for the All Party Parliamentary Group on the Rule of Law in Westminster on 4th November 2021. All speakers (the majority of whom are from Northern Ireland), opposed the Command paper which preceded this Bill:

- Sir Declan Morgan, former Lord Chief Justice of Northern Ireland
- Naomi Long MLA, Minister for Justice, Northern Ireland
- Professor Louise Mallinder, Queen's University Belfast
- Pablo de Greiff, Former UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence
- Lt Col the Reverend Nicholas Mercer, former senior military legal adviser to the 1st Armoured Division

Together with the Committee on the Administration of Justice and Queen's University Belfast, the Bingham Centre hosted a second event on these proposals in Stormont on 22nd November 2021. None of the speakers supported these proposals:

- Paula Bradshaw MLA (Alliance Party)
- Professor Kieran McEvoy (Queen's University Belfast)
- Alyson Kilpatrick (Northern Ireland Human Rights Commissioner)
- Stephen White OBE (Chair of St George Cross Foundation)
- Alan McBride (Wave trauma centre, a Northern Ireland based victims group)
- Dr Ronan Cormacain (Bingham Centre)
- Favian Salvioli, UN Special Rapporteur on Transitional Justice

The House of Commons Library Briefing Paper collated reactions to the Command paper.[59] The following were all opposed to it:

- Shadow Secretary of State for Northern Ireland, Louise Haigh MP
- Sir Jeffrey Donaldson MP, leader of the DUP
- SDLP Deputy Leader Nichola Mallon
- Stephen Farry MP, Alliance Party
- Michelle O'Neill MLA, deputy First Minister of Northern Ireland, Sinn Féin
- Micheál Martin, Irish Taoiseach
- Archbishop Eamon Martin, leader of the Roman Catholic Church in Ireland
- Ulster Human Rights Watch
- Amnesty International
- Sandra Peake, CEO Wave trauma centre
- Ian Simpson, Northern Ireland Veterans' Association

On 20 July 2021, the Northern Ireland Assembly passed a motion to reject the Command paper.[60] There were no dissensions from this motion.

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[58] Explanatory Notes, paragraph 6.
[59] Clare Mills, David Torrance, "Investigation of former Armed Forces Personnel who served in Northern Ireland" (House of Commons Library, 18 May 2022)

The proposals in this Bill have united everyone in Northern Ireland against them: nationalists, republicans, unionists, loyalists and the ever-increasing non-aligned section of the community. This Bill does not take into account the wishes of the people of Northern Ireland. The process undermines the Rule of Law by being neither accountable nor democratic.

Lack of agreement of the parties justifying this Bill

The Good Friday Agreement 1998 (also referred to as the Belfast Agreement) has as its full title "Agreement reached in multi-party negotiations". It also contains as an Annex the "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland".

The St. Andrews Agreement 2006 was an agreement reached between the British and Irish Governments and the Northern Ireland political parties.

The Stormont House Agreement 2014 was likewise an agreement between the political parties in Northern Ireland, supported by the British and Irish Governments.

All these agreements produced important legal and constitutional change in Northern Ireland. All the resulting legislation had a democratic legitimacy. Even more fundamentally, the sacrifices required by the Good Friday Agreement required the legitimacy of a referendum in Northern Ireland before (amongst other things) prisoners could be released.

This Bill is solely the product of the UK Government. It does not arise out of any agreement with the political parties in Northern Ireland, nor with the Government of Ireland. It does not have the democratic legitimacy that previous legislative change had. Even though it purports to be about reconciliation in Northern Ireland, it does not have the support of the people of Northern Ireland.

[60] Northern Ireland Assembly, Hansard, 20 July 2021, Volume 141, No 7.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
E binghamcentre@biicl.org

www.binghamcentre.biicl.org

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