The politics of amnesty: Lessons from Northern Ireland

The *Troubles* in Northern Ireland took about 3,500 lives over a 30-year period between 1968 and 1998. The tripartite conflict involving British soldiers and paramilitaries from both sides of the sectarian divide brought death and destruction not only to each other, but also to the civilian populations whom they were supposed to protect. Despite the by and large successful resolution of the conflict with the signing of the Good Friday Agreement (GFA) in 1998, its legacy still casts a long shadow over the traumatised region up to this day.

Among the unfinished tasks of overcoming the Troubles legacy is the question of justice for the victims. For decades, family members of individual victims have been yearning for truth and justice for their loved ones, some meeting partial success (the *Saville Report of the Bloody Sunday Inquiry*), others hindered by expedient political decisions they themselves did not make (the so-called *On-the-Run* scheme that gave de facto amnesty to certain Republican fugitives until it was exposed in 2014).

The British and Northern Irish experience of mastering the Troubles past therefore offers useful examples of both successes and failures for other deeply divided societies, possibly including Hong Kong since the *8.31* decision of the National People's Congress Standing Committee in 2014.

Of particular relevance are perhaps the Westminster parliamentary debates on a statute of limitations for British soldiers and veterans in recent years. In these exchanges among proponents such as the Democratic Unionist Party (DUP) and the House of Commons Defence Select Committee (DC), and a somewhat reluctant government (under Theresa May) supported by—ironically in this case—individual Labour MPs, one can see what is at stake in the politics of amnesty in the British context and its legal boundaries.

Debates on a statute of limitations in the United Kingdom

To begin with, both the DUP and the DC are not happy with the fact that British veterans who served in Operation Banner in Northern Ireland (over 250,000 according to official figures) and who are now in their 60s or 70s, if not older, still have to face the prospect of being (re)investigated for Troubles-related crimes.

They claim that this "lawfare", or the judicialisation of war, as the recently sacked Defence secretary, Penny Mordaunt, calls it, is unfair to veterans, especially those who have already been cleared in previous investigations (some of which, however, were later found to be flawed).

They also see a certain imbalance in the way paramilitary criminals and soldiers are treated. Referring to the two-year sentence cap in the prisoner release mechanism of the GFA, Julian Lewis (Con), the DC chair, complained in 2017: "If a terrorist has killed 16 people and gets prosecuted, they are let out after two years… Whereas if a soldier has killed one person wrongly and they are prosecuted, they serve a life sentence." In addition, considerations on army recruitment and financial implications also come into play.

The DUP also sees a sinister move by Sinn Féin, its nationalist counterpart in Northern Ireland, to "rewrite history" by promoting a "disproportionate" investigative focus on crimes allegedly committed by British forces, as if the British state and not the Irish Republican Army (IRA) were the main culprit of the Troubles.

According to its proponents, a statute of limitations, which establishes time limits for specific crimes to be prosecutable, would effectively solve all these problems and protect British veterans *and*— perhaps more importantly for the DC—soldiers (those who will serve in future operations or have served in other recent ones such as in Iraq and Afghanistan).

For three years, the May government was reluctant to give in, even when Conservative backbenchers like Johnny Mercer (now Minister for Defence People and Veterans) threatened to withdraw support for her unless the government did something to stop the "lawfare" against veterans.

This might seem surprising, given the Brexit preoccupation and the weak position of the minority government (since the disastrous 2017 general election) sustained only by the confidence-and-supply agreement with the DUP, every Commons vote should count for the beleaguered prime minister.

But time and again Theresa May and her second Northern Ireland secretary, Karen Bradley, braved friendly fire on the question of statutory limits. Aside from the expressed concern for the victims and their families—which one can only hope to be genuine—the UK's international legal obligations seem to have prevented the government from fulfilling the wishes of the DUP and the DC.

As Theresa May shot back at Mercer, after being pestered for the third time in a single PMQ (Prime Minister's Questions) on May 22, just two days before she announced her resignation as party leader: "I think the implication of my honourable friend's question is that he is urging me to put in place a system that would equate terrorists with members of the armed forces. *Any statute of limitations and any amnesty that is put in place would, as a matter of law, have to apply across the board.* I do not want to see—and I will not see—an amnesty for the terrorists."

> ***In other words, such an anti-extradition-bill amnesty will likely also cover police misconduct, violence committed by suspected triad gangs ...***

In support of the government's stance in an earlier occasion, Stephen Pound (Labour), the long-year shadow minister for Northern Ireland, emphasised that "justice cannot be time-expired… Above all, we need to remember two groups: the veterans, by all means; but also let us never forget the victims."

Indeed, under international human rights law (the European Convention on Human Rights, ECHR), it would not be permissible to have an amnesty or statute of limitations applicable only to one side of the conflict. As confirmed by the legal experts invited to give evidence to one of the DC's own related inquiries (whose opinions were nonetheless selectively presented in the official report at the end), it would be illegal for the UK to have a statute of limitations for British service personnel only.

In the words of Kieran McEvoy: "if you introduce a statute of limitations that is only directed at state actors, it looks like state impunity, in effect; there are international legal obligations around state impunity." The professor of law and transitional justice at Queen's University Belfast also added that if the amnesty or statute of limitations negates the victims' right to truth recovery (concerning the deprivation of life), as implied in Article 2 of ECHR, then "I don't think it is law."

The alternative of derogation from ECHR—returning to the so-called law of armed conflict (the Geneva Conventions) would not do the trick for the veterans of Operation Banner, either, for the UK never recognised the conflict in Northern Ireland as war, which the Republicans had long claimed as a "war of liberation" to justify their attacks on British soldiers and policemen as "legitimate targets" of war.

Instead, McEvoy suggested the solution of capitalising on the existing prisoner release mechanism in the GFA—the two-year framework and the Sentence Review Commission—which should be, in principle according to him, applicable to paramilitaries as well as soldiers.

In this way, the rule of law can run its course whereby the investigation of truth can take place (and guilt, if any, established), while at the same time "some kind of a punishment" is meted out to satisfy—albeit only partially—the demands for justice, and to offer some deterrence and protection for society.

The DC did not take up McEvoy's suggestion (for their goal is zero investigation for veterans, not just reduced punishment), but opted for another legal opinion that favours derogation from the ECHR.

Relevance for Hong Kong

The outcome of the British parliamentary debates on a statute of limitations is still open: while the Northern Ireland Office has resisted repeated calls to include the statute as one of the options to reform historical investigations in the devolved region (under de facto direct rule since 2017), the Ministry of Defence is testing the waters with a consultation on a lookalike—a "statutory presumption against prosecution."

This British experience thus far, however, raises certain considerations for the reflection on one of the five core demands of Hong Kong anti-extradition-bill protesters: the unconditional release of or amnesty for the arrested protesters.

Although under different international legal regimes, Hong Kong, just like the UK, neglects its international and domestic legal constraints at its peril when contemplating a suitable amnesty for the present predicament.

Indeed, as has been noted by many, including the Honourable Andrew Li and others who are otherwise sympathetic with the protesters' goals, any form of time- and event-specific amnesty can only be *universal*, as in not only applicable to one or the other party in a conflict, in order to be up to relevant international human rights standards, such as the International Convention on Civil and Political Rights.

In other words, such an anti-extradition-bill amnesty will likely also cover police misconduct, violence committed by suspected triad gangs, and other crimes arising from the alleged collusion between the two during this period.

To say the least, this will require our close engagement with the different victim groups, who alone, in the final analysis, have the prerogative to exercise justice and mercy, which is over and above what a government official empowered by law to pardon and to commute penalties can do. Unwarranted representative forgiveness is a most common problem in conflict resolution which only bodes ill for the reconciliation process down the road.

On the other hand, the McEvoy solution—untampered judicial investigation coupled with variegated but limited punishment that is applicable to all in a conflict—also offers food for thought for the present situation in Hong Kong: Can a suitable level of punishment for all anti-extradition-bill-related crimes be determined that is legally and politically agreeable? Are there to be exceptions (exceptional brutality, murder, etc.)? Can the mechanism be combined with the expungement of criminal records so that they do not remain with the offenders for life? Should the offenders eligible for sentence review be required to seek forgiveness from their victims for the damage inflicted, as in to express repentance for the consequences of their political means, and not necessarily for their political ends? In lieu of a ratification process, which gave birth to the GFA together with its prisoner release mechanism, what kind of engagement with the victims can bring legitimacy to a similar scheme in Hong Kong?

At the end of the day, a key pillar of the peace settlement in Northern Ireland is the recognition that incompatible political ideals are legitimate in themselves: they are there to stay and consent is the key to any constitutional change. Hong Kong—and mainland China, to an even greater extent I'm afraid—is still far from that recognition.

In the meantime, however, it is in everyone's interest—first and foremost the victims among the protesters—that a human rights-compliant solution to the present conflict in Hong Kong can be found.

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