

What Did the Lawyers Do During the 'War'? Neutrality, Conflict and the Culture of Quietism

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Using Northern Ireland as a case study, this paper explores how lawyers responded to the challenges of entrenched discrimination, sustained political violence and an emerging peace process. Drawing upon the literature of the sociology of lawyering, it examines whether lawyers can or should be more than 'paid technicians' in such circumstances. It focuses in particular upon a number of 'critical junctures' in the legal history of the jurisdiction and uncouples key elements of the local legal culture which contributed to an ethos of quietism. The paper argues that the version of legal professionalism that emerged in Northern Ireland was contingent and socially constructed and, with notable exceptions, obfuscated a collective failure of moral courage. It concludes that facing the truth concerning past silence is fundamental to a properly embedded rule of law and a more grounded notion of what it means to be a lawyer in a conflict.

INTRODUCTION

In his analysis of the role of law in the South African conflict and transition, Richard Abel quipped that one of the reasons why it was so well studied was that it was the first such struggle to 'happen in English'.¹ Northern Ireland qualified for a similarly close analysis. For legal academics, the jurisdiction has offered a particularly rich site for theoretical and doctrinal analysis.² However, whilst the centrality of law to both the conflict and peace process have been well

*Professor of Law and Transitional Justice, Law School, Queens University Belfast. I received very helpful comments from two anonymous referees, as well as academic colleagues after presentations of different versions of the paper at Queen's University Belfast, the University of Liverpool, the University of Oxford and the University of Manchester. Brice Dickson, Ron Dudai, Colin Harvey, John Jackson, Louise Mallinder, John Morison, Hannah Quirk and Marny Requa all provided detailed comments on previous drafts, and Rachel Rebouché, Alex Schwartz and Louise Mallinder supplied excellent research assistance. The staff at the Queen's and University of Ulster libraries, Linenhall Library, Public Records Office and Bar Library were helpful in facilitating the archival work. Thanks are also due to Atlantic Philanthropies which funded the research, the judges and lawyers who were interviewed and to Brona Heinz for her archival materials on the Northern Ireland Association of Socialist Lawyers. Other lawyers also gave me access to their own personal archives on the basis of strictest confidentiality and I am grateful for their trust. Finally the article is drawn from a larger comparative project which was begun with my mentor Stephen Livingstone. Stephen, himself an immensely talented lawyer, died tragically in 2004. I would like to dedicate this article to his memory.

1 R. Abel, *Politics By Other Means: Law and the Struggle Against Apartheid in South Africa 1980–1994* (London: Routledge, 1995).

2 eg G. Hogan and C. Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989); J. Jackson and S. Doran, *Judge Without Jury: Diplock Trials in the Adversarial System* (Oxford: Oxford University Press, 1995); J. Morison and S. Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (London: Sweet and Maxwell, 1995); B. Dickson, *The European Convention on Human Rights and the Northern Ireland Conflict* (Oxford: Oxford University Press, 2010).

explored,³ comparatively little has been written about the lawyers who worked in the system and who shaped, challenged and implemented its laws.

Amongst other things, the circumstances of Northern Ireland required lawyers to consider: their relationships with an emerging civil rights movement; ethical questions about whether and how to participate in legal proceedings under an emergency law regime; their responses when their own members became the victims of paramilitary and state inspired violence; and whether to challenge long held views as to what constituted a 'neutral' legal system. Each of these experiences speaks forcefully to what Scheingold and Sarat refer to as lawyering as a 'public profession' where the contribution to society is more than the acquisition, aggregation and deployment of technical skills.⁴ Such a perspective challenges the narrow version of professionalism which focuses exclusively upon legal competence and instead suggests that lawyers must face 'head on' their broader social, political or moral responsibilities in a society in conflict.⁵

This paper arises from a number of practical and scholarly interests concerning the role and responsibilities of lawyers in conflicted and transitional societies both inside and outside the courtroom.⁶ In total, over fifty lawyers and judges in Northern Ireland were interviewed for this paper. Interviews were conducted in two main tranches, in 2002–3, and between 2008–2010. All interviews took place after the signing of the Good Friday Agreement, thus subjects were 'reflecting back' on events which had occurred during the conflict and early transition. Only one (a barrister) was interviewed twice.⁷

3 C. Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart, 2001); K. McEvoy and J. Morison, 'Beyond the Constitutional Moment: Law, Transition and Peacemaking in Northern Ireland' (2003) 26 *Fordham International Law Journal* 961; C. Campbell F. Ní Aoláin and C. Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *MLR* 317.

4 A. Sarat and S. Scheingold, *Something to Believe In: Politics, Professionalism and Cause-Lawyering* (Palo Alto CA: Stanford University Press, 2004) 23.

5 A. Sarat and S. Scheingold 'Cause Lawyering and the Reproduction of Professional Authority' in A. Sarat and S. Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998) 3.

6 eg K. McEvoy, 'Law, Struggle, and Political Transformation in Northern Ireland' (2000) 27 *JLS* 542; K. McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 *JLS* 411.

7 Those interviewed included 12 judges, 18 barristers (9 of whom were QCs), 21 solicitors and a number of officials associated with the Law Society, Director of Public Prosecutions, Bar Council and Northern Ireland Service. Unless interviewees indicated that they wished their comments to be explicitly attributed, interviews were conducted on conditions of confidentiality and anonymity. Interviews were semi-structured, framed around key human rights and historical themes and usually lasted 1–2 hours. A 'purposeful sampling' methodology was deployed where interviewees were chosen using a range of criteria including professional seniority, experience of working on conflict or human rights related cases or knowledge and experience of debates within the professional groupings. There was a more or less even divide amongst the barristers between those who had acted as defence lawyers or prosecutors (or in some cases both) and a number of the judges were also former prosecuting counsel. An initial 'wish list' of key interviewees was drawn up, these were written to and, after some negotiation, almost all agreed to be interviewed. Once fieldwork was commenced, others were recruited using 'snowball' referrals to professional friends and colleagues. There are well-established challenges to an exclusive focus on 'elite level' interviews such as these, usually concerning access, interviewee skills at avoiding difficult or challenging questions and the danger of over-representing hegemonic understandings of historical

The structure of this article is as follows: section one offers a brief outline of the relevant literature from the sociology of lawyering and the theoretical insights which may be derived from exploring 'critical junctures' in the legal history of a jurisdiction. Section two examines the era of the civil rights movement and the introduction and operation of internment without trial, characterising it as a period of *failed mobilisation* in the legal community. Section three charts the role and response of lawyers to Emergency Laws as a key element of the state's strategy to cope with sustained political violence and the introduction of non-jury Diplock courts. This phase is framed as an examination of *the politics of silence*. Section four explores the response of the legal community to attacks upon their own members and challenges from fellow lawyers to the prevailing British and Unionist ethos of the judicial system. The painfully slow transition from indefensible silence to a principled position in favour of the rights of defence lawyers is tentatively described as *the emergence of a collective legal conscience*. The article concludes by uncoupling the key elements of the local legal culture and its relationship to the particular political/historical context of the jurisdiction. It argues that an appropriately nuanced usage of the post-colonial lens of historical and sociological scholarship provides insights into how that culture shaped the prevailing ethos of quietism. It concludes that a more truthful understanding of past silence is a fundamental pre-requisite to a properly embedded rule of law and a more grounded notion of legal professionalism.

LAWYERING AND CRITICAL JUNCTURES

Rather than offering an exhaustive account of the history of lawyering during the Northern Ireland conflict, I explore in some detail certain 'critical junctures' which speak to some of the broader themes being examined. In order to frame those discussions properly, in particular the distinct notion of professionalism which came to the fore, I draw upon some of the key ideas from the relevant literature on lawyering. The three themes of most pertinence to the Northern Ireland context are: the relationship between lawyers and the state; the experiences of 'cause lawyering' wherein lawyers abandon the traditional position that law and lawyers can be divorced from politics and the question of how well or otherwise lawyers perform in the context of political violence and state repression.

events unchallenged by critical perspectives 'from below'. However, in this study, access proved largely unproblematic, interviews were supplemented by extensive archival research and the author (and others) had previously conducted extensive research on those directly affected by the legal process during the Northern Ireland conflict. In that context, interviews with legal elites were adjudged the most appropriate means to understand the broader political, social and cultural forces at work within the professional community. For similar methodologies deployed with lawyers, see E. Smigel, *The Wall Street Lawyer: A Professional Organizational Man?* (Bloomington IA: Indiana University Press, 1969) and C. Shdaimah, 'Dilemmas of Progressive Lawyering: Empowerment and Hierarchy' in A. Sarat and S. Scheingold (eds), *The World Cause Lawyers Make* (Stanford CA: Stanford University Press, 2005). For a more general discussion of relevant design challenges see S. Merriam, *Qualitative Research: A Guide to Design and Implementation* (San Francisco CA: Wiley, 2009), and L. Dexter, *Elites and Specialised Interviewing* (Colchester: ECPR Press, 2006).

Rooted variously in the Weberian, Marxist and Durkheimian traditions, there is a rich literature usually referred to as the sociology of lawyering which examines amongst other things the education, mores, values, working practices, systems of self-regulation, efforts to sustain the monopoly in service delivery and social status of lawyers.⁸ As with the sociology of the professions in general,⁹ a central theme of much of this literature concerns the relationship between the legal profession and the state. As Burrage has outlined, the distinctive characteristics of legal professions in different countries are intimately linked to their respective histories of state formation and the practical and symbolic relationship between the legal profession and the state.¹⁰ Certainly in Northern Ireland that relationship was absolutely central in the development of the local legal culture.

There is a growing literature which addresses the challenges of the professional roles and responsibility of lawyers in conflicted societies, such as South Africa,¹¹ Latin America,¹² Israel and the Occupied Territories¹³ and America post the 9/11 attacks.¹⁴ The experiences of lawyers who work 'at the sharp end' in some of these countries and who must discern and act upon their professional responsibilities when the rule of law is in such a keenly contested space speaks directly to the Northern Ireland context.¹⁵

8 For an overview see J. Heinz and E. Laumann, *Chicago Lawyers: The Social Structure of the Chicago Bar* (New York: Russell Sage Foundation, 1983); T. Halliday, *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (Chicago: University of Chicago Press, 1987); R. Abel (ed), *Lawyers: A Critical Reader* (New York: The New Press, 1997); R. Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford: Oxford University Press, 2004); L. Fox (ed), *Raising the Bar: Real World Solutions for a Troubled Profession* (Chicago: American Bar Association, 2007).

9 See eg T. Johnson, *Professions and Power* (London: Macmillan, 1972); K. MacDonald, *The Sociology of the Professions* (London: Sage, 1995); J. Evetts et al, 'Sociological Theories of Professions: Conflict, Competition and Cooperation' in A. Dennis and I. Kalekin-Fishman (eds), *The ISA Handbook in Contemporary Sociology* (London: Sage, 2009).

10 M. Burrage, *Revolution and the Making of the Contemporary Legal Profession: England, France, and the United States* (Oxford: Oxford University Press, 2006). See also D. Sugarman and W. Pue (eds), *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart, 2003).

11 See Abel, n 1 above; S. Ellman, 'Law and Legitimacy in South Africa' (1995) 20 *Law and Social Inquiry* 407; D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart, 1998).

12 See eg Y. Dezaley and B. Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002); R. Pérez Perdomo, *Latin American Lawyers; A Historical Introduction* (Stanford: Stanford University Press, 2006).

13 See R. Brooks, 'The New Imperialism: Violence, Norms, and the "Rule Of Law"' (2003) 101 *Michigan LR* 2275.

14 See eg A. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) esp chs 4 and 5; R. Weisberg, 'Loose Professionalism, or Why Lawyers Take the Lead on Torture' in S. Levinson (ed), *Torture: A Collection* (New York: Oxford University Press, 2004); R. Bilder and D. F. Vagts, 'Speaking Truth to Power: Lawyers and Torture' (2004) 98 *American Journal of International Law* 689; D. Luban, 'Lawyers and Legal Ethics in Guantanamo' (2007) 60 *Stanford LR* 1981; A. Meyerstein, 'The Law and Lawyers as Enemy Combatants' (2007) 18 *University of Florida Journal of Law and Public Policy* 299; M. Cheh, 'Should Lawyers Participate in Rigged Systems? The Case of Military Commissions' (2007) 1 *Journal of National Security Law and Policy* 375; H. Bruff, *Bad Advice: Bush's Lawyers and the War on Terror* (Lawrence KS: University of Kansas Press, 2009).

15 For the classic discussion on contested understandings of the rule of law see O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton NJ: Princeton University Press, 1961).

A central concern in such sites is the extent to which law can form part of broader resistance or, perhaps more accurately, mobilisation strategies. 'Cause-lawyering' is the genre of scholarship most associated with this style of analysis. Sarat and Scheingold in particular have mapped out a rich terrain of comparative work which explores the ways in which lawyers challenge prevailing political, social, moral or legal power.¹⁶ While definitional wrangles persist,¹⁷ at its core cause lawyering is a form of 'moral activism' wherein committed lawyers 'do more' than simply deploy their technical services on behalf of their client. The common thread which links these lawyers is an abandonment of the traditional disavowal of the politics of legality through, for example, pro bono work, strategic litigation, styles of argumentation and public mobilisation beyond the courtroom. Cause lawyers are essentially more open to the view that the professional is indeed *political*.¹⁸

Of course, as one raises the notion of cause lawyering in the Northern Irish context, the immediate question is 'which cause?' While other political conflicts have occasionally produced lawyers who explicitly aligned themselves with the political or military 'struggle' of particular groups,¹⁹ this did not occur in Northern Ireland. The consequences discussed below concerning public affiliations to either violent Republicanism or Loyalism in such a small jurisdiction were genuine. While Republican and Loyalist defendants gravitated towards particular solicitor firms and requested particular barristers to act for them, often the lawyers were at pains to stress their willingness to represent people from 'either community'. As one barrister recounted:

I have represented both Republican and Loyalist defendants and I never made any distinction between them . . . It is true, however, that a preponderance of the conflict related defendants I represented were actually Loyalists who I would say knew my [Catholic] background. In part it may have been the particular firms who instructed me. Also if you do a decent job for someone one time he is up he may ask for you or tell his friends. There may also be a sense in which sometimes Loyalists appeared to believe that Catholic lawyers were more willing to go the extra mile for them, less deferential to authority or willing to exercise our supposed Jesuitical skills [laughs] in their defence.²⁰

Although attacks on lawyers were not as widespread as in other conflict zones, the threat to some lawyers and especially their judicial colleagues was

16 S. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 2nd ed, 2004); A. Sarat and S. Scheingold (eds), n 5 above; A. Sarat and S. Scheingold (eds), *Cause Lawyering and the State in a Global Era* (New York: Oxford University Press, 2001); S. Scheingold and A. Sarat, n 4 above; A. Sarat and S. Scheingold (eds), *Cause Lawyers and Social Movements* (Palo Alto CA: Stanford University Press, 2006).

17 See eg T. Halliday, L. Karpik and M. Feeley, 'The Legal Complex and Struggles for Political Liberalism' in T. Halliday, L. Karpik and M. Feeley (eds), *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism* (Oxford: Hart Publishing, 2007).

18 See R. Abel, 'The Professional is Political' (2004) 11 *International Journal for the Study of the Legal Profession* 131.

19 See eg S. Aust, *Baeder Meinhof: The Inside Story of the R. A. F.* (New York: Oxford University Press, 3rd ed, 2009) esp part four.

20 Interview barrister 23 June 2008.

significant.²¹ The relevance of cause-lawyering to Northern Ireland is through its framework for examining the social and political processes by which organised voices emerge (or fail to emerge) from the legal profession in defence of the rule of law, in response to attacks on the profession itself or in the promotion of international human rights standards – all ostensibly small ‘p’ political themes around which it would seem more straightforward for lawyers to coalesce.

The key phases in Northern Ireland which are examined below are referred to as ‘critical junctures’.²² This notion is drawn from the political science literature on historical institutionalism, which analyses the construction, maintenance and adaptation of particular institutions (such as legal systems) and the ways in which these shape and are shaped by the social and political world.²³ One important variant of this work constructs analytical narratives of empirical events and theorises about their significance. Since historical institutionalists ‘take time seriously’, they are often drawn to ‘critical junctures’ in the history of any institutions.²⁴ A critical juncture may be brief, or stretch over a period of several years in which institutions go through a process of what Mahoney refers to as ‘reorientation’.²⁵ In such periods of reorientation, fundamental questions may be asked and the legitimacy of the existing order is sometimes undermined to the extent that a ‘paradigm change’ ensues in politics, policy or ideas about how things should be done.²⁶ In others, the status quo remains unaltered.²⁷ Nonetheless, these critical junctures allow us to *see* more readily how the actors in a given institution perform ‘under pressure’, the power relations within and without the institution and the ways in

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- 21 During the conflict judges were by far the most likely to be attacked by paramilitaries. At least 18 Republican paramilitary attacks were carried out against the judiciary, resulting in the murders of two magistrates, two county court judges, and Gibson LJ and his wife as well as one member of the Director of Public Prosecutions (DPP) office. Politically active lawyers were also targeted. For example, the IRA murdered Unionist politician and law lecturer Edgar Graham and Loyalists killed law student and Sinn Féin activist Sheena Campbell. These instances aside however, part of the shock provoked by the killing of solicitor Pat Finucane (discussed below) was that until then, lawyers had been broadly viewed as ‘off-limits’ by both Republicans and Loyalists. Interview Director of Public Prosecutions and staff, 12 November 2002. See also C. Blair, *Judicial Appointments: Research Report 5 Criminal Justice Review of Northern Ireland* (Belfast: HMSO, 2000) 29.
- 22 For a fuller discussion of the analytical utility of critical junctures (concerning the role of bar councils and law societies in a range of jurisdictions) see K. McEvoy and R. Rebouché, ‘Mobilising the Professions: Lawyers, Politics and the Collective Legal Conscience’ in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition and Human Rights* (Oxford: Oxford University Press, 2007).
- 23 K. Thelen, S. Steinmo and F. Lonstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992); K. Thelen, ‘Historical Institutionalism in Comparative Politics’ (1999) 2 *Annual Review of Political Science* 369; E. Sanders, ‘Historical Institutionalism’ in R. Rhodes, S. Binder and B. Rockman (eds), *The Oxford Handbook of Political Science* (Oxford: Oxford University Press, 2006).
- 24 P. Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton, NJ: Princeton University Press, 2004).
- 25 J. Mahoney, ‘Path Dependent Explanations of Regime Change: Central America in Comparative Perspective’ (2001) 36 *Studies in Comparative International Development* 111.
- 26 J. W. Hogan, ‘Remoulding the Critical Junctures Approach’ (2006) 39 *Canadian Journal of Political Science* 657; J. Hogan and D. Doyle, ‘A Comparative Framework: How Broadly Applicable is a “Rigorous” Critical Junctures Framework?’ (2009) 44 *Acta Politica* 211.
- 27 G. Capoccia and R. Kelemen, ‘The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism’ (2007) 59 *World Politics* 341.

which a particular institutional self image is constructed and reproduced in the organisational and societal memory.²⁸

Choosing which key events to focus upon in the complex history of any institution is inevitably subjective. Rather than using complex grids, sets of predictors or pathway dependency models as external 'validators',²⁹ I was drawn to the perspective that the actors themselves are key to defining the critical phases of their institutional history and how these speak to the broader political and social history of the society in which it is located.³⁰ A widespread consensus emerged from the fieldwork that the relevant critical junctures in Northern Ireland were: the civil rights campaign, the Emergency Law regime, the murder of two prominent solicitors and the dispute concerning the Declaration for becoming a Queen's Counsel.³¹ Each is discussed below.

CIVIL RIGHTS AND FAILED MOBILISATION

A detailed outline of the origins and history of the civil rights movement in Northern Ireland is beyond the scope of this paper.³² In brief, following partition of the island of Ireland in 1921, Northern Ireland was governed as a de facto one-party state, controlled by successive Unionist governments. Facilitated by a constitutional practice which emerged that Westminster did not normally 'discuss' the domestic affairs of Northern Ireland,³³ Unionist governments essentially ignored the Nationalist/Catholic parliamentary opposition.³⁴ Most aspects of civic and political life in the jurisdiction, including policing and security policy, were characterised by a spectrum of institutional and casual sectarianism and discrimination against Catholics whose 'loyalty' to the Union could never be trusted.³⁵ These factors contributed directly to the rise of the civil rights movement in the 1960s in the period before the outbreak of sustained political violence in 1969.³⁶

28 R. B. Collier and D. Collier, *Shaping the Political Arena: Critical Junctures, the Labor Movement, and Regime Dynamics in Latin America* (Notre Dame IN: University of Notre Dame Press, 2002).

29 See Hogan and Doyle, n 26 above.

30 See esp M. Halbwachs, *On Collective Memory* (Chicago: University of Chicago Press, translated by L. A. Coser, 1992) and R. Narvaez, 'Embodiment, Collective Memory and Time' (2006) 12 *Body and Society* 51.

31 It could be argued that the consensus amongst the interviewees was a reflection of the sampling methodology. As was noted above the vast majority of those judges and lawyers interviewed had direct experience of conflict related cases, criminal work and/or human rights litigation. Undoubtedly the vantage point of a sample of property or tax lawyers on what constituted the key legal events of the past forty years would have been different although perhaps of less obvious relevance to the broader parameters of the conflict which is the focus of this paper.

32 For an overview see B. Purdie, *Politics in the Streets: The Origins of the Civil Rights Movement in Northern Ireland* (Belfast: Blackstaff Press, 1990); N. Ó Dochartaigh, *From Civil Rights to Armalites: Derry and the Birth of the Irish Troubles* (Cork: Cork University Press, 1997).

33 H. Calvert, *Constitutional Law in Northern Ireland* (London: Stevens and Sons, 1968).

34 E. Phoenix, *Northern Nationalism: Nationalist Politics, Partition and the Catholic Minority in Northern Ireland* (Belfast: Ulster Historical Association, 1994) 368.

35 K. McEvoy and C. White, 'Loyalty, Redress and Citizenship: Security Vetting in Northern Ireland' (1998) 61 *MLR* 341.

36 M. Farrell, *Northern Ireland: The Orange State* (London: Pluto Press, 2nd ed, 1980).

The Northern Ireland civil rights movement was also influenced by events elsewhere in the 1960s. In particular, the inspiration drawn from the American civil rights movement has been well documented.³⁷ Many of those taking part in civil rights marches drew analogies between the plight of the Catholic minority in Northern Ireland and the experience of African Americans across the Atlantic.³⁸ They adopted similar tactics such as sit-ins, marches, and public demonstrations designed to expose the sectarianism of the police.³⁹ What is of particular interest for current purposes, is that unlike their American counterparts, neither law nor lawyers played a particularly significant role in the civil rights struggle in Northern Ireland.⁴⁰ While individual campaign groupings demonstrated differing attitudes towards the use of law, none appeared to view legal challenges as central to delivering upon their objectives. The attitudes of a number of key organisations are instructive.

One of the first significant organisations to emerge in the Northern Ireland civil rights movement was the Dungannon-based Campaign for Social Justice (CSJ). This group, made up largely of middle-class professionals, eschewed the traditional Nationalist grievance of partition and instead focused on issues such as housing, discrimination, and police brutality. Their strategy was to lobby politicians and public opinion (particularly in Britain) through pamphlets and a regular newsletter. They spent considerable time gathering evidence of discrimination and other Unionist malpractices. These were eventually presented to the British Prime Minister, Sir Alec Douglas-Home in 1964. Douglas-Home responded that they should seek redress in the courts.⁴¹ In response, the CSJ sought legal aid to challenge the housing allocation policy of Dungannon Council as discriminatory. However, their application was turned down by the Legal Aid Committee of the Law Society and again upon appeal on technical grounds.⁴²

The CSJ made one other significant effort to pursue legal redress, through the European Court of Human Rights. Assisted by an Irish American lawyer, it lodged six applications between April and June 1968, suggesting *inter alia* that the aspects of the Special Powers Acts (NI) 1922–43, the electoral arrangements and discrimination in housing, education, employment and other aspects of public life

37 See eg B. Devlin, *The Price of My Soul* (London: Pan Books Ltd, 1969); C. McCluskey, *Up Off Their Knees: A Commentary on the Civil Rights Movement in Northern Ireland* (Dungannon: Conn McCluskey and Associates, 1989); M. Dooley, *Black and Green: The Fight for Civil Rights in Northern Ireland and Black America* (London: Pluto, 1998).

38 A photograph of a parade in Dugannon in 1963 saw two little boys, one with his faced blackened holding a placard which read 'We are pals from Alabama, Where they say we cant agree, is there really much difference, When you look at him and me.' *Dungannon Observer* 21 September 1963.

39 G. M. Maney, 'Transnational Mobilization and Civil Rights in Northern Ireland' (2000) 47 *Social Problems* 153.

40 While the strained relations between the cause lawyers of the National Association for the Advancement of Coloured People (NAACP) and other more radical organisations in the US are well established, even the more sceptical commentators would acknowledge that lawyers were 'instrumental in constituting the civil rights movement': Sarat and Scheingold (2006), n 16 above, 7. For an important critique of the 'overselling' of the importance of lawyering in the US civil rights movement, see K. Mack, 'Rethinking Civil Rights Lawyering and Politics in the Era Before Brown' (2005) 115 *Yale LJ* 256.

41 Campaign for Social Justice, *Northern Ireland: The Plain Truth* (Dungannon: CSJ, 1964).

42 The grounds were that the applicant concerned was not claiming personal discrimination in the allocation of housing. See Dickson, n 2 above 45.

were in breach of various articles of the European Convention on Human Rights. These efforts to use the courts failed, according to the CSJ, because Northern Irish solicitors were unable or unwilling to take such cases and because the relationship with their American lawyer ultimately proved unworkable.⁴³ In the CJS pamphlets and newsletters, a sense of frustration at the limitations of legal redress is augmented by a palpable sense of exasperation with lawyers per se.⁴⁴

Other groups within the Northern Irish civil rights movement appeared to have similar attitudes towards legal actions. For example, the archives from groups such as the Derry Citizens' Action Committee (DCAC), Derry Housing Action Committee (DHAC), and the People's Democracy (PD) reveal little sustained attention to litigation as part of the overall civil rights struggle. Activists such as Eamon McCann (prominent in DHAC) were aware of the potential of court cases as symbolic platforms for publicity. For example, following his arrest and conviction for a housing related protest, he explained, 'The court proceedings provided us with a platform; fines and suspended sentences conferred on us an aura of minor martyrdom.'⁴⁵ As in the case of McCann, it would appear that the courts were generally viewed as useful propagandist by-products of the direct action campaigns, rather than as elements of an overarching legal strategy which might deliver material benefits. As another prominent civil rights activist told me:

I suppose it is true to say that unlike in the US, we didn't hold out much hope of going to court. The courts were seen very much as part and parcel of the Unionist establishment. Legal Aid wasn't as readily available and apart from a few honourable exceptions, I don't remember lawyers tripping over themselves to do pro-bono work.⁴⁶

Even civil rights organisations with an ostensibly legal bent appeared in practice to place little faith in legal forms of redress. The largest and best known of these was the Northern Ireland Civil Rights Association (NICRA) established in 1967. Its constitution was borrowed from the London-based National Council of Civil Liberties and, on paper at least, it mirrored NCCL's focus on legal and constitutional rights.⁴⁷ For the first year and a half of its life, widely regarded as 'a period of general ineffectuality', much of NICRA's time was spent in letter writing campaigns to the Northern Ireland government.⁴⁸ Little effort was devoted to seeking out appropriate cases to advance the civil rights agenda.⁴⁹ In January 1969 NICRA lodged an application with the European Commission on Human Rights together with six other applicants alleging that their right to demonstrate had been violated by the banning of a civil rights march in Derry and the police

43 CSJ, *Northern Ireland: The Mailed Fist* (Dungannon: CSJ and the Association for Legal Justice, 1972).

44 See eg CSJ, *Northern Ireland Legal Aid to Oppose Discrimination: Not Likely* (Dungannon: CSJ, 1966).

45 E. McCann, *War and an Irish Town* (Harmondsworth: Penguin, 1974) 35.

46 Interview with Northern Ireland Solicitor, 8 February 2010.

47 The five objectives of the Association were to defend the basic freedom of all citizens; to protect the rights of the individual; to highlight all possible abuses of power; to demand guarantees for freedom of speech, assembly and association; and to inform the public of their lawful rights. NICRA, *We Shall Overcome: The History of the Struggle for Civil Rights in Northern Ireland, 1968–1978* (Belfast: NICRA, 1978).

48 Purdie, n 32 above 133.

49 *ibid* 133.

failure to protect marchers in Armagh.⁵⁰ Ultimately these applications were removed from the list because the Commission determined 'the applicants have shown a clear lack of interest in pursuing these applications.'⁵¹

It would be wrong to give the impression that lawyers were entirely silent during these formative years of the civil rights era. Some practicing and academic lawyers including Paddy McGrory, Kevin Boyle, Harry Calvert and others provided free legal advice to CCJ and other groups. Some practising lawyers did march with the student-led People's Democracy and some of the student leaders later became prominent barristers or solicitors including Eilis McDermott, Sean McCann and Michael Farrell. Apart from these few individual contemporary or future lawyers, perhaps the best known collective intervention by lawyers of this era was the Northern Ireland Society of Labour Lawyers (NISLL).

The NISLL was formed in 1966 as an offshoot of the Society of Labour Lawyers in England as a left-leaning and pro-Union (with Britain) organisation, affiliated with the Northern Ireland Labour Party. It involved some solicitors, barristers and a few academics. NISLL's most visible activity was producing a series of political pamphlets on issues, such as the 'Special Powers Act', 'Public Order', and 'Discrimination'.⁵² Individual members acted on behalf of people arrested because of civil rights-related activities, in some instances without being paid.⁵³ The NISLL remained small and quickly disappeared following the outbreak of sustained political violence in 1970 which led to some members 'shying back from politics a bit as people were pigeonholed into the two traditional political camps'.⁵⁴ The emergence of the Nationalist Social Democratic and Labour Party also made membership of such a group less attractive to Catholic lawyers.

Despite the activities of those comparatively few committed lawyers advising the various campaigning organisations, as well as the work of the NISLL in the late 1960s, it is the comparative absence of lawyerly mobilisation or indeed significant attention to strategic litigation that is most noteworthy during the civil rights period. Of course, as a number of lawyers pointed out, the circumstances of the time were not entirely conducive to progressive cause-lawyering. In the mid to late 1960s, compared to Britain, the legal community in Northern Ireland was relatively small so there were fewer lawyers to *be* active. The level of technical skills amongst lawyers, certainly with regard to the use of the European Convention on Human Rights, was questionable.⁵⁵

50 Dickson, n 2 above 47.

51 *A and Others v UK* (App No 3625 and others) (1970) Ybk 340, 434.

52 Northern Ireland Society of Labour Lawyers (NISLL), *A State of Emergency: A Review of the Northern Ireland Special Powers Act* (Belfast: NISLL, 1969); NISLL, *Public Order* (Belfast: NISLL, 1969); NISLL, *Discrimination: Pride for Prejudice* (Belfast: NISLL, 1969). As one founding member recalled: 'They were quite prophetic, they were just small little pamphlets, polemics if you like, that's all they were. I don't think any of us knew what was coming. We were arguing really for the emergency powers to be scaled down and we were arguing for anti-discrimination legislation in the private and public sector, and I am rather proud that we did that.' Interview with Northern Ireland solicitor, 3 March 2003.

53 Interview with Northern Ireland barrister, 14 November 2002.

54 Interview with same Northern Ireland barrister, 14 November 2002.

55 For example Dickson, n 2 above 47, argues that one of the reasons why the cases which the CJS and NICRA sought to take to Europe ultimately floundered was that it seemed the lawyers involved 'did not do their jobs properly'. He also notes that when the then MP for Mid-Ulster

Amongst the civil rights groups, there was little faith in the ability of a Unionist-dominated judiciary to rule in their favour when challenging the power of the state.⁵⁶ Certainly the ways in which the courts of the Stormont era had dealt with challenges to discrimination or abuses of state power suggest that a degree of cynicism was well grounded.⁵⁷ The absence of legal aid until 1965 was also a significant structural obstacle. Finally, as Dickson has demonstrated, the capacity of legal system to deliver real change in human rights terms in Northern Ireland or the United Kingdom during this period was also restricted.⁵⁸

Even taking into account all of these factors, the dearth of lawyerly activity both inside and outside the courts in a society which was otherwise undergoing such a profound period of civil rights activism remains striking. As noted above, there are well-rehearsed tensions in the social movement literature more generally between lawyers and other activists. Often these crystallise around concerns that lawyers may 'narrow' the focus of social or political struggles onto overly legalistic terrain, over-sell the capacity of law to deliver real change or divert organisational resources away from other mobilising activities.⁵⁹ Such debates are indicative however of the substantive influence of lawyers in these broader social and political movements. They are litigating in the courts but also, in places such as Chile, South Africa and Pakistan, they are often amongst the most prominent actors outside the courts in mobilising for political change. The chances of successful progressive litigation in conflicted societies in particular is almost always curtailed by reactionary laws or conservative judges. Lawyers in such circumstances expect to lose more cases than they win, to make progress only fitfully and incrementally. They are, however, *engaged*. With honourable exceptions, this was not particularly the case in Northern Ireland. What I have termed a culture of quietism was to continue in the legal community as civil rights activism gave way to sustained political violence and the state responded by expanding and enhancing its existing emergency powers.

Bernadette Devlin lodged an unsuccessful challenge at Strasbourg against her conviction for riotous behaviour she chose to be represented by a firm of London solicitors.

56 As Hadden and Hillyard summarised in 1973, 'Of 20 High Court judges appointed since the independent Northern Ireland courts were established, 15 have been openly associated with the Unionist party. Of 23 County Court appointments, 14 had been visibly connected with the Unionist administration. At the height of the civil rights campaign in the late 1960s two of the three judges in the Northern Ireland Court of Appeal were ex-Attorneys General in Unionist governments: one of the four High Court judges was likewise an ex-Attorney General, and another the son of an Attorney General; two of the five County Court judges were ex-Unionist MPs and another the son of a Unionist MP, an ex-Unionist Senator, a defeated Unionist candidate and a former legal advisor to the Minister of Home Affairs.' T. Hadden and P. Hillyard, *Justice in Northern Ireland: A Study in Social Confidence* (London: Cobden Trust, 1973) 11.

57 See Morison and Livingstone, n 2 above.

58 Dickson, n 2 above.

59 See Scheingold, n 16 above. See also R. Rosenberrn, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); M. McCann, *Pay Equity Reforms and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994); C. Mandfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004).

EMERGENCY LAW AND THE POLITICS OF SILENCE

As is amply demonstrated elsewhere, the 'emergency' legal formations which are introduced in response to political violence offer rich potential for analysis of the legal culture of a given jurisdiction.⁶⁰ In Northern Ireland, the longevity of emergency powers illustrates the argument that such extra-ordinary powers and procedures can become all too readily normalised.⁶¹ Since the formation of the state, the authorities in Northern Ireland have had a wide array of emergency powers at their disposal, many of which survived into the direct rule era.⁶² As far as the actions of lawyers were concerned, the critical junctures associated with emergency law during the Northern Ireland conflict were the introduction and operation of internment without trial and the non-jury Diplock trials.

Internment

Regulation 12(1) of the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 (Special Powers Act 1922) authorised the Northern Ireland Minister of Home Affairs to issue an Internment Order against a person 'who is suspected of acting of having acted or being about to act in a manner prejudicial to the preservation of the peace and the maintenance of order in Northern Ireland'. As in the South, this power of internment was used by the Unionist government between 1921–24, 1938–45 and 1956–61 in response to Republican violence.⁶³ Internment thus came to be viewed as a practical and symbolic expression of the state's determination to 'face down' the Republican threat.⁶⁴

Following sustained Unionist pressure, the Heath-led Conservative government agreed to the Stormont government's request to introduce internment in a mass operation on 9 August 1971. This poorly planned and crudely executed operation was disastrous in both security and political terms.⁶⁵ Much of the intelligence was flawed so that many innocent people were arrested and interned. The reality of British soldiers and RUC officers smashing down doors and dragging suspects from their beds had a predictably alienating effect on relations with the Catholic community against whom the brunt of the operations were directed.⁶⁶ Indeed levels of violence increased dramatically following internment.⁶⁷

60 See eg V. Ramraj, M. Hor and K. Roach (eds), *Global Anti-terrorism Law* (Cambridge: Cambridge University Press, 2005); D. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

61 O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) 228.

62 See L. Donohue, *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922–2000* (Dublin: Irish Academic Press, 2001).

63 J. McGuffin, *Internment* (Tralee: Anvil Books, 1973).

64 J. Bowyer Bell, *The Irish Troubles: A Generation of Violence 1967–1992* (Dublin: Gill and Macmillan, 1993) 208.

65 See K. McEvoy, *Paramilitary Imprisonment in Northern Ireland* (Oxford: Oxford University Press, 2001) esp ch 8.

66 E. Mallie and P. Bishop, *The Provisional IRA* (London: Corgi, 1988).

67 P. Hillyard, 'Political and Social Dimensions of Emergency Law' in A. Jennings (ed), *Justice under Fire: The Abuse of Civil Liberties in Northern Ireland* (London: Pluto Press, 1990).

The legal procedures for processing internees were initially fairly crude. Under the provisions of the Special Powers Act 1922, the Minister for Home Affairs (assisted by an advisory committee of police, army and intelligence figures whose advice he could reject) issued internment orders. Internees could make legal representations to that Advisory Committee. After the introduction of direct rule from London, the British government refined this legislation to include a 'quasi-judicial element' with the introduction of the Detention of Terrorists Order 1972. Under Article 4 of that order, the Secretary of State could order the 'interim custody' of a 'suspected terrorist' for up to 28 days. That detention was then examined by a 'Commissioner', a 'judicially qualified person' appointed by the Secretary of State. If the Commissioner was satisfied that the suspect was 'concerned in the commission of or attempted commission of any act of terrorism, or in the direction, organisation or training of any persons for the purpose of terrorism' and that 'his detention was necessary for the protection of the public' (Article 12), a detention order could be made for an additional 12 months, and thereafter reviewed every six months (Article 35 (1) and (2)).

Suspects were entitled to see a copy of the 'charges' of which they were accused, although these often lacked precision. While defendants were entitled to legal representation much of the procedure of the actual hearings could be left to the discretion of the Commissioner. Evidence inadmissible in a criminal trial could be heard and witnesses testifying to the involvement of the individual in 'terrorism' (usually an RUC officer) gave their evidence from behind screens.⁶⁸ At times, both the suspect and their counsel were excluded from parts of the hearing and were unable to cross-examine and test the reliability of evidence provided by witnesses who included paid informers.⁶⁹ In two cases it was confirmed by the High Court of Northern Ireland that, in effect, the only way a detention order could be challenged in court was by showing that the order had been made in bad faith.⁷⁰ While internees (or detainees as they became known after 1972) brought a number of successful civil actions for damages,⁷¹ most of these focused on physical and psychological maltreatment during interrogation. In fact they underlined that such maltreatment did not necessarily negate the lawfulness of the detention.⁷²

Lord Gardiner's criticisms of the procedures are worth reproducing:

The procedures are unsatisfactory, or even farcical, if considered as judicial. The adversarial method of the trial is reduced to impotence by the needs of security. The use of screens and voice scramblers, the overwhelming amount of hearsay evidence and the in camera sessions are totally alien to ordinary trial procedures. The quasi-judicial procedures are a veneer to an enquiry which, to be effective, inevitably has no relationship to common law procedures.⁷³

68 McGuffin, n 63 above.

69 'Trial by Tittle Tattle' *Sunday Times* 21 December 1973.

70 See *Re McElduff* [1972] NI 1 and *Kelly v Faulkner* [1973] NI 31.

71 See eg *Moore v Ministry of Defence et al* unreported, Armagh County Court 10 February 1972; *Smith v Ministry for Defence* unreported December 1973; *Sean Hughes v Ministry of Defence etc* 17 October 1972 [NI] 25; *OJ Kelly v Ministry of Home Affairs* 17 October 1972 [NI] 10; See further B. J. Narain, *Public Law in Northern Ireland* (Muckamore: Shanway Services, 1975).

72 D. Lowry, 'Internment; Detention without Trial in Northern Ireland' (1976) 5 *Human Rights* 261, 282.

73 Lord Gardiner, *Report of a Committee to Consider in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (London: HMSO, 1975) 44.

Given the nature of the proceedings, lawyers had a choice whether to take part in internment hearings and thereby legitimise them or to leave clients without legal representation. Unlike, for example, in the context of the military courts in Israel where there have been several organised strikes of defence lawyers,⁷⁴ no similar organised actions occurred in Northern Ireland. A small number of individual lawyers expressed their opposition to internment by joining organisations such as the Association for Legal Justice, which lobbied for a boycott of the internment hearings, but the bulk opted that lawyers should take part.⁷⁵ As one interviewee recalled:

Internment was a huge event and the Bar was divided . . . I attended a general meeting about whether services should be withdrawn . . . it was ultimately decided that the services would be continued to be offered. I was of the view that it was permissible within the existing jurisprudence and that we should take part.⁷⁶

The involvement of lawyers in the internment process was central to its symbolic and practical functioning and it is clear that the government made considerable efforts to ensure their participation. Internment suspects were entitled to be represented by a solicitor and counsel of choice, a service provided by the Northern Ireland Office so that no application for legal aid was involved. The remuneration for this work was quite substantial for the time – a joint fee for counsel and solicitor of £250–£300 per day. Although groups of lawyers periodically threatened to withdraw their services, in practice the Northern Irish legal profession cooperated in the system of hearings throughout the period when they were in operation, and were criticised by a number of commentators for so doing.⁷⁷ It is hard to quibble with the conclusion of Boyle et al that the legal profession's decision to continue to provide legal services was in part due to the lawyers' genuine desire to assist their clients and . . . also in part due to the very substantial remuneration which had been provided'.⁷⁸

The Diplock Courts

The other key legal arena for lawyers under the emergency law regime in Northern Ireland was in the courts themselves when defendants were tried for 'terrorist related'

74 L. Haijar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (Berkeley CA: University of California Press, 2005) 174–177.

75 See eg Association for Legal Justice (ALJ), *Association for Legal Justice Bulletin* (Dublin: ALJ, 1971).

76 Interview with Northern Ireland barrister, 3 March 2003.

77 As an editorial in one Dublin-based Nationalist paper outlined: 'It has been obvious that the British government has attempted to give the Commission hearings an air of legal respectability and so they do not hesitate to hand out lucrative fees for the prosecution and defence and for the British judges who sit as Commissioners. Northern Irish lawyers should seriously question whether or not their participation is bringing the profession into disrepute There are some solicitors who refuse to become involved in these hearings even though it troubles their conscience as to whether an appearance would be helpful to the accused. There are others who are only too glad to take whatever cases are going, but these should seriously question whether or not their appearances lend weight and authority to a procedure which, by substituting form for substance, makes a sad mockery of the noble concept of justice' (*Irish Press* 23 August 1974).

78 K. Boyle, T. Hadden and P. Hillyard, *Law and the State: The Case of Northern Ireland* (London: Martin Robertson, 1975) 67.

offences. Following the introduction of direct rule from Westminster, the British government established a review committee chaired by Lord Diplock to consider 'what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations . . . otherwise than by internment by the Executive'.⁷⁹ The Report, published in December 1972, proposed a range of measures designed to facilitate convictions of suspected paramilitaries including that police and army powers of stop, question and arrest be extended, limitations on bail be imposed, and that the law governing the admissibility of confessions be relaxed. Finally, a system was recommended to suspend jury trial for a list of 'Scheduled Offences', the Commission having concluded that jury trial was impractical for terrorist crimes because of the threat of intimidation of witnesses and the fear that Loyalist defendants would be perversely acquitted by predominantly Protestant juries.⁸⁰ The bulk of the Diplock Commission's proposals were subsequently enacted by the British government in the Northern Ireland (Emergency Provisions) Act 1973 (EPA).

Section 2(1) of the EPA provided that 'a trial on indictment of a scheduled offence shall be conducted by the court without a jury'. This measure underlined the increased significance of successfully obtaining confessions from 'terrorist' suspects, with some studies suggesting that up to 80 per cent of all Diplock prosecutions were based primarily upon confessional evidence.⁸¹ Although Lord Diplock did not recommend ending internment, the government clearly envisaged that more suspects would be tried before the courts thereby facilitating its eventual phasing out – as occurred in 1975.⁸² As Jackson has argued, the cumulative effects of the new strategy were to facilitate more coercive interrogation techniques.⁸³ While levels of brutality and coercion in confessions at specialist interrogation centres such as Castlereagh and Gough Barracks appeared to peak in the 1970s and early 1980s,⁸⁴ incidents continued even into the early 1990s.⁸⁵

As with the operation of the internment proceedings, the response of lawyers in Northern Ireland to the introduction and institutionalisation of the Diplock courts was to continue participating. There was little organised resistance within the legal community to the removal of jury trial for paramilitary suspects. It is difficult to gauge whether or not lawyers were persuaded by the arguments put

79 Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal With Terrorist Activities in Northern Ireland* (London: HMSO, 1972) 1.

80 Diplock, *ibid* paras 17, 35–37. For a critique of this reasoning see S. Greer and A. White, *Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offences in Northern Ireland* (London: Cobden Trust, 1986).

81 Jackson and Doran, n 2 above, 31.

82 M. Cunningham, *British Government Policy in Northern Ireland, 1969–89* (Manchester: Manchester University Press, 1991) 70.

83 J. Jackson, 'Many Years on in Northern Ireland: The Diplock Legacy' (2009) 60 NILQ 213, 216–17.

84 Amnesty International, *Report of an Amnesty International Mission to Northern Ireland* (London: Amnesty International, 1978); P. Taylor, *Beating the Terrorists? Interrogation in Omagh, Gough and Castlereagh* (Harmondsworth: Penguin Books, 1980). K. Boyle, T. Hadden and P. Hillyard, *Ten Years On in Northern Ireland: The Legal Control of Political Violence* (London: Cobden Trust, 1980).

85 See eg Committee on the Administration of Justice (CAJ), *Allegations of Ill-Treatment in Castlereagh* (Belfast: CAJ, 1991); Amnesty International, *United Kingdom: Allegations of Ill-Treatment in Northern Ireland* (London: Amnesty International, 1991); Helsinki Watch, *Children in Northern Ireland: Abused by the Security Forces and Paramilitaries* (Washington: Helsinki Watch, 1991).

forward by Lord Diplock's report concerning jury intimidation and the risk of perverse acquittals of Loyalist suspects; opinion seemed evenly divided amongst those interviewed. What is clear is that there was a lack of public debate amongst key actors and institutions in the legal community about the emergency laws.

I have been unable to unearth any formal submissions from either the Law Society or the Bar Council to either the Diplock Commission or any of the other principal commissions and investigations that reported on the operation of the emergency law system in Northern Ireland in the 1970s and 1980s. Whilst the Northern Ireland Law Society and Bar Council were significantly smaller and less well resourced than their counterparts in England and Wales, the apparent lack of engagement is still marked. As John Jackson has pointed out, they made interventions on issues regarding Legal Aid and legal representation for 'ordinary' offenders following the introduction of the Police and Criminal Evidence Order (Northern Ireland) 1989.⁸⁶ In the regular reviews of the emergency law provisions however,⁸⁷ evidence from both bodies is conspicuously absent.⁸⁸ Indeed, the Bennett Enquiry which investigated the allegations of police brutality and torture in the holding centres and questions of lawyer/client access during interrogations made a pointed note that while it received letters from some individual solicitors after an organisational invite was sent to the Law Society, they 'received no information from the Bar Council or from individual barristers'.⁸⁹ Again one must stress that some individual lawyers did take a public stance in producing critical commentaries on the operation of the system.⁹⁰ However, as is discussed further below, it was more common to see criticisms of the emergency law system being made by prominent lawyers and lawyers' organisations from beyond Northern Ireland.⁹¹

86 J. Jackson, M. Wolfe and K. Quinn, *Legislating Against Silence: The Northern Ireland Experience* (Belfast: Northern Ireland Office, 2000) and correspondence with the author.

87 See E. Compton, *Report of the Enquiry into Allegations Against the Security Forces of Physical Brutality in Northern Ireland Arising Out of Events on 9th August 1971* (London: HMSO, 1971); Lord Parker, *Report of a Committee of Privy Counsellors Appointed to Consider the Authorised Procedures for the Interrogation of Persons Suspected of Terrorism* (London: HMSO, 1972); Diplock, n 79 above; Lord Shackleton, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976* (London: HMSO, 1978); Earl Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976* (London: HMSO, 1983).

88 Lord Gardiner, n 73 above; G. Baker, *Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978* (London, HMSO, 1984).

89 J. Bennett, *Report of the Committee of Enquiry into Police Interrogation Procedures in Northern Ireland* (London: HMSO, 1979) 3. In his interviews with eleven barristers in Northern Ireland in 1980 Jorgensen argues that any such submission from barristers was viewed as impossible 'because of the range of political views inside the bar'. B. Jorgensen, 'Defending the Terrorists: Queen's Counsel before the Courts of Northern Ireland' (1982) 9 JLS 115, 121.

90 eg P. J. McGrory, *Law and the Constitution: Present Discontents: Emergency Legislation* (Derry: Field Day Theatre, 1986). McGrory concluded 'emergency legislation is a product of political instability and injustice. Its effect has been to intensify both. It has many victims to its discredit; but its first victim is the law' (25). See also E. McDermott, 'Law and Disorder' in M. Farrell (ed), *Twenty Years On* (Dingle: Brandon, 1989).

91 See eg R. Harvey, *Diplock and the Assault on Civil Liberties: Time to Repeal Northern Ireland's Emergency Legislation* (London: Haldane Society of Socialist Lawyers, 1981); D. Korff, *The Diplock Courts in Northern Ireland: A Fair Trial?* (Utrecht: Netherlands Institute of Human Rights, 1983); K. Asmal, *If Law is the Enemy: Human Rights in Northern Ireland: Britain's Responsibilities* (London: Britain & Ireland Human Rights Project, 1990).

Perhaps the most controversial aspect of the Diplock courts was the period known as the 'Supergrass' era. While there had been sporadic supergrass style trials in the 1970s,⁹² the mass trials of large numbers of paramilitary suspects based on the evidence of alleged accomplices (who were either granted immunity or reduced sentences and given resources to establish 'a new life' elsewhere) did not become a mainstay of security strategy until the early 1980s. Between November 1981 and November 1983 at least 7 Loyalist and 19 Republican supergrasses were responsible for nearly 600 people being arrested and charged with paramilitary-related offences.⁹³ While conviction rates were initially very high,⁹⁴ by 1986 the practice appears to have been largely abandoned. The reasons for that shift are worth examining more closely for current purposes.

Following the initially successful prosecutions in the *Bennett*, *Black* and *McGrady* cases, the judiciary increasingly became much more critical of the evidence brought before them in supergrass trials. In particular, the credibility of some of the chief prosecution witnesses was held up to scrutiny. For example, one Republican supergrass (Raymond Gilmour) was described by then Lord Chief Justice Lowry as 'entirely unworthy of belief since he was a completely selfish, self-regarding man, to whose lips in the witness box a lie invariably came more naturally than the truth.'⁹⁵

A second and related feature was the skill and persistence of some defence counsel in undermining the credibility of Crown witnesses, seeking to clarify the nature and impact of the inducements offered to the supergrasses and questioning the ability of the judiciary to act as arbiters of both fact and law. As one solicitor who represented a number of defendants in supergrass trials told the author:

I think that barristers like Dessie Boal can take a great deal of credit in undermining the supergrass system. People like him just picked and picked relentlessly at evidence in a reasoned and well argued fashion until the whole thing fell apart . . . of course they were helped by the fact that in a number of the cases the supergrasses themselves were very dubious characters but it was still very effective advocacy.⁹⁶

A third factor was the growing unrest at the impact of the trials on notions of judicial independence and the rule of law. Again while that unease was not perhaps so manifest amongst local practitioners,⁹⁷ it became increasingly prominent

92 Workers Research Unit, *Rough Justice: Bulletin No 10* (Belfast: Workers Research Unit, 1982).

93 See Mr Nicholas Scott, Northern Ireland Junior Minister, HC Debates vol 73, 100, 1985. While Scott put the figure at 593 for 1982–1985, Greer argues that this is an underestimation as it did not take account of the number of supergrasses who retracted their evidence before their names became public. S. Greer, *Supergrasses: A Study in Anti-terrorist Law Enforcement in Northern Ireland* (Oxford: Oxford University Press, 1995) 57.

94 In the first three significant cases, 88 per cent of the 64 defendants in the three trials were found guilty. See *R v Graham and Others* (1983) 7 NIJB; *R v Donnelly* (1983) unreported judgement; *R v Gibney* 13 NIJB 2. These cases were popularly known by the names of the supergrasses around which they were built, ie Bennett, Black and McGrady.

95 *R v Robson and others* (unreported) cited in Greer, n 92 above at 136.

96 Interview with solicitor, 22 September 2003. Desmond Boal QC was a former Unionist member of the Stormont Parliament and one of the most experienced and highly regarded barristers to operate in the Diplock system.

97 Although see E. Grant, 'The use of Supergrass Evidence in Northern Ireland 1982–1985' (1985) 135 NLJ 1125; McGrory, n 90 above and McDermott, n 90 above for useful critiques from senior practitioners.

in academic circles⁹⁸ and amongst practitioners from outside the jurisdiction.⁹⁹ In 1983 Lord Gifford QC (a Labour peer) was commissioned by the London-based civil liberties organisation, the Cobden Trust, to conduct an inquiry into the supergrass system. Gifford's highly critical report argued that the absence of a jury in the Diplock process was a key failing of the supergrass system and was directly responsible for the corrosion of public confidence in the Northern Irish judiciary and legal system. Gifford's detailed and legalistic critique was aimed in particular at 'mainland' judges and lawyers and underlined the failures of the Diplock courts to uphold common law standards of fairness and due process.¹⁰⁰ In effect, his strategy appeared designed to embarrass Northern Ireland judges in the eyes of their British peers. Indeed, his central argument was subsequently, if only implicitly, endorsed by the Northern Ireland Court of Appeal in effectively dismantling the system.¹⁰¹

The few critical voices raised against the supergrass system from within the Northern Ireland legal community were to be found amongst groups of specialist criminal practitioners, left-wing lawyers and a fledgling human rights non-governmental organisation – the Committee on the Administration of Justice (discussed below). By their own admission, as one seasoned activist recalled, each of these were 'small, vocal when we could get our voices heard, but by and large irrelevant'.¹⁰² The specialist criminal practitioners group, the Solicitors Criminal Bar Association (established in 1982), issued an unheeded call for solicitors to boycott the supergrass system.¹⁰³ Another body, the Northern Ireland Association of Socialist Lawyers (NIASL), established in 1980, called for the repeal of the emergency laws, organised speaking opportunities for visiting left-wing lawyers and attempted to coordinate with other community-based organisations who were involved in the anti-supergrass campaign.¹⁰⁴ In reviewing the NIASL archives and in interviews with a number of former members, it is clear that the group felt their efforts were 'bedevilled by the general apathy and conservatism

98 eg J. Jackson, 'The Use of Supergrasses as a Method of Prosecuting in Northern Ireland' in *10th Report of the Standing Advisory Commission on Human Rights; Report for 1983–84* (London: HMSO, 1985); S. Greer, 'Supergrasses and the Legal System in Northern Ireland and Great Britain' (1986) 102 LQR 198. It should be noted that other legal academics were strong supporters of the supergrass system, see eg E. Graham, 'A Vital Weapon in the Anti-terrorist Arsenal' (1983) 198 *Fortnight* 10.

99 eg M. Bonnemarche, *Preliminary Report of the Observer Mission Attending the Hearing on Appeal of the Case of the 22 Irish Nationalists* (Brussels: International Association of Democratic Lawyers, 1986).

100 Greer, n 93 above, 114.

101 Livingstone also makes the telling point that another reason for the ultimate judicial unease with supergrass trials was that it was one area of anti-terrorist practices where there was no express parliamentary approval. See S. Livingstone, 'And Justice for All? The Judiciary and the Legal Profession in Transition' in C. Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart Publishing, 2001) 150.

102 Interview 26 November 2009.

103 Interview Northern Ireland solicitor, 21 March 2003.

104 NIASL, *Manifesto and Constitution* (Belfast: NIASL, 1980); NIASL, *Civil Liberties and Socialism in Northern Ireland* (Belfast: NIASL, 1981); NIASL, *Annual Review and Annual Report 1981/82 and 1982/3* (Belfast: NIASL, 1982, 1983). The 1982 Annual Report of the organisation notes that there was a total membership of 25. An undated press release from NIASL issued in autumn 1983 which notes an address by Lord Gifford also records the organization's efforts to assist in better mobilising the anti-supergrass campaign.

of the legal community' and, like its predecessor the Northern Ireland Society of Labour Lawyers, it too went out of existence after a few years of frustrated activism.¹⁰⁵

Other lawyers chose to put their critical energies into the nascent human rights NGO, the Committee on the Administration of Justice (CAJ). The CAJ held its first conferences in 1981 and 1982 on various aspects of emergency laws, including the supergrass system.¹⁰⁶ The CAJ still campaigns vigorously on human rights and has grown to become a highly respected human rights organisation.¹⁰⁷ However, committed members acknowledge that its influence was also probably fairly marginal up until the late 1980s.¹⁰⁸ While CAJ has always included some practising lawyers, and it has taken prominent legal action, much of its leadership and most active membership has traditionally come from the academic and community sectors.

Other than these critical voices, the contribution of the local legal community to the demise of the supergrass system was largely confined to the courts. As with the operation of internment, and the running of the Diplock system more generally, many lawyers appear to have simply got on with their legal practices rather than questioning the operation of these emergency laws. Of course, internment hearings or Diplock trials were arguably only 'core business' for a comparatively small number of specialist criminal lawyers and perhaps 6–8 solicitor firms.¹⁰⁹ The marginalisation of criminal work amongst legal practitioners is not unique to Northern Ireland¹¹⁰ and does not fully explain a tendency for the bulk of lawyers in the jurisdiction to acquiescence so readily to self-evidently controversial legal measures. In other legal cultures, lawyers tend to coalesce and organise within the legal community into, for example, black lawyers' or feminist lawyers' collectives, in order to pressurise more conservative parent bodies into taking a stand.¹¹¹ This did not occur in Northern Ireland. The creation of a Catholic or Nationalist sub-grouping within the profession was viewed as sectarian. However, the absence of such a grouping or at least an alternative source of meaningful pressure encouraged a de facto acquiescence with the status quo. The view was repeatedly expressed in the fieldwork that taking a political stance' on issues such as emergency law would create sectarian division in the legal community. Whether the concerns to avoid a divided profession were justified is

105 Interview with Northern Ireland Solicitor, 27 May 2002. See also N. Shannon, *Problem for the Socialist Lawyer and the Northern Ireland Association of Socialist Lawyers* 1 January 1983, paper made available to the author.

106 CAJ, *The Administration of Justice in Northern Ireland: Proceedings of a Conference* (Belfast: CAJ, 1981); CAJ, *Emergency Laws in Northern Ireland: Conference Report* (Belfast: CAJ, 1982).

107 In 1998 CAJ was awarded the Council of Europe Human Rights Prize for its contribution to the peace process in Northern Ireland. By way of a declaration of interest, the author is a former Chairperson and Executive Committee member of CAJ.

108 Interview with long term CAJ activist, 26 November 2009.

109 Jackson and Doran, n 2 above at 83. See also J. Morison and P. Leith, *The Barrister's World and the Nature of Law* (Milton Keynes: Open University Press, 1992) 40.

110 See eg M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford: Oxford University Press, 1994).

111 J. Smith, 'The Black Bar Association and Civil Rights' (1981–82) 15 Creighton LR 651; E. Sheehy and S. MacIntyre, *Calling for Change: Women, Law and the Legal Profession* (Ottawa: University of Ottawa Press, 2006).

discussed further below. The net result, however, was that without such pressures from within the legal profession, for much of the conflict, bodies such as the Law Society and Bar Council said little or nothing about very significant events in the justice system. Not 'speaking out' in such circumstances is in fact a very meaningful act of language,¹¹² an inherently active rather than a passive response.¹¹³ In this context, the relative silence of lawyers about emergency law related human rights abuses arguably constituted what Cohen has described as 'a blameworthy form of collusion or encouragement'.¹¹⁴ It was also quintessentially political.

THE EMERGENCE OF A COLLECTIVE LEGAL CONSCIENCE?

The critical junctures discussed above show how the Northern Ireland legal profession (failed to) responded to broader political events and dramatic changes to the criminal justice system. This section analyses how lawyers responded to events *within* the legal community when the conflict and beginnings of the peace process impacted directly upon the version of professionalism propagated by the legal profession in Northern Ireland. In particular, I explore the ways in which the Law Society and Bar Council, as perhaps the most powerful organised voices within the legal community, responded to a number of important challenges. As one interviewee for this research commented, 'in the ideal world, a Law Society or a Bar Council should function as the collective conscience of the legal profession'.¹¹⁵ The term collective conscience, while it has obvious Durkheimian resonances, is used here to portray the efforts by legal collectives to display what Halliday has described as 'moral authority', where legal knowledge and skills are deployed in a self-consciously moral fashion because it is deemed 'the right thing to do'.¹¹⁶

The Murders of Patrick Finucane and Rosemary Nelson

I have written elsewhere about the complex narratives surrounding the murders of Pat Finucane and Rosemary Nelson.¹¹⁷ For this paper, it is only necessary to provide sufficient detail to understand the broader processes of legal and political mobilisation which have surrounded the two events.

Patrick Finucane's murder, in 1989, is one of the most controversial killings of the Northern Ireland conflict. Although, as was noted above, other judges and legal figures were killed by paramilitaries, it is the persistent allegations of state collusion in Finucane's death that led to it becoming such a high profile death.¹¹⁸

112 L. Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge, 2001) 7.

113 J. Winter 'Thinking About Silence' in E. Ben-Ze'ev, R. Gionio and J. Winter (eds), *Shadows of War: A Social History of Silence in the Twentieth Century* (Cambridge: Cambridge University Press, 2010) 11.

114 S. Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Cambridge: Polity, 2001).

115 Interview Northern Ireland barrister, 25 August 2005.

116 T. Halliday, 'Knowledge Mandates: Collective Influence by Scientific, Normative and Syncretic Professions' (1985) 36 *British Journal of Sociology* 421, 429.

117 McEvoy and Rebouché, n 22 above.

118 J. O'Brien, *Killing Finucane: Murder in Defence of the Realm* (Dublin: Gill and Macmillan, 2005).

Finucane was a defence solicitor whose clients included several leading Republicans. The Loyalist Ulster Defence Association, who shot him, claimed that he was a member of the IRA. While a number of his brothers were IRA members, investigations by the RUC, former Metropolitan Police Commissioner now Lord Stevens and former Canadian Supreme Court Justice Peter Cory all concluded that he was not a member of any Republican paramilitary grouping.¹¹⁹ Prior to Finucane's death he and a number of other defence lawyers had expressed concerns regarding direct death threats from police officers and warnings from clients that the police were also urging Loyalists to kill certain solicitors who represented Republicans.¹²⁰ In addition, Parliamentary Under-Secretary of State, Douglas Hogg MP told the House of Commons a few weeks before Finucane was murdered that 'there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA'.¹²¹ In the third of his inquiries into this case and surrounding allegations of collusion, former Metropolitan Chief Constable Sir John Stevens concluded that the Minister's comments were based on information provided by the RUC, 'were not justifiable and that the Minister was compromised'.¹²² Both the Stevens Inquiries and the Cory Report found evidence of collusion between the security forces and Loyalist paramilitaries in Finucane's death.¹²³

Allegations of state collusion in the murder of Pat Finucane emerged almost immediately after the killing. However, the reaction of the local legal community to the murder of a fellow lawyer itself became a source of considerable controversy. The Bar Council, appeared to take the view that since the threats were directed against solicitors rather than barristers, it was beyond their purview and did not comment on the killing.¹²⁴ The Law Society issued a statement condemning the murder and held a public meeting. However, no further official action was taken other than to make private representations to the authorities.¹²⁵ Despite the fact that the Law Society was aware of the nature of the threats being made against lawyers by the RUC and the comments by Mr Hogg which preceded the Finucane murder, the Society failed to call for an inquiry into the circumstances of his death or to call for measures designed to protect the independence of lawyers. In his finding that harassment of lawyers by the RUC had occurred, the UN

119 See J. Stevens, *Stevens Enquiry 3: Overview and Recommendations* (2003) 11 at <http://www.madden-finucane.com/patfinucane/archive/patfinucane/2003-04-17stevens.report.pdf> (last visited 28 January 2011); P. Cory, *Cory Collusion Inquiry Report: Patrick Finucane* (London: HMSO, 2004) 11.

120 Amnesty International, *United Kingdom: Human Rights Concerns* (London: Amnesty International, 1991) 56; BIRW, *Intimidation of Defence Lawyers in Northern Ireland Update* (London: BIRW, 1992); LCHR, *Human Rights and Legal Defence in Northern Ireland* (New York: LCHR, 1993); LCHR, *Beyond Collusion: The UK Security Forces and the Murder of Pat Finucane* (New York, LCHR, 2003).

121 Hansard, House of Commons, Standing Committee B 17 January 1989 col 508.

122 Stevens, n 117 above.

123 An army agent supplied the intelligence which led to Mr Finucane's death and an RUC Special Branch agent supplied the principal weapon used and both claimed to have told the authorities of the planned assassination. Another RUC informer, Ken Barrett, pleaded guilty and was convicted of the actual murder in 2004. When these events were being investigated by Lord Stevens, his report referred to 'a deliberate act of arson when his Incident room was destroyed by fire' and 'widespread obstruction' of his enquiry by the RUC and Army. Stevens, n 119 above; Cory, n 119 above.

124 Livingstone, n 101 above, 137.

125 Lawyers Committee for Human Rights, n 120 above, 61.

Special Rapporteur on the Independence of Lawyers and Judges concluded that the Law Society had potentially breached its professional duties under Principle 25 of the United Nations Basic Principles on the Role of Lawyers which requires professional associations to work to ensure that lawyers are able to do their job ‘without improper interference’.

The Special Rapporteur expresses his concern over the manner in which the professional bodies in Northern Ireland, particularly the Law Society, addressed this issue. Harassment and intimidation of defence lawyers goes to the core of the concept of independence of the legal profession and the administration of justice. The professional associations in such cases are duty bound to rush to the aid of their members in such situations. What greater objective or interest can the organized legal profession have than the protection of the independence of the profession and it of its individual members.¹²⁶

One prominent criminal practitioner, Barra McGrory, himself the object of death threats, lodged an unsuccessful judicial review challenge to a decision by the Law Society President which prevented the Law Society’s human rights committee from even discussing a report by a London-based human rights group into collusion by the security forces in the killing.¹²⁷ The Law Society’s position in maintaining its continued opposition to calling for a public inquiry was that ‘there was an overtly political dimension to all of this . . . and we wanted to be absolutely neutral’.¹²⁸

The Finucane killing became something of a *cause célèbre* in the international legal community. Indeed, the campaign for a full public inquiry into the case headed by Mr Finucane’s widow and a number of his former legal colleagues deliberately chose to focus on international legal actors because of what they perceived as the obduracy and conservatism of the local Law Society. As one lawyer involved in the campaign told the author,

The week after Pat was killed I was told in Castlereagh [holding centre] ‘that bastard’s been shot and you are next’ and all this sort of stuff. We started to record it and I sent a letter to the Law Society asking them to take it up . . . I got a letter back saying this isn’t a matter for the Law Society, take it up with your political representative . . . So I didn’t really expect the Law Society as a body to do anything, although others were incensed but I had no expectations . . . they were really the last bastion if you like, after all the numerous other law societies and lawyers throughout the world who signed up calling for an inquiry, they were the last to support it.¹²⁹

126 C. Paramswamy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Report of a Mission to the United Kingdom* (New York: United Nations Economic and Social Council, 1998) 12.

127 ‘Law Body Blocking Report on Finucane’ *Irish News* 10 March 1999; ‘NI Law Society Officers “Trying to Stop” Study of Murder Report’ *Irish Times* 10 March 1999. The report in question was British Irish Rights Watch, *Justice Delayed: Alleged State Collusion In The Murder Of Patrick Finucane And Others* (London: British Irish Rights Watch, 1999).

128 Interview with Law Society representative, 13 December 2002.

129 Interview with solicitor, 21 February 2003. The range of international voices which eventually joined such calls included Claire Palley (UK nominee to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities); Peter Burns (UK Rapporteur for the UN Committee Against Torture); the UN Special Representative on Human Rights Defen-

The attention of prominent international actors was not always welcomed by the local legal establishment. One renowned American lawyer found the Northern Ireland local Law Society 'actively hostile' to the involvement of international lawyers in lobbying for a public inquiry.¹³⁰ These international critics were also joined by a range of British-based and local organisations including Liberty, the Haldane Society, the Northern Ireland Standing Advisory Commission on Human Rights (SACHR), CAJ and British Irish Rights Watch.¹³¹

In the context of the gathering international momentum on the case, a group of 33 lawyers from Northern Ireland issued a statement calling for an inquiry into the allegations of collusion in the Finucane murder in January 1998.¹³² The following year the Bar Council of Northern Ireland indicated that it too was now supporting the call by the UN Special Rapporteur for an independent judicial inquiry into the killing, thus confirming the isolation of the Law Society.¹³³

The debate was given added impetus by the murder of a second lawyer, Rosemary Nelson, again with strong claims of collusion emerging almost immediately after the killing.¹³⁴ Mrs Nelson was one of the lawyers who had called for an inquiry into the Finucane killing. She too had acted in a number of high profile cases, defending an alleged commander of the IRA and representing a Nationalist residents' group in Portadown that was actively campaigning against Orange marches through their neighbourhood. She also began to receive similar threats to those which had preceded the Finucane murder and these were well documented by a range of important human rights actors.¹³⁵ Part of the strategy adopted by Nelson and the human rights activists with whom she was in contact was to raise her international profile in order to offer her greater protection. A number of local and international human rights groups wrote to the RUC and the Northern Ireland Office expressing concerns for her safety. She also gave evidence to a much publicised American Congressional Committee hearing in September 1998 where, in addition to detailing the threats and intimidation against lawyers, she testified about her fears for her own safety. In March 1999, those fears were realised when she was murdered by Loyalist paramilitaries.¹³⁶

ders; Helsinki Watch (later renamed Human Rights Watch); Amnesty International; the International Federation of Human Rights; the International Commission of Jurists; the International Bar Association; the American Bar Association and the New York Bar Association.

130 Interview with Mike Posner, Executive Director Lawyers Committee for Human Rights (now called Human Rights First) 14 June 2002. Mr Posner, who is now Assistant Secretary of State for Human Rights in the Obama administration, waived his offer of anonymity for this research.

131 G. Finucane *The Long Road to Truth: PJ McGrory Memorial Lecture* (Belfast: Feile An Phobail, 2004).

132 Statement issued by 33 lawyers on 14 January 1998, 'Equal Protection Under the Law' reproduced in Amnesty International, *Report on Intimidation of Defence Lawyers in Northern Ireland* (London: Amnesty International, 1998).

133 'Finucane Inquiry Backed By Bar Council' *Irish News* 19 February 1999.

134 At the time of writing, a public inquiry into these allegations of collusion in the murder of Mrs Nelson is ongoing. See M. Mooreland, Chairman's Initiation Statement, Rosemary Nelson Public Inquiry, 19 April 2005 at <http://www.rosemarynelsoninquiry.org/current-key-documents/> (last visited 28 January 2011).

135 For example, in his 1998 report the UN Special Rapporteur on the Independence of Judges and Lawyers paid special attention to these death threats and, repeated in a range of press interviews that Mrs Nelson's life could be in particular danger.

136 P. Cory, *Collusion Inquiry Rosemary Nelson* (London: HMSO, 2004).

The reaction of the legal community to this murder, which took place five years after the first cease-fire declarations, was much less ambivalent than it had been to Finucane's. Strong public condemnations were issued by the Law Society, Bar Council and Lord Chief Justice.¹³⁷ This second murder also appeared to galvanise those who had been seeking to change the position of the Law Society with regard to the Finucane killing. In May 1999 a group of twenty petitioners forced an Extraordinary General Meeting of the Law Society which called for an independent inquiry into both the killings of Finucane and Nelson and a motion of no-confidence in the Society's Ruling Council. The resultant meeting, was attended by over 700 of the 1,700 solicitors then in the jurisdiction. The motion for an independent inquiry into the Finucane killing was overwhelmingly carried, the motion with regard to Nelson was also supported albeit by a narrow majority¹³⁸ and the vote of no-confidence was defeated.¹³⁹ While some prominent Unionist lawyers criticised what they perceived as a political 'take over' of the Law Society,¹⁴⁰ most of those who took part in the debate, including those who supported the losing position of the Law Society Council, commented on the largely professional and serious nature of the discussion.¹⁴¹

As the spokesperson for the Law Society interviewed for this research acknowledged, the much feared split into sectarian camps by the Society's move away from 'neutrality' did not materialise.¹⁴² Indeed, many of those who took part in the debate were at pains to stress to the author how the voting, particularly with regard to the Finucane case, did not divide into a simple sectarian head-count between Catholics and Protestants. While the religious demographics in the profession had changed over the course of the conflict with an increase in the number of Catholics,¹⁴³ only one of those interviewed suggested this was the key variable in the changed position.¹⁴⁴ Certainly those who proposed the motion appeared to have given significant tactical thought to how the arguments should be presented. A number of speakers who spoke in favour of an independent inquiry self-identified as being from a Unionist background and many made reference to the

137 'Law Body in Call for Talks with Flanagan' *Irish News* 17 March 1999.

138 Many of those present argued that given the investigation into Mrs Nelson's murder had only been ongoing for two months, the call for an independent public inquiry was premature. Interview with solicitor, 28 June 2008.

139 'Law Society U-turn over Nelson Death' *Irish News* 12 May 1999.

140 Ms Arlene Foster, now a Democratic Unionist Party Minister in the Northern Ireland Executive, quoted in 'Unionists Hit Out as Law Society Backs Probe; Solicitors Demand Murder Inquiries' *Belfast Telegraph* 12 May 1999.

141 Catherine Dixon, President of the Law Society, quoted in 'NI Solicitors Overturn Council's Decision on Finucane Inquiry' *Irish Times* 12 May 1999.

142 Interview with Law Society representative, 13 December 2002.

143 In the 1971 Census (in which 15.6 per cent of lawyers did not give their religion) 27.9 per cent self-declared as Catholic, with the remaining 56.5 were Protestant. In the 1981 (in which 19.7 per cent did not give their religion) the percentage of Catholic lawyers had risen to 37.8. Figures reproduced in D. Greer, 'Access to Legal Education and the Legal Profession in Northern Ireland' in R. Dhavan, N. Kibble and W. Twining (eds), *Access to Legal Education and the Legal Profession* (London: Butterworths, 1989) 214. Morison and Fox note that since 1979–80 a majority of students enrolling in the Law School at Queen's University Belfast (which then produced the vast number of local practitioners) have been Catholic. See J. Morison and M. Fox, 'Lawyers in a Divided Society: Legal Culture and Legal Services in Northern Ireland' (1992) 19 JLS 124, 139.

144 Interview with solicitor, 25 November 2002.

international commentary on the case.¹⁴⁵ The fact that so many international legal commentators had explicitly framed the issue of the protection of lawyers as a human rights issue and drawn upon the relevant international standards gave lawyers a familiar legal language through which to manage a potentially divisive topic.¹⁴⁶ This same human rights language was to prove equally crucial in the final critical juncture examined in this paper, the judicial challenge to the Declaration required in order to become a Queen's Counsel.

Legal challenges to 'well and truly serve the Queen'

If the debates concerning the calls for a public inquiry into the deaths of Finucane and Nelson were the defining moments of the early stage of the peace process for solicitors in Northern Ireland, without doubt the equivalent for the Bar was the challenge taken by two senior barristers concerning the Declaration required to become a Queen's Counsel.

Almost since the formation of the state, any barrister seeking promotion to Queen's Counsel was required to take an Oath of Allegiance to the Crown as well as a particular Declaration of Office.¹⁴⁷ While no similarly worded oath was required in England, as was noted above, the emphasis upon 'loyalty' in Northern Ireland was in keeping with many other aspects of public life in the Unionist-dominated state of the Stormont era.¹⁴⁸ Following the imposition of direct rule in 1972, the power to appoint QCs passed to the Secretary of State for Northern Ireland, acting on the advice of the Lord Chief Justice. In 1995, barrister Philip Magee made an application for judicial review challenging both the Oath of Allegiance and the Declaration of Office. Before that case was heard, however, it was conceded that the Oath of Allegiance was contrary to the Promissory Oaths Act 1868 and it was abandoned but the Declaration remained. In subsequent correspondence with the Secretary of State, the then Lord Chief Justice of Northern Ireland, Sir Brian Hutton, cautioned against removing the Declaration.

If you decide to remove the requirement for a declaration it will appear that you are either being influenced by political pressure to alter the procedure relating to an office which links Northern Ireland to the Crown or you will appear to be accepting the allegation of Mr Magee. . .¹⁴⁹

145 Interview with solicitor, 14 February 2002, Interview with solicitor, 28 June 2008.

146 Interview with solicitor, 21 February 2003.

147 The declaration of office was required in the following terms: 'I do declare that well and truly I will serve the Queen as one of Her Counsel learned in the law and truly counsel the Queen in Her matters, when I shall be called upon to do so, and duly and truly administer the Queen's process after the course of the law, and after my cunning. I will duly in convenient time speed such matters as I may lawfully do which any person shall have to do in the law against the Queen. And in all other respects I will be attendant to the Queen's matters when I be thereto'. Cited in *Re Treacy's and another's Application for Judicial Review* [2000] NILR 334 (*Re Treacy*).

148 McEvoy and White, n 35 above.

149 *Re Treacy* n 147 above, 334.

A Bar Council committee, under the chairmanship of Fraser Elliot QC, concluded that the Declaration to the Crown was outdated and irrelevant and that 'a neutral Declaration' which obliged QCs to serve 'all whom [they] may lawfully be called upon to serve' would be more appropriate.¹⁵⁰ The Bar Council accepted this report, forwarding it to the Lord Chief Justice, by then Sir Robert Carswell. In subsequent correspondence to the Lord Chancellor regarding the Elliott report,¹⁵¹ the Lord Chief Justice made clear his view that the Declaration ought to be maintained. Agreeing with the views of his predecessor, Lord Chief Justice Carswell wrote,

I think it is likely that if there is no longer a requirement that those who become Queen's Counsel make a Declaration to serve the Queen it could be argued that there is no longer any reason why they should be called Queen's Counsel. I have little doubt myself that this is all part of an ongoing politically-based campaign to have the office of Queen's Counsel replaced by a rank entitled Senior Counsel, or something to that effect.

The Lord Chancellor ultimately decided to side with the Lord Chief Justice and to retain the Declaration. In December 1999, when Seamus Treacy (now a high court judge) and Barry McDonald were called to become QCs they indicated their desire to make the Declaration in the terms outlined in the Elliott report. The Bar Council supported them on this issue. Eventually the two barristers sought leave to apply for judicial review and in a highly significant move, the Bar Council agreed to support and fund that review. After a group of 30 members challenged the support of the judicial review, the Bar Council convened a special meeting to discuss the issue as an organisation. Despite media predictions that the funding would be withdrawn for fear of division, the decision was overwhelmingly confirmed.¹⁵² Indeed, the Bar Council voted to fund the judicial review after what then Bar Chairperson Brian Fee described as 'a calm and considered discussion of the motion'.¹⁵³ Upon granting leave to appeal, Mr Justice Kerr also gave leave for both the Bar Council and the Northern Ireland Human Rights Commission to make oral and written statements. Mr Justice Kerr ultimately rejected the human rights arguments presented, including that the Declaration was discriminatory on the grounds of political opinion. He did, however, decide in favour of the applicants on the narrow grounds that in opting to retain the Declaration, the Lord Chancellor had been wrong on the facts (with regard to the consultation of the judges) and this constituted unreasonableness since he had not foreseen the potential for controversy.¹⁵⁴ One month later, the Northern Ireland Court Service issued a press notice that the Declaration was to be changed

150 F. Elliot, *Report to Consider All Aspects of the Appointment of Queen's Counsel in Northern Ireland* (Belfast: Bar Council, 1997).

151 Ronald Weatherup QC, quoted in 'Barrister Row Revelation' *Irish News* 5 May 2000.

152 'Unionist Barristers Seek to Prevent Bar Council from Paying Catholic Barristers Legal Bill' *Sunday Tribune* 30 January 2000.

153 Quoted in 'Bar Council Funds Barristers Case' *Irish News* 1 February 2000.

154 *Re Treacy* n 147 above.

in line with the Elliott Report. Subsequently, both Treacy and McDonald were admitted as QCs.¹⁵⁵

In comparison to the ethical decisions on whether or not to take part in internment hearings or supergrass trials, or to take a position on the alleged involvement of the state in the murder of lawyers, this case on the internal oaths within the legal profession may appear somewhat trivial. I would argue, however, that from a political and symbolic perspective, it too represented an important moment. Since the formation of the state, the courts in Northern Ireland have flown the Union flag, displayed Crown insignia and operated in effect as if such traditional symbolic affiliations with British and Unionist language and iconography were little other than 'neutral' expressions of the constitutional status quo. Many Nationalists had, albeit quietly in the case of the legal profession, long questioned that assumed neutrality.¹⁵⁶ Although these symbols became the subject of the post Good Friday Agreement Criminal Justice Review (discussed below), this case together with that taken by Magee represented an explicit challenge by lawyers rather than politicians to such assumed neutrality.

At a sociological level, it is hard to overstate the sensitivity of these proceedings within the legal community of such a small jurisdiction. Many of the lawyers interviewed for this research spoke about what they perceived as the deferential attitude to judiciary and senior legal figures in general in the local legal community. Yet this was a case taken by two prominent barristers, supported by the Bar Council, against the Lord Chancellor, which focused upon the correspondence of the previous and serving Lord Chief Justice who had set their face against change. The traditional arguments that the case would undermine the neutrality of the Bar did not persuade the large numbers of barristers who attended the special meeting to discuss the continued support of the challenge. While a small number of those barristers interviewed for this project were critical of the challenge to the Declaration as being 'politically motivated',¹⁵⁷ the vast majority remained supportive. As one seasoned barrister suggested:

It was one of the Bar's finest hours in my view. The opposition to it [supporting the judicial review] was very slender due largely to [name omitted] who spoke a lot of sense, analysed the thing, showed that this was one of the things we ought to do. . . . I mean there was no politics in it, there was no sectarianism. They took the view that

155 The new Declaration stated 'I [name] do sincerely promise and declare that I will well and truly serve all whom I may lawfully be called upon to serve in the office of one of Her Majesty's Counsel learned in the law according to the best of my skill and understanding' (Northern Ireland Court Service Press Notice Friday 23 June 2000, *Queen's Counsel Ceremony Declaration is Changed: Bar-Council's Recommendation is to be Adopted*).

156 As Philip Magee, instigator of the original challenge in 1997, summed up in a strongly worded statement in 2000 in support of the Treacy/McDonald review. He suggested that the Declaration was 'in truth, the genteel equivalent of putting a picture of the Queen on a Catholic worker's machine. . . . The Declaration is seen by many barristers as being simply a political test of loyalty to embarrass and, if possible, to weed out the croppie with attitude.' Quoted in 'Lawyers Wait on Oath of Allegiance Ruling' (2000) *Irish News*, 20 December. The term 'croppie' is said to be a nickname given to the rebels during the 1798 rebellion because of their close-cropped hair. Subsequently, the term became synonymous with 'rebel', Nationalist or Catholic.

157 eg. Interview with barrister, 15 November 2002.

a number of people had a very genuine deep seated objection to something that wasn't right and they supported them.¹⁵⁸

In a similar fashion to the EGM held by the Law Society with regard to the Nelson and Finucane cases, the Bar's deliberations and ultimate decision to support the legal challenge against the Declaration showed that it was capable of mature and rational debate concerning a politically delicate topic without adopting the default option of 'not taking a position'. These developments arguably represent a significant demonstration of a collective legal conscience being mobilised in support of colleagues on a matter of principle. While the human rights arguments of the Treacy/McDonald review were rejected by the court, the fact that the issues concerned could be discussed by lawyers more generally in legal terms assisted significantly. Some scholars (including the author) have argued that one of the weaknesses of human rights talk in public discourse more generally is its tendency to deny the quintessentially *political* nature of its argumentation or to obscure the fact that rights claims may conflict.¹⁵⁹ However in this context, where lawyers were debating sensitive issues in a divided society, the fact that discussion could be framed in largely apolitical and legalistic human rights language was a distinct advantage.

CONCLUSION

'What did you expect, they are lawyers for God's Sake!'¹⁶⁰

E.P. Thompson famously reflected on the 'enormous condescension of posterity',¹⁶¹ the tendency to judge harshly those facing difficult predicaments from the comfort of an easier age. This danger is something I have reflected upon a lot in the writing of this paper. The obvious retort to the challenges raised here is that lawyers 'did their jobs' in very difficult circumstances and that public stances were beyond their remit. In considering what 'their jobs' were, as the comment above suggests, a key question is what exactly are our expectations from lawyers in conflicted societies. Is doing a competent job in the courtroom or solicitor's office enough? Should we view lawyers simply as apolitical business people who make necessary accommodations in order to sustain their own status, income and monopoly in the marketplace?¹⁶² Alternatively, is it fair to burden them with more pressing responsibilities? Are they the key players in defence of what Halliday et al define as 'political liberalism' or what Abel terms 'legality' in the post 9/11 context?¹⁶³ Even more onerously, should we expect to see the emergence

158 Interview with barrister, 14 November 2002.

159 M. Ignatieff, *Human Rights, Politics and Idolatry* (Princeton NJ: Princeton University Press, 2001) 20; D. Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 116; K. McEvoy, n 6 above.

160 Interview with barrister, 15 December 2009.

161 E. P. Thompson, *The Making of the English Working Class* (London: Victor Gollanz, 1963) 18.

162 As Abel described, '... most lawyers just want to earn a living and leave politics to others ... Like Rhett Butler, most lawyers frankly do not give a damn.' R. Abel, n 1 above 470.

163 Halliday, Karpik and Feeley, n 17 above; R. Abel, 'Contested Legality in the United States after September 11' in T. Halliday, L. Karpik and M. Feeley (eds), *Fighting for Political Freedom* (Oxford: Hart Publishing, 2007).

of versions of Scheingold and Sarat's 'cause lawyers' who eschew the myth of professional neutrality to take a public stand as well as fighting in legal arenas for what is right and just, however defined? Whatever amalgam of these Weberian ideal-types one favours, the reality of how lawyers behave is inevitably shaped by the social and political conditions of a given society in general and its legal culture in particular. As Nelken has argued, analysing legal culture offers the potential to move beyond the quest for universal truths about law and instead garner a more nuanced view of the ways in which law is 'conceived and lived' in different societies.¹⁶⁴ A more granular understanding of such lived realities of law and lawyering is required in order to assess the extent to which any such experiences are relevant for other contexts.

While the precise meaning and analytical utility of the notion of legal culture is contested,¹⁶⁵ the concept is a useful one for current purposes. Friedman's extensive work on the topic suggests that legal culture speaks to 'the underlying traits of a whole legal system – its ruling ideas, its flavour, its style'.¹⁶⁶ Certain legal cultures may be more or less receptive to innovation, styles of reasoning, passive or dynamic notions of the law and, of course, notions of what professionalism amongst lawyers actually means. In addition, 'real forces, real people are at work'.¹⁶⁷ Powerful individuals can have a huge impact on large and diverse policy communities. In smaller places or organisations, the historical influence of, for example, very conservative Lord Chief Justices or heads of legal collectives may be influential in propagating what Klare referred to as the 'inarticulate premises which are culturally and historically ingrained'.¹⁶⁸ Thus, the way that lawyers *think*, their *language*, their *self-image* and *status* as professionals, their particular *organisational history*, their *relationship with the state* and local politics more generally – these and other features are the key components of what makes up a legal culture.

I would argue that it is possible to identify a number of overlapping features of Northern Ireland's legal culture that explain, at least in part, why lawyers behaved as they did. One obvious factor is the nature of the legal community practising in such a small jurisdiction. The traditional preponderance of sole practitioners and small firms of solicitors in Northern Ireland did not practically or culturally lend itself easily to collective organisation beyond obvious pecuniary interests of members. With regards to the Bar, and perhaps somewhat counter-intuitively, it appears that the fact that they were and are organised into one Bar Library rather than different chambers had a similar effect. The progressive efforts by the various groups discussed above did not take root within the organisational cultures of the

164 D. Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Australian Journal of the Philosophy of Law* 1, 3.

165 R. Cotterell, 'The Concept of Legal Culture' in D. Nelken (ed), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997).

166 L. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage, 1975) 15; L. Friedman, 'Is there a Modern Legal Culture?' (1994) 7 *Ratio Juris* 117; L. Friedman, 'Human Rights and Modern Legal Culture' in E. Ryden and B. K. Bundy (eds), *Human Rights in the Pacific Rim: Imagining a New Critical Discourse* (Taiwan: Fu Jen Catholic University Press, 2006).

167 Friedman (1975) *ibid* 155.

168 K. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 4 *South African Journal on Human Rights* 146.

larger legal collectives and, as elsewhere, the concerns of criminal practitioners in particular could be marginalised. As for the size of the jurisdiction, there is a rich literature on the impact and importance of 'small places' in general and in particular with regards to the insights which such sites may provide into better understanding justice related mores, values and practices.¹⁶⁹ As with other knowledge or professional communities, even in much larger countries, the legal profession can in reality consist of a comparatively small series of concentric circles where 'everyone knows everyone' by virtue of the nature of the work, status, reputation, and formal and informal social networks. For much of its history, almost everyone in the legal profession in Northern Ireland really did know everyone else. The smallness of the jurisdiction undoubtedly contributed significantly to what many interviewees identified as the conservatism of the local legal culture. Part of that conservatism was also undoubtedly gendered. The absence of women on the bench or their 'ghettoisation' into certain areas such as family law were regularly cited as evidence of an 'old boys' network' by interviewees¹⁷⁰ and has been well discussed elsewhere.¹⁷¹ More broadly, however, in such a context hegemonic and conservative understandings of the appropriate public role for lawyers were readily reproduced and defended. As one barrister summed it up:

I think lawyers here are instinctively conservative and I don't think that is a criticism, I think in many ways that conservatism has a very valued place in any social organism and that is the way it is.¹⁷²

A second and related feature has been the material and ideological realities of the war. This was a brutal and violent conflict which lasted for almost 30 years and which saw over 3,600 people killed and thousands more injured. Judges and some lawyers were targeted for doing their job. At the symbolic level, given that the origins of the conflict lay in competing claims to British and Irish political identity, the much discussed centrality of the lawyers' relationship to the state (i.e. in the sociology of the legal profession literature) was all the more acutely felt in Northern Ireland. Emergency laws, internment, harsh interrogation techniques, supergrass trials, collusion: these and other strategies were all elements of the state's response to political violence. The British state was not therefore neutral in the conflict, it was a protagonist and the justice system

169 See T. Eriksen, *Small Places: An Introduction to Social and Cultural Anthropology* (London: Pluto, 2001); F. Adler, *Nations Not Obsessed with Crime* (Littleton CO: F.B. Rothman, 1983); H. Gunnlaugsson and J. Gallihier, *Wayward Icelanders: Punishment, Boundary Maintenance, and the Creation of Crime* (Madison: University of Wisconsin Press, 2001).

170 eg Interview with solicitor, 14 January 2003, interview with Solicitor, 28 June 2008.

171 Commissioner for Judicial Appointments for Northern Ireland, *Audit Report* (2003) at <http://cjani.courtsni.gov.uk/cjanitreport.pdf> (last visited 28 January 2011); D. Feenan *Applications by Women for Silk and Judicial Office in Northern Ireland* (Commissioner for Judicial Appointments for Northern Ireland, 2005) at <http://cjani.courtsni.gov.uk/CJANIREsearchReport.pdf> (last visited 28 January 2011); and <https://www.nijac.org/publications/documents/research> (last visited 28 January 2011). For example, Leith et al note that there are no female high court judges, and that women make up only 21% of all judicial office holders: P. Leith et al, *Propensity to Apply for Judicial Office under the New Northern Ireland Judicial Appointments System* (2008) at <http://www.nijac.org/publications/documents/research> (last visited 28 January 2011) 37.

172 Interview barrister, 25 November 2003.

was, by definition, a key part of its armoury. Lawyers who spoke out in defence of the rule of law and against state abuses were by definition criticising that same state when it appeared to all intents and purposes to be 'at war' with Republicans who represented a direct challenge to its legitimacy.¹⁷³ In a context where 'loyalty' to the state, however imagined, was a deeply engrained aspect of the dominant culture, it is perhaps little wonder that many lawyers appeared disinclined to criticise.¹⁷⁴

This issue is worth exploring in a little more detail. A range of scholars who focus on the importance of law in the shaping of ethnocultural identities provide us with an interesting literature on colonial and post-colonial lawyering.¹⁷⁵ Some of the most insightful aspects of this work trace the importance of symbols and the influence of legal education and legal 'ways of thinking' amongst lawyers trained in the traditions of the British, French or other imperial powers.¹⁷⁶ As Engle Merry has argued, the cultural power of law was central to the colonial project and leaves a longstanding legacy.¹⁷⁷ For obvious reasons one treads very carefully in applying a postcolonial lens to Northern Ireland.¹⁷⁸ The deployment of any analytical framework to understand political and violent struggles inevitably either resonates with or grates against the competing interpretations of the macro-conflict. Taking that danger as read, I would still argue that there are important theoretical insights to be gained from this literature, regardless whether one regards the historical antecedents of the relationship between Ireland and Britain as colonial or not.

At the symbolic level, as evidenced by the discussions above, historically at least the ethos and culture of the legal system in Northern Ireland appeared 'more British than the British'. Prominent displays of the Royal Coat of Arms on courts, the flying of the Union flag, and a declaration of 'God Save the Queen' when a judge entered the court were all much more common place than in England and

173 For a discussion on the legal and political implications of applying the 'war' concept to Northern Ireland, see C. Campbell and I. Connolly, 'Making War on Terror? Global Lessons from Northern Ireland' (2006) 69 MLR 935.

174 For the classic account of the relationship between loyalty and the state, see B. Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 2nd ed, 1991). For a discussion on the Northern Ireland variant see H. Patterson and E. Kauffman, *Unionism and Orangism Since 1945: The Decline of the Loyal Family* (Manchester: Manchester University Press, 2007).

175 See eg C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 3rd ed, 2000); M. Chanock, 'The Lawyers' Self: Sketches on Establishing a Professional Identity in South Africa 1900–1925' in R. McQueen and W. Pue (eds), *Misplaced Traditions: British Lawyers, Colonial Peoples* (Annandale: Federation Press, 1999); W. Pue, 'Cultural Projects and Structural Transformation in the Canadian Legal Profession' in Sugarman and Pue, n 10 above; A. Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press, 2006).

176 M. Sharafi, 'A New History of Colonial Lawyering: Lihowski and Legal Identities' (2007) 32 *Law and Social Inquiry* 1059.

177 S. Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, NJ: Princeton University Press, 2000).

178 See S. Howe, *Ireland and Empire: Colonial Legacies in Irish History and Culture* (Oxford: Oxford University Press, 2000) esp ch 10, for a nuanced discussion. Interestingly Kotsonouris has argued that the British influence on legal culture in Ireland has not been limited to Northern Ireland. She makes the case that following partition in the South of Ireland, the Free State authorities to a large extent aped the British colonial legal structures and processes as part of establishing the credibility and legitimacy of the new nation state. M. Kotsonouris, *Retreat from Revolution: The Dáil Courts 1920–1924* (Dublin: Irish Academic Press, 1994).

Wales.¹⁷⁹ This was a context in which the legal system was permeated by symbols of exaggerated Britishness, what one prominent postcolonial scholar refers to as a fetishisation of the colonial culture.¹⁸⁰ The naturalisation and normalisation of such an ethos in the fabric of the legal system and its representation as ‘neutral’ or ‘as if it were a natural consequence’¹⁸¹ in such a manifestly divided society underlines the extent to which lawyers who protested against unlawful actions of the British state beyond the courts were indeed sticking their heads above the collective parapet.

Perhaps even more significant in terms of the local legal culture has been the strength and durability of a largely positivistic outlook on law which is also much associated with the British legal tradition. Paraphrasing Pue, Dicey may have been more influential in the historical construction of colonial British identity than either Rudyard Kipling or William Shakespeare.¹⁸² A detailed treatise on the various meanings of legal positivism is beyond the scope of the current paper. However, as Hunt has described, amongst the key unarticulated premises of British legal culture is the ‘absolute, continuing and indivisible sovereignty of Parliament’. This premise creates a mindset in which courts are but neutral arbiters applying legal rules and negates the reality that judges, and by extension lawyers, either in the arguments they use or the activities they engage in, are actually involved in value choices.¹⁸³ As was noted above, the vast majority of anti-terrorist laws in Northern Ireland’s history had express parliamentary approval. During the conflict almost all law graduates in the jurisdiction, including the author, were educated into this Diceyan understanding of law and lawyering. The limitations of this traditional ‘sovereign will of the people’ argument for Northern Ireland, as Livingstone has argued, were illustrated by the political realities of one-party Unionist rule from 1921–72 or the lack of any politically workable alternative to direct rule from 1972–2000.¹⁸⁴ Time and again in the fieldwork for this paper, even some lawyers involved in the most controversial aspects of conflict-related work appeared unwilling to abstract from their experiences or to venture into

179 Interview with barrister, 23 June 2008. Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* (Belfast: HMSO, 2000) 184. This was a civil service led review which included a number of independent advisors established under the Good Friday Agreement. It recommended no change to the arrangements for displaying the Royal Coat of Arms on the exterior of existing courthouses, but that the interior of the courts should be free from all symbols, and that the practice of declaring God Save the Queen should cease. It also recommended that the practice of flying the Union flag could continue in line with flag flying practices for other government buildings in Northern Ireland. By contrast, the Independent Commission on Policing chaired by Lord Patten went much further. It recommended that all police stations should be ‘neutral working environments’ which required that the Union flag not be flown, the changing of the name and badge of the Royal Ulster Constabulary and the removal of all portraits of the Queen from police stations. Independent Commission on Policing, *The Report of the Independent Commission on Policing for Northern Ireland* (Belfast: HMSO, 2000) 99.

180 H. Bhabha, *The Location of Culture* (London: Routledge, 1994) 91.

181 C. Wright Mills, *The Sociological Imagination* (Fortieth Anniversary Edition, New York: Oxford University Press, 2000) 36.

182 W. Pue, ‘British Masculinities, Canadian Lawyers: Canadian Legal Education 1900–1930’ in McQueen and Pue, n 175 above, 83.

183 M. Hunt, ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’ (1999) 26 JLS 86, 92.

184 Livingstone, n 101 above, 159–160.

conversations concerning the politics of legality, preferring instead to limit discussions to judgments, doctrine, obiter and so forth. In such a legal culture, jokingly described by one interviewee as 'the law is the law is the law, no politics, no context, just law',¹⁸⁵ it is not difficult to see how moral choices became narrowed exclusively to legal analysis, challenges to the status quo outside the courts were viewed as 'political' and acquiescence became a byword for professional 'neutrality'.

A further issue to be noted in seeking to understand better the ways in which lawyers responded to events in Northern Ireland is the question of timing. The literature on critical junctures privileges the importance of time and timing. Similarly in conflict resolution and peacemaking scholarship there is significant attention to the notion of 'ripeness' which suggests essentially that a combination of political, ideological, social or material factors may render a conflict *ready* for resolution.¹⁸⁶ The EGM which saw the Law Society call for a public inquiry into the murders of Finucane and Nelson and the Bar's decision to support the change in the Declaration for taking Silk both occurred a number of years after the IRA and Loyalist ceasefires when the political transition was well underway. In the same year as the ceasefires, the Law Society successfully mobilised in opposition to a proposal that paramilitary suspects should not be permitted to secure a lawyer of their own choosing but rather should be provided one from a list of government approved legal representatives. In marked contrast to its earlier acquiescence, the Law Society made their 'implacable hostility' clear (on the grounds that solicitors in such a system might be viewed with 'total suspicion and hostility') and indeed also rejected a subsequent watered down scheme.¹⁸⁷ In the face of such legal opposition, impetus for the proposed changes gradually disappeared in the context of dwindling numbers of paramilitary suspects. Of course, as with the EGM and QCs challenge, this successful demonstration of collective power and influence begs the obvious question whether such mobilisation of the main legal collectives could *only* take place when society was clearly emerging out of conflict. Disappointingly, in the Northern Ireland context, this would appear to have been the case.

Geertz has famously argued that law represents a distinct way of 'imagining the real'.¹⁸⁸ In a similar fashion the version of legal professionalism propagated during the Northern Ireland conflict was contingent and socially constructed – a useful fiction for a collective failure of moral courage. As others have

185 Interview with Northern Irish barrister, 2 August 2005.

186 See I. Zartman, *Ripe for Resolution* (New York: Oxford University Press, 1989); P. Coleman *et al*, 'Reconstructing Ripeness II: Models and Methods for Constructing Stakeholder Engagement Across Protracted Divides' (2008) 26 *Conflict Resolution Quarterly* 1, 43.

187 Law Society, *Response by the Law Society of Northern Ireland to Proposals by Sir Louis Blom-Cooper, Independent Inspector for the Holding Centres, For a Duty Solicitor Scheme for the Holding Centres in Northern Ireland* (Belfast: Law Society of Northern Ireland, 2004). L. Blom Cooper, *Fifth Annual Report of the Independent Commissioner for Holding Centres* (Belfast: Independent Commission for Holding Centres, 1997). There may also have been a degree of self interest in the position of the Law Society. One newspaper article from the Belfast Telegraph, 16th March 1994, notes a comment from the Law Society suggesting that Blom Cooper's proposal could be '... a cynical means of reducing the legal aid bill'.

188 Geertz, n 175 above, 184.

demonstrated, a culture of quietism amongst powerful players within the legal community is not unique to Northern Ireland.¹⁸⁹ As I have been at pains to point out, most simply got on with the business of lawyering while a small number of individual lawyers and indeed sporadic groups also ‘spoke out’ bravely at what they perceived as egregious human rights abuses. Often such lawyers were marginalised, labelled trouble-makers and accused of undermining the political neutrality of the profession.¹⁹⁰ The marginalisation of such voices, and the collective silence of many of their colleagues was all the more impactful in Northern Ireland precisely because it is such a small place. Together with doctors, lawyers are the only profession with highly developed United Nations standards, designed to protect their independence and underpin their professional authority. Mobilised groups of lawyers bring what Bourdieu refers to as ‘symbolic capital’ to important political and social debates – ‘authority, knowledge, prestige, and reputation’.¹⁹¹ Correspondingly, their silence during such debates in the Northern Ireland conflict was deafening.

While a universally agreed account about the role of the legal profession in the jurisdiction may be impossible, some effort to systemically interrogate the past would at least ‘narrow the space for permissible lies’.¹⁹² Skilled advocacy, courage and integrity are an element of that history, but so too are the failures discussed above. In South Africa, the Truth and Reconciliation Commission (TRC) held hearings into the conduct of the judicial and legal professions during the Apartheid era. Those hearings, described by TRC Chairperson Archbishop Tutu as ‘. . . the most important of the professional hearings, almost as important as the victim/survivor hearings’,¹⁹³ explored issues concerning the importance of judicial independence, the ways in which parliamentary sovereignty was interpreted, the integrity of the prosecution service, the role of the professional associations and the treatment of those lawyers who did take public positions in opposition to Emergency laws and other aspects of the Apartheid regime. While the levels of cooperation and the outcomes were uneven, they did establish an important precedent. Northern Ireland has yet to resolve its protracted debate on how to deal with its past.¹⁹⁴ But when a process is settled upon, the themes explored in the South African TRC are a useful starting point.

I have argued elsewhere that there is a general tendency to oversell the healing and reconciliatory power of truth recovery in the field of transitional justice.¹⁹⁵ In the case of the legal community however, the impetus towards a more rounded appreciation of its history is not premised upon such intangible – though laudable – goals. Rather, it is based upon a pragmatic view that unless contemporary and

189 eg G. Barzilai, ‘The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent’ in Halliday, n 17 above; D. Brinks, *The Judicial Response to Police Violence in Latin America: Inequality and the Rule of Law* (New York: Cambridge University Press, 2008).

190 Lawyers Committee for Human Rights, n 118 above.

191 P. Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977).

192 M. Ignatieff, ‘Articles of Faith’ (1996) 5 *Index on Censorship* 96, 111.

193 Quoted in Dyzenhaus, n 11 above 26.

194 A. Duffy, ‘A Truth Commission for Northern Ireland?’ (2010) *International Journal of Transitional Justice* 4, 1, 26.

195 K. McEvoy, *The Trouble with Truth: Struggling with the Past in Northern Ireland* (London: Routledge, 2011).

future lawyers know about, acknowledge and engage with the challenges thrown up by violent political conflict, they cannot in fact do their jobs properly in peacetime.¹⁹⁶ As O'Donnell has argued, law matters in the consolidation of democracy,¹⁹⁷ but so do the values, mores and actions of the lawyers who administer and mould it. The legal actors in Northern Ireland who staffed key institutions – including the universities – created and maintained a pervasive culture of quietism during the conflict. Understanding their silence is a fundamental requirement for a properly embedded rule of law and a more grounded notion of legal professionalism.

196 For example, drawing from successful experiences in the United States and South Africa, a major funder has recently established a Public Interest Litigation Support organisation in Northern Ireland designed to fund strategic litigation, promote pro-bono work, explore the barriers to public interest litigation and promote access to justice of those in need. Efforts to promote this as a local variant of 'cause-lawyering' can only be realised with a proper understanding of the historical context and legal culture explored herein. See <http://www.pilsni.org> (last visited 28 January 2011).

197 G. O'Donnell, 'Why the Rule of Law Matters' (2004) 15 *Journal of Democracy* 4, 32.