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Mobilising the Professions? : Lawyers, Politics and the Collective Legal Conscience*

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*'In the ideal world, a Law Society or a Bar Council should function as the collective conscience of the legal profession. They should be the most vocal in not just defending the financial or institutional interests of their members but in deploying their skills and resources in defence of human rights and of the rule of law itself, despite whatever pressures the state and other powerful forces may deploy. Unfortunately however history teaches us that a range of factors often contribute to the opposite. If lawyers do the right thing it is often despite such groups rather than because of them.'*¹

Introduction

This chapter considers the ways in which lawyers either do or do not make their voices heard in processes of political, social and legal transformation. By examining a number of key moments of legal and political history in three distinct jurisdictions, it looks in particular at the interaction between those lawyers who do 'make a stand' and the professional bodies to which they belong. The purpose of that examination is to explore ways in which the potential for particular groups of lawyers to serve as the 'collective conscience' of the legal professional may be developed and enhanced.² Of course, as is well discussed in the literature reviewed below, Law Societies, Bar Associations, Bar Councils and the like often tend to adopt conservative positions which favour the political and institutional positions of the state in which they practice and which is, in the final analysis, the guarantor over their continued de facto monopoly on the delivery of legal services. As will be seen below, often such positions are expressed in terms of maintaining the 'neutrality' or 'independence' of the profession and a denial of the

* Kieran McEvoy would like to thank the staff of the Institute of Legal Research, School of Law, University of Berkeley where his contribution to this chapter was completed in particular Frank Zimring, Harry Scheiber and Karen Chin for their assistance and support.

¹ Interview Northern Ireland barrister, 25th August 2005.

² As noted above the notion of collective conscience emerged from one practitioner in our fieldwork and we considered that it well captured some of the issues with which we were grappling. Obviously the concept resonates with Durkheim's concept of '*the totality of beliefs and sentiments common to the average citizens of the same society [which] forms a determinant system which has its own life : One may call it the collective or common conscience.*'² However we are not deploying the term here as synonymous with some sort of 'averaged out' or lowest common denominator form of consensus to which the Durkheimian concept is sometimes (mistakenly) applied. Rather we are utilising the notion of collective conscience to describe a more ambitious, far reaching and ultimately more courageous expression of what Halliday has described as 'moral authority' wherein technical legal knowledge and skills are deployed in a self consciously *moral* and quite often *political* fashion because it is deemed by the professional organization involved to be 'the right thing to do.' The practical difficulties of determining such a path for legal associations is discussed at length below. Emile Durkheim *The Division of Labour* (1893\1933) at p. 79; Roger Cotterrell *Emile Durkheim : Law in a Moral Domain* (1999) ; Terence Halliday 'Knowledge Mandates : Collective Influence By Scientific, Normative and Syncretic Professions.' (1985) *British Journal of Sociology*, 421 at p. 429.

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political nature of such stances. However, we will argue that even in circumstances wherein the dominant forces in the legal community appear largely pliant to the interests of the state or other powerful institutional forces, progressive lawyers find ways to ignore, circumnavigate or otherwise negotiate such institutional blockages and have their voices heard. In each of the examples discussed, it is ultimately the legal collectives which have shifted their stance. Often such movement has been done begrudgingly. However we would argue that the process of *internationalisation*, *popular mobilisation* and *acknowledgement of the past* in the three jurisdictions discussed have nudged along the established organisations of the profession towards a more honourable expression of what we have termed the ‘collective legal conscience’.

The key moments or ‘critical junctures’ which we examine are drawn from a major comparative research project on the ways in which lawyers utilise and adapt to human rights discourses in times of profound political and legal transformation.³ The rationale for conducting comparative legal research are well rehearsed.⁴ Indeed one of the features of human rights discourse in particular and of the broader process of increased globalisation is that legal scholars and practitioners are increasingly required to be internationalist and comparativist in nature.⁵ More generally, as Nelken has argued, comparative scholarship allows us to “raise or sharpen awkward questions” about our own jurisdictions.⁶ It can facilitate a process of reflection which allows actors to ‘step back’ from the immediacy of their own context, particularly when dealing with politically sensitive or difficult issues.⁷ Providing an approach is adopted which avoids simplistic or mechanistic transpositions from one jurisdiction to another, but rather draws upon other experiences to thematise and frame that which is relevant, comparative research is an extremely useful analytical tool for moving debates beyond their localised context.⁸

³ This chapter is drawn from research completed between 2002 and 2006 by the authors and Professor Stephen Livingstone. That project involved fieldwork in the United States, Canada, Northern Ireland, South Africa, Britain and the Republic of Ireland. Over 130 interviews were conducted with judges and lawyers including five chief justices. All of those interviewees who wish to be anonymised are identified by the branch of the profession to which they belong and the date of the interview. For a more detailed discussion on the findings see Stephen Livingstone, Kieran McEvoy, Rachel Rebouche and Paul Mageean (2006) *Judges, Lawyers and Human Rights in the Northern Ireland Transition*.

⁴ See e.g. David Nelken (ed.), *Comparing Legal Cultures* (1997); David Nelken (ed.), *Contrasting Criminal Justice: Getting From Here to There* (2000); Konrad Zweigert and Hein Koetz, *An Introduction to Comparative Law* (3rd ed), (1998); Paul Roberts ‘On Method: The Ascent of Comparative Criminal Justice’ (2002) 22, *Oxford Journal of Legal Studies*, 539.

⁵ Christopher McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Human Rights’ (2000) 20 *Oxford Journal of Legal Studies*, 499; William Twining *Globalisation and Legal Theory* (2002).

⁶ David Nelken, ‘Whom Can You Trust: The Future of Comparative Criminology.’ in D. Nelken (ed.), *The Futures of Criminology* (1994).

⁷ Kieran McEvoy & Graham Ellison, ‘Criminological Discourses In Northern Ireland: Conflict And Conflict Resolution, In Kieran McEvoy and Tim Newburn (eds.), *Criminology, Conflict Resolution and Restorative Justice* (2003).

⁸ David Nelken, ‘Beyond Compare? Criticizing ‘The American Way of Law’ (2003) 28 *Law and Social Inquiry*, 799.

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In part one of the chapter we first outline what is meant by the notion of a critical juncture and how a close examination of such a defining ‘moment’ can speak to broader political and sociological themes of more general applicability. Part two then considers key themes which emerge from the literature on the sociology of the legal professions more generally and in particular with regard to the role of professional associations in contributing to the mores, values and working practices which make up the legal culture of a given jurisdiction. Part three then considers the particularities of the responses of three different legal communities to such critical junctures. Although a range of overlapping strategies were deployed in all of the jurisdictions aimed at galvanising lawyers, each is used heuristically to illustrate particular features of broader applicability. In Northern Ireland, we examine how *internationalisation* became a key feature in breaking down long held traditions of quietism within a legal community that was finally galvanised by the decision of the Law Society of Northern Ireland to call for public inquiries into the murders of two of its prominent members in circumstances which strongly suggested collusion by the security forces. In Canada, we explore the strategy of *popular mobilisation* employed by feminist lawyers concerning their efforts to mainstream gender equality in the discussions preceding the introduction of Canadian Charter of Rights and Freedoms. In South Africa, we examine a key moment in the Apartheid era when the Bar excluded one of its own members for his stance in opposition to the regime and the manner in which the profession engaged in a process of *acknowledgement* of that event and its related history through the Truth and Reconciliation Commission. In the final part of the article we seek to draw together the lessons from these and other jurisdictions and to frame those experiences within the ‘cause lawyering’ literature. In particular we suggest that through a more sophisticated notion of professionalism amongst lawyers and legal organisations they may be afforded the confidence and space to engage in contentious public conversations of which they could and should be a part.

I. Recognising a Critical Juncture

Before exploring the ways in which lawyers are mobilised or not, it might be useful to offer some guidance as to how one might recognise a key moment or critical juncture in the history of an organisation, institution or political system. The notion of a critical juncture applied in this context to the professional history of lawyers is derived from the literature on *Historical Institutionalism*. This is a rich comparative political science literature, the nuances of which are beyond the needs of the current chapter. Summarising for the sake of brevity, historical institutionalism is the study of the ways in which particular institutions emerge over time and the ways in which such institutions influence the social and political world around them.⁹ Originally heavily influenced by fairly rigid functionalist perspectives on the intersection of the social and political arenas as an overall system of interacting parts,¹⁰ historical institutionalists have increasingly adopted

⁹ Kathleen Thelen, Sven Steinmo and Frank Lonstreth (eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (1992); Sven Steinmo ‘The New Institutionalism,’ in Barry Clarke and Joe Foweraker (eds.), *The Encyclopaedia of Democratic Thought* (2001).

¹⁰ Ronald Chilcote, *Theories of Comparative Politics* (1981); David Knoke, ‘Networks of Political Action: Towards Theory Construction’ (1990) 68, *Social Forces*, 1041.

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an expanded perspective of determining *which* institutions matter (beyond obvious political institutions such as parliaments) and the *ways* in which they matter.¹¹ They increasingly focus upon more subtle forms of ‘cultural’ relationships between individual actors and the institutions to which they belong.¹² They are sensitive to the operation of power, both within institutions themselves and in terms of broader sets of power relations between differing institutions.¹³ Finally historical institutionalist scholarship places considerable emphasis upon the significance of time. By tracking changes and continuities within particular institutions carefully (and avoiding simplistic linear narratives wherein, for example, institutions evolve in an inevitably liberal or progressive manner),¹⁴ historical institutionalism provides us with the notion of ‘critical junctures’, key ‘moments’ or periods in the history of any institution which provide crucial insights into the ways in which organisation *see, act* and *think* of themselves.

Some of the most persuasive writings on critical junctures are suffused with the notion of crisis, challenge or significant change in the history of a given institution.¹⁵ In particular, the ways in which particular institutions respond to such challenges is examined in the context of their ‘legacy’, and the ways in which such legacies are ‘reproduced’ both in terms of how the institutions function at a practical level but also in terms of the ways in which they are publicly perceived and remembered and the ways in which an organisational self image emerges.¹⁶ Thus for some scholars in this field, the specific configurations of a given institution may be crystallised as a result of a particular critical juncture.¹⁷ At the very least, the ways in which an institution responds to critical junctures renders its workings more visible.¹⁸

By way of illustration, the murder of Stephen Lawrence and the subsequent MacPherson Inquiry would be widely accepted amongst policing scholars and practitioners alike to

¹¹ Peter Hall and Rosemary Taylor, ‘The Potential of Historical Institutionalism’ (1998) XLVI *Political Studies*, 958.

¹² Kathleen Thelen, ‘Historical Institutionalism In Comparative Politics’ (1999) 2, *Annual Review of Political Science*, 369. Ellen Immergut, ‘The Theoretical Core of the New Institutionalism’ (1998) 26 *Politics and Society*, 5.

¹³ Johannes Lindner and Berthold Rittberger, ‘The Creation, Interpretation and Contestation of Institutions: Revisiting Historical Institutionalism’ (2003) 41 *Journal of Common Market Studies*, 445; Terry Moe, ‘Power and Political Institutions’ (2005) 3 *Perspectives on Politics*, 215.

¹⁴ Paul Pierson and Theda Skocpol, ‘Historical Institutionalism In Contemporary Political Science’ (2002) *Political Science the State of the Discipline*; Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (2004).

¹⁵ E.g. Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia and China* (1979); Ruth Collier and David Collier, *Shaping The Political Arena: Critical Junctures, The Labor Movement, And Regime Dynamics In Latin America* (1991).

¹⁶ Theda Skocpol, Ganz Marshall and Ziad Munson, ‘A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States’ (2000) 94, *American Political Science Review* 527.

¹⁷ Thelen (1991) above n.12 at p. 391 also makes the useful corrective point that the notion of particular institutional relations being crystallised (and thereby ensuring some degree of legacy which will last) should not be viewed as meaning that such relations stand still. Rather, as she points out, institutions which do achieve some form of historical continuity are often marked out by their capacity to adapt to changes in their environment.

¹⁸ For a classic account see Stuart Hall, Charles Critcher, Tony Jefferson, John Clarke and Brian Robert, *Policing the Crisis : Mugging, the State and Law and Order* (1978).

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constitute a critical juncture in the history of British policing.¹⁹ In the world of British prisons, the prison riots of the 1980s and the subsequent report of Lord Woolf is also seen by many as a defining period with a legacy which remains highly significant to this day.²⁰ In the legal world, despite a heated debate as to its actual transformative impact,²¹ few would dispute that the introduction of the Human Rights Act 1998 was a key moment in the history of the British legal system. In each instance, as a result of incidents which occurred within their domain which were of considerable broader political significance, these institutions were hugely affected both internally and externally. For the actors within these institutions ‘MacPherson’, ‘Woolf’ or the ‘Human Rights Act’ became shorthand for a series of (often contested) meanings around which hotly disputed discourses such as ‘institutional racism’ in the police, ‘moral crisis’ within the prisons or the ‘appropriate balance’ between public safety and civil liberties coalesced. For actors within these institutions, such critical junctures provided important historical and cultural narratives in the development of an institutional memory and informed the mores and values which shaped the organisational culture. For those on the outside, they offered glimpses into comparatively closed worlds as well as useful historical ‘moments’ around which to frame broader social and political discussions concerning such institutions.²²

Critical junctures therefore are defining moments in the history of organisations and institutions which offer us insights into how they work, the power relationship at work within and without, the ways in which they are perceived and remembered, and the ways in which they see themselves. The critical junctures we have chosen are in some senses eclectic. Certainly we are conscious that we could have chosen many others from the diverse histories of the legal communities in Northern Ireland, Canada and South Africa. However, the junctures we decided to focus upon emerged organically from our fieldwork, they were all viewed as ‘key moments’ by the actors involved. In addition, we considered that they were illustrative of themes and strategies of broader applicability beyond the confines of each jurisdiction.

¹⁹ Michael Rowe, *Policing, Race and Racism* (2004); John Stevens, *Not for the Faint Hearted: My Life Fighting Crime* (2006).

²⁰ Michael Cavadino & James Dignan, *The Penal System: An Introduction* (2002); Alison Lieblich, *Prisons and their Moral Performance* (2004).

²¹ See e.g. the special issue of the *Journal of Law and Society* especially Stephen Sedley, ‘The Rocks or the Open Sea: Where is the Human Rights Act Heading?’ (2005) 32 *Journal of Law and Society*, 3; Luke Clements, ‘Winner and Losers’ (2005) 32, *Journal of Law Society*, 34; Shami Chakrabati, ‘Rights And Rhetoric: The Politics Of Asylum and Human Rights Culture In The United Kingdom’ (2005) 32, *Journal of Law and Society*, 131.

²² There is a similar notion contained with policing literature, referred to as ‘signal events’, which may be events or controversies which ‘everyone knows about’ regardless of whether the precise nature of such events has been established. See Martin Innes, ‘Signal Crimes And Signal Disorders: Notes On Deviance As Communicative Action’ (2004), 55 *British Journal of Sociology*, 335. Such events may become watersheds, key markers in individuals’ biographies and a focus around which experiences of and attitudes within and towards institutions such as the police may be structured, understood and articulated. See also Sharon Pickering, *Policing and Resistance in Northern Ireland* (2002) and Aogán Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform* (2005).

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II. Legal Collectives and the Sociology of the Legal Profession

The origins of work on the sociology of the profession actually lie with the broader study of societies in transformation. Drawing upon the work of Weber and Durkheim, professions such as law or medicine were historically seen as amongst the most important and stabilising influences in a fast changing world.²³ Up until the 1960s the sociology of the professions was heavily influenced by the emphasis which Durkheim in particular placed upon the professions and professional bodies as entities which represented *corps-intermediaires* (intermediate bodies) between the individual and the state.²⁴ His view was that in the context of increased division of labour and related social and political upheaval, such groups embodied the social forces which were required to prevent a breakdown in moral authority.²⁵ Later work on the professions began to look at how such groupings exercised 'license and mandate' over their work by virtue of the state and the support of political, social or economic elites. Some such commentators were highly critical of the processes by which particular dominant professions are distinguished from other occupations, setting in place their own oversight and educational mechanisms and developing a particular sense of self regard 'by virtue of professional myths imposed on a gullible public'.²⁶ The creation of a monopoly over access and services, the exercise of autonomous power over their own members, the particular relations of such groups with the political culture in which they operate and the achievement of social status and reputation are amongst the most important features which sets apart such 'professions'.²⁷

With regard to lawyers in particular, they too have been long identified as seeking to control admission to and training for the profession, demarcate and protect jurisdiction within which they alone are entitled to practice, impose their own rules of etiquette and

²³ '...they inherit, preserve and pass on a tradition... they engender modes of life, habits of thought and standards of judgement which render them centres of resistance to crude forces which threaten steady and peaceful evolution... the great professions stand like rocks against which the waves raised by these forces beat in vain.' Alexander Carr-Saunders and Paul Wilson, *The Professions* (1933) (repr 1964) at p 497.

²⁴ Terence Johnson, *Professions and Power* (1972); Keith MacDonald, *The Sociology of the Professions* (1995).

²⁵ Emile Durkheim, *Professional Ethics and Civic Morals* (1957).

²⁶ '...several dominant occupations (especially medicine & law) have come to occupy uniquely powerful positions in Western societies from which they monopolistically initiate, direct and regulate widespread social change. Several of the mechanisms which have facilitated these developments have been identified and discussed. Principal amongst them are the emergence of the a mythology concerning professionalism' John McKinlay 'On the Professional Regulation of Change, in Paul Halmos (ed.), *Professionalization and Social Change* (1973) at p. 77. For a classic polemic on this process in the medical world see Ivan Illich, *Limits to Medicine: Medical Nemesis, the Expropriation of Health* (1977). See also Andrew Abbot, *The System of Professions an Essay on the Division of Expert Labor* (1988), mirroring Nils Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology*, 1 on the ways in which lawyers have come to claim exclusive 'jurisdiction' over conflicts defined as 'legal disputes'. See also Lawrence Friedman, *Legal Culture and the Legal Profession* (1995).

²⁷ Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (1977); Terence Johnson, 'The State and the Professions' in Anthony Giddens and Gavin Mackenzie (eds.), *Social Class and the Division of Labour* (1982); Anne Witz, *Professions and Patriarchy* (1992); Keith MacDonald, *The Sociology of the Professions* (1995).

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practice upon one another and to defend and if possible enhance their status.²⁸ As Western world societies became more questioning of irrational bases of social privilege, legal professions historically met this challenge by reforming the training, admission and regulation of their members in ways which would limit numbers and organise forms of competition.²⁹ In effect, lawyers have sought to modernise the basis of their social advantage through monopolisation.³⁰ The means through which that monopoly was maintained has historically been via organisations such as Bar Associations and Law Societies which were charged with the task of the self-governance of the professions.

Much critical work on such entities has focused upon such organisations as the vehicles through which the pecuniary interests and professional monopolies of their members are maintained and promulgated.³¹ Historically such analysis has tended to concentrate in particular on the weaknesses of the self-governance model in dealing with professional misconduct.³² More sympathetic studies, particularly of American Bar Associations, suggest that once the dominance of the legal market was secured, the preoccupation with the maintenance of the monopoly gave way to an ethos of 'civic professionalism' wherein energies were directed towards the improvement of the legal systems in which their members operated.³³ Studies of other systems such as England have been less charitable. For example, Abel in his seminal work in the English profession is famously scathing about the record of the Law Society and Bar Council on their lack of sustained engagement in matters of legal reform which did not impact directly on their own interests.³⁴ As he navigates the various attempts to erode the monopoly of legal service provision in the British context in the 1980s and 1990s he sums up;

²⁸ Daniel Duman, 'The Creation and Diffusion of a Professional Ideology in Nineteenth Century England,' (1979) 27 *Sociological Review*, 113; John Flood, *The Legal Profession in the United States* (3rd ed) (1985). Michael Burrage, 'Revolution and the Collective Action of the French, American, and English Legal Professions' (1988) 13 *Law and Social Inquiry*, 225; Hilary Sommerlad, 'Managerialism and the Legal Profession: A New Professional Paradigm' (1995) 2 *International Journal of the Legal Profession* 159; Terence Halliday, *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (1987); Gerard Hanlon, 'Lawyers, the Market and Significant Others' (1997) 60 *Modern Law Review*, 798; Fiona Kay, 'Professionalism And Exclusionary Practices: Shifting The Terrain Of Privilege And Professional Monopoly' (2004) 11 *International Journal of the Legal Profession*, 11.

²⁹ See generally Richard Abel and Philip Lewis, *Lawyers in Society* (1988), esp vol 1.

³⁰ Mark Osiel, 'Lawyers as Monopolists, Aristocrats and Entrepreneurs' (2000) 103, *Harvard Law Review*, 2009.

³¹ See Richard Abel, 'The Rise of Professionalism' (1981) 6, *British Journal of Law and Society*, 82; Terence Halliday, 'Professions, Class and Capitalism' (1983) 24 *European Journal of Sociology*, 321 for a review. For a classic account with regard to medicine see Jeffrey Berlant, *Profession And Monopoly: A Study Of Medicine in the United States And Great Britain* (1975).

³² e.g. David Wilkins, 'Who Should Regulate Lawyers?' (1992) 104 *Harvard Law Review*, 799; Bruce Arnold & Fiona Kay, 'Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-regulation' (1995) 4, *International Journal of the Sociology of Law*, 321; Christine Parker, *Just Lawyers: Regulation and Access to Justice* (2000).

³³ Halliday, above n28; Michael Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* (1988); Terence Halliday, Michael Powell and Mark Granfors, 'After Minimalism: Transformations of State Bar Associations from Market Dependence to State Reliance, 1918 to 1950' (1993) 58 *American Sociological Review*, 515.

³⁴ John Morison and Philip Leith, *The Barristers World and the Nature of Law* (1995); Andrew Levin and Jennifer Boon, *The Ethics and Conduct of Lawyers in England and Wales* (1999); Mary Seneviratne, *The*

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*'The greatest pitfall of self-governance [in England and Wales], however, is not tension among fractions or between professional and public interest, oligarchy and democracy, but apathy. Most lawyers just want to earn a living and leave politics to others... Like Rhet Butler, most lawyers frankly do not give a damn.'*³⁵

In very broad terms therefore much of the literature on the sociology of the legal profession in general and of organisations within the professions in particular, suggests a profession more interested in protecting itself and the status of its members. Viewed from such a reductionist perspective, the legal profession is individualist in nature, it secures its privileged status due in large part to its mechanisms for self governance and those mechanisms are, in the final analysis, guaranteed by the state in which lawyers operate.³⁶ In such a context, it is perhaps small wonder that organised groups of lawyers do not do more to collectively 'rock the boat' and indeed may take a dim view of those lawyers who do.³⁷ Of course such a crude generalisation fails to grasp much of the differences and nuances of the lived experiences of lawyers and legal organisations within and between different jurisdictions. It also fails to take account of a long tradition of progressive work (sometimes referred to as 'cause lawyering') carried out by individual lawyers, law firms, collective organisations and even, on occasion, established bar associations and law societies in a wide range of different contexts. This is a style of lawyering which we shall return to in the final section of this chapter. For current purposes however this more cynical notion of lawyers and their capacity for mobilisation provides a useful backdrop to the critical junctures explored below in Northern Ireland, Canada and South Africa.

III. Critical Junctures in Context: Comparative Examples

It is our contention that the experiences discussed below in Northern Ireland, Canada and South Africa at various critical junctures in their own legal history may help to elucidate some of the broader arguments concerning the mobilisation of lawyers being explored here. Each of these societies have experienced considerable political and constitutional transformation. As is discussed elsewhere in this volume, the era since the paramilitary ceasefires in Northern Ireland has seen the introduction of the Belfast Agreement in 1998 and the Human Rights Act. Despite the stop start nature of devolution, both of these pieces of legislation have had a important effect on the political and legal landscape in the jurisdiction.³⁸ In Canada the Canadian Charter of Fundamental Rights and Freedoms

Legal Profession: Regulation and the Consumer (1999); Daniel Muzio, *The Professional Project And The Contemporary Re-Organisation Of The Legal Profession In England And Wales* (2004).

³⁵ Richard Abel, *English Lawyers: Between Market and State* (2003) at p. 470. For an interesting discussion on the break-up of lawyers monopoly on service provision in the United States see Herbert Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World* (1999) 33, *Law and Society Review*, 713.

³⁶ Fiona Kay (2004) above n28.

³⁷ As one colleague suggested at an earlier presentation of a version of this paper, 'what else would you expect from a bunch of lawyers?' Seminar, Institute of Governance, Queens University Belfast, 27th June 2006.

³⁸ Arthur Aughey, *The Politics of Northern Ireland : Beyond the Good Friday Agreement* (2005).

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has also had a profound impact on Canadian legal and political culture and way in which Canadian political power is exercised.³⁹ In South Africa, the post apartheid 1996 South African Constitution was both a legal and symbolic marker in the dramatic transition from a racist legal system (based the primacy of parliamentary sovereignty) to a system tied explicitly to the interpretation of entrenched rights.⁴⁰ As John Morison and Marie Lynch argue herein with regard to Northern Ireland, as Christopher Manfredi has underlined with regard to Canada,⁴¹ and Rick Abel with regard to South Africa⁴² some lawyers were deeply imbued in the struggles before and after these legal and constitutional initiatives and their outplaying on the political stage. In each instance, they were often blocked by powerful institutional forces both within and outside of their own profession. While the histories of these countries differ radically in other ways, we will argue that the search for peace in Northern Ireland, the creation of the Charter in Canada and the struggle to end apartheid in South Africa created moments of change wherein the possibility of an elevated collective legal conscience was underlined.

Internationalisation and the Collective Legal Conscience in Northern Ireland.

We have argued elsewhere that a range of factors including the small size of the jurisdiction and legal community, the exigencies of the Northern Ireland conflict, the particularities of the relationship which many lawyers and judges have had with the state, all contributed to a legal culture which was (in very broad terms) conservative, positivistic and shaped by a desire to avoid 'division' at all costs.⁴³ With a few exceptions, the self image of lawyers of all hues in Northern Ireland during the conflict was of a profession striving to remain 'above' politics, a group of skilled professionals engaged in a collective process of upholding 'the rule of law.'⁴⁴ The numbers working 'at the coalface' of cases related to the violent conflict were small in comparative terms and, for the reasons discussed below, were loath to be seen as affiliated to the political causes of their clients.⁴⁵ A number of small collectives of critical lawyers did emerge for brief periods during the conflict and engaged in high profile public commentary around civil rights, emergency laws and other conflict-related issues and a limited amount of pro-bono work. However, these organisations withered on the vine after a few years in existence.⁴⁶

³⁹ See e.g. James Kelly, *Governing with the Charter: Legislative and Judicial Activism and the Framers' Intent* (2005).

⁴⁰ Hassen Ebrahim, *The Soul of a Nation: Constitution Making in South Africa* (1999).

⁴¹ Richard Abel, *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994* (1994).

⁴² Christopher Manfredi, *Feminist Activism in the Supreme Court; Legal Mobilization and the Women's Legal Education and Action Fund* (2004).

⁴³ Stephen Livingstone et al (2006) above n3. See also Stephen Livingstone, 'And Justice for All?: The Judiciary and the Legal Profession in Transition' in Colin Harvey (ed.), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (2001)

⁴⁴ As one barrister interviewed jokingly described it to us, '...the law is the law is the law, no politics, no context, just law.' Interview 25th August 2005.

⁴⁵ See John Jackson and Sean Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (1995); Steven Greer, *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland*; Kieran McEvoy, 'What the Lawyers Did During the War: Critical Junctures in the Legal Culture of Northern Ireland', (2006) paper presented Institute of Governance Queens University Belfast, 26th June 2006.

⁴⁶ The two most prominent of these were the Northern Ireland Society of Labour Lawyers in the late 1960s and early 1970s and the Northern Ireland Association of Socialist Lawyers established in 1980/1981. The

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In addition, in the early 1980s a local human rights NGO the Committee on the Administration of Justice (CAJ) was established which included practicing lawyers amongst its early membership and went on to become one of the most internationally respected local human rights NGOs in the world.⁴⁷ Those important exceptions aside however, Northern Ireland has seen nothing like the public and collective legal activism which characterised aspects of feminist mobilisation associated with the development of the Charter in Canada and the anti-apartheid struggle in South Africa. That culture of 'quietism' was perhaps best highlighted by the response of the legal profession to the murder of two of its own members, defence solicitors Pat Finucane and Rosemary Nelson.

The murder of Pat Finucane by the Ulster Defence Association was one of most controversial killings of the Northern Ireland conflict. Although a number of other lawyers and judges were also murdered by paramilitaries,⁴⁸ it was the persistent allegations of state collusion in the Finucane killing which arguably gave this killing such national and international prominence. In claiming responsibility for the murder the UDA claimed that Mr Finucane was a member of the IRA, a claim hotly disputed by his family and colleagues and refuted by the RUC and by retired Canadian Supreme Court judge Peter Cory in his investigation into whether a public inquiry should be conducted into the circumstances of his death.⁴⁹ Mr Finucane's murder took place in a context wherein a number of prominent lawyers involved in defending Republican suspects had become increasingly concerned about threats made by police officers.⁵⁰ Certainly the level of personal animosity felt by some police officers towards Finucane and other defence

contribution of both are analysed at length in Livingstone et al, (2006) above n3 and Kieran McEvoy (2006), *ibid*.

⁴⁷ Eitan Felner, *Human Rights Leaders in Conflict Zones* (2003).

⁴⁸ At least eighteen paramilitary attacks were carried out against the judiciary, resulting in the murder of two magistrates, two county court judges and in 1987 the death of senior judge Lord Justice Gibson and his wife in a bomb planted by the IRA. Republicans were also responsible for the murder of Unionist politician and law lecturer Edgar Graham and the killing of one member of the Director of Public Prosecutions office as well as a number of attempted attacks on DPP staff. As well as the Finucane and Nelson murders, Loyalists were also involved in the killing of Queens University law student and Sinn Fein activist, Sheena Campbell. See Colette Blair, *Judicial Appointments: Research Report 5*, Criminal Justice Review of Northern Ireland at p. 29; Tim Pat Coogan, *The Troubles* (1995) at p.204; David McKittrick, Seamus Kelters, Brian Feeney and Chris Thornton, *Lost Lives: The Stories of the Men, Women and Children Who Died Through the Northern Ireland Troubles* (1999).

⁴⁹ '...there is nothing in the RUC files which indicates that Patrick Finucane was a member of PIRA, the IRA or the INLA. It is apparent that two of his brothers were members of Republican organizations but a man cannot be held responsible for the criminal acts of his brothers. If this were not so, history would have held Abel as guilty as his murderous brother Cain... The presiding coroner confirmed that: "The police refute the claim that Mr Finucane was a member of PIRA. He was just another law-abiding citizen going about his professional duties in a professional manner. He was well known both inside and outside the legal profession. He was regarded in police circles as very professional and he discharged his duties with vigour and professionalism.' Peter Cory, *Cory Collusion Inquiry Report: Patrick Finucane* (2004) at p.11.

⁵⁰ In their comprehensive report on the intimidation of defence lawyers in Northern Ireland, the US based Lawyers Committee for Human Rights concluded that '*...credible evidence suggests that Patrick Finucane's murder was simply the most heinous instance of systematic harassment of defense lawyers for simply doing their job*' Lawyers Committee for Human Rights, *Human Rights and Legal Defense in Northern Ireland* (1993) at p. 25.

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lawyers was viewed as shocking by one experienced officer from Great Britain.⁵¹ While Finucane had originally viewed these threats as a means to get his clients to talk during interrogation, he had become more worried in the year immediately preceding his death, both by the consistency of what his clients were relating to him and by the fact that such vicarious intimidating tactics were accompanied by threatening telephone calls⁵² Most infamously perhaps, his murder was also preceded by comments in the House of Commons by Parliamentary Under-Secretary of State, Douglas Hogg MP, the previous month that “...there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA.”⁵³

In addition to compelling evidence of state collusion,⁵⁴ the complacency of the Northern Ireland legal community has been the subject of much outrage and scrutiny. The Bar Council, apparently taking the view that RUC threats were directed solely against solicitors, said nothing.⁵⁵ In what was described by the New York based Lawyers Committee on Human Rights as a ‘tepid’ response, the Law Society issued a statement condemning the murder, but did not follow this up with calls for an Inquiry or measures

⁵¹ See e.g. John Stalker, *Stalker* (1998) at p. 49.

⁵² Amnesty International *United Kingdom: Human Rights Concerns* (1991) at p.56; British Irish Rights Watch, *Intimidation of Defence Lawyers in Northern Ireland*, (1992a); British Irish Rights Watch *Intimidation of Defence Lawyers in Northern Ireland Update* (1992b).

⁵³ *Hansard*, House of Commons, Standing Committee B, 17th January 1989, col 508. When challenged by the SDLP’s Seamus Mallon, Mr Hogg repeated the allegation claiming, ‘I state it on the basis of advice I have received, guidance that I have been given by people who are dealing with these matters and I shall not expand on it further.’ Mallon later prophetically remarked in the debate, ‘I have no doubt that there are lawyers walking the streets or driving on the roads of Northern Ireland who have become targets for assassins’ bullets as a result of the statement that has been made tonight...’ (*Hansard*, at col. 519). Hogg subsequently admitted to the Guardian newspaper that his briefings came from the RUC (*Guardian*, 13th June 2001). The third of a series of Enquiries conducted by former Metropolitan Chief Constable Sir John Stevens into this case and related allegations of collusion ultimately concluded that the Ministers comments were based on information provided by the RUC, and that ‘...they were not justifiable and that the Minister was compromised.’ Sir John Stevens, *Stevens Enquiry 3: Overview and Recommendations* (2003) at p. 11).

⁵⁴ The intelligence which led to Finucane’s murder was co-ordinated by Brian Nelson, a UDA member and Army’s Force Research Unit agent. The principal weapon was supplied by another RUC Special Branch agent, William Stobie. Both Nelson and Stobie claimed that they had informed their respective handlers of the plan to kill Finucane. Ken Barrett, one of the prime actors recently convicted of the murder, was also an RUC informer. When Brian Nelson was arrested in 1990 and faced 34 charges including two counts of murder counsel, the Attorney General told the court that after “a scrupulous assessment of the possible evidential difficulties and a rigorous examination of the interests of justice,” fifteen charges were to be dropped including the two murders. These facts have been the subject of three investigations by the former Chief of the Metropolitan Police Sir John Stevens and an independent report by Judge Cory, both of whom found evidence that collusion had taken place. Judge Cory recommended public inquiries into this and three other cases. The British government announced the need for a new Inquiries Act to deal with the Finucane killing and subsequent Inquiries and indicated that because of the sensitivities of national security in this case, much of the Inquiry will have to be held in private. See Committee For The Administration Of Justice (CAJ) *Additional Submission to the Criminal Justice Review (in relation to Patrick Finucane case)*, (1999) ; British & Irish Rights Watch *Justice Delayed: Alleged State Collusion In The Murder Of Patrick Finucane And Others* (2000); John Stevens (2003) *ibid*; Lawyers Committee for Human Rights *Beyond Collusion: The UK Security Forces and the Murder of Patrick Finucane* (2003); Peter Cory, (2004) above n49; Justin O’ Brien, *Killing Finucane: Murder in Defence of the Realm* (2005).

⁵⁵ Stephen Livingstone (2001) above n43.

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to protect the independence of lawyers.⁵⁶ A public meeting was held shortly after the murder but no decision on official Law Society action resulted other than raising the matter privately with the authorities.⁵⁷ Even the early attention paid by international human rights groups clearly created a level of discomfiture amongst some members of the Law Society. As Executive Director Mike Posner of the Lawyers Committee for Human Rights recounted with regard to his organization's 1992 meeting with the Law Society:

'We came to Belfast and we saw the Bar Council and the Law Society, and the Law Society meeting I would say was actively hostile. I mean they were so uncomfortable that we were there; we had a very hard time trying to find somebody to talk to us. When we finally met this sort of administrator of the place who was just icy cold and we got an earful about how our members don't care about this and there's a few 'types' that take these political cases and they know what they're getting themselves into...The more we got into it the worse it got in a way, and they were clearly not interested. So we walked out really disgusted with them and I think eventually on that trip we wound up seeing one of the lay leaders, one of the officers. He was a little more polite but he wouldn't meet us in the Law Society's headquarters; he met us in some place where nobody would see him and he said, "I sort of agree with some of the things you're saying but I can't really say it out loud".'⁵⁸

The continued failure of the Law Society to either call for a public inquiry into the killing of Pat Finucane or to offer more fulsome public support to other lawyers subject to threats and harassment became a source of much criticism. The Lawyers Committee concluded in their 1993 report that '*...we are left with the impression that, for a large part of the legal profession in Northern Ireland, the obligation of lawyers to assert fundamental human rights against abuses by the state is a low priority: and if not the legal profession, who will do so?*'.⁵⁹ The UN Special Rapporteur for the Independence of Judges and Lawyers was even stronger. As well as supporting the call for an independent judicial inquiry into the killing and the allegations of collusion, he argued that the failure of both the Law Society and Bar Council to stand up in defence of their colleagues meant that they had failed to meet their professional obligations under Principle 25 of the UN Basic Principles on the Role of Lawyers.⁶⁰

⁵⁶ Lawyers Committee for Human Rights, (1993) above n50. at p.61. In 2004 the Lawyers Committee for Human Rights changed its name to Human Rights First.

⁵⁷ Lawyers Committee for Human Rights, *At the Crossroads: Human Rights and the Northern Ireland Peace Process* (1996).

⁵⁸ Interview with Mike Posner 14th June 2002.

⁵⁹ Lawyers Committee for Human Rights (1993) above n50 at p.41.

⁶⁰ Principle 25 states that '*..professional associations of lawyers shall cooperate with governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.*' See Param Cumaraswamy *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy, on a Mission to Great Britain and Northern Ireland* E/CN.4/1998/39/Add.4 (1998).

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Throughout the 1990s the vocal criticism of the Lawyers Committee and the UN Special Rapporteur for the Independence of Judges and Lawyers and the calls for an independent inquiry into collusion by state forces in the Finucane killing was augmented by a range of influential national and international legal groupings. By 2002 these 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), Amnesty International, the International Federation of Human Rights, the UN Special Representative on Human Rights Defenders, Helsinki Watch, the International Commission of Jurists, the International Bar Association, the American Bar Association and the New York Bar Association.⁶¹ These international bodies were also joined by influential national and local organisations including Liberty, the Haldane Society, the Northern Ireland Standing Advisory Commission on Human Rights (SACHR), the Committee on the Administration of Justice and British Irish Rights Watch.⁶² The Finucane family, together with the law firm Madden and Finucane in which Mr Finucane was a founding partner, also engaged in a long running campaign to keep the case high on the political agenda through lobbying in the US, Britain and Ireland, a poster and letter writing campaign and a number of legal actions including a case lodged at the European Court of Human Rights.⁶³

Despite the considerable build up of international pressure, the Law Society of Northern Ireland maintained its position of remaining 'neutral' on the question of calling for a public inquiry into the Finucane killing for over ten years. That position was eventually reversed in an Extraordinary General Meeting of the Law Society in May 1999 which overturned the position of the Law Society's ruling council. That meeting took place two months after a second murder of a nationalist solicitor by Loyalist paramilitaries, also amidst widespread allegations of state collusion in her death.

Rosemary Nelson was a private practitioner based in Lurgan whose practice involved a mixture of civil, matrimonial and criminal work. Following her involvement as the solicitor acting in a number of high profile cases, in a similar fashion to Finucane, she began to record threats including death threats from RUC officers via her clients.⁶⁴ Ironically Rosemary Nelson was one of the 33 lawyers who had called for an independent Inquiry into the Pat Finucane murder the previous January.⁶⁵

What distinguished Rosemary Nelson was that as a result of these threats, and in particular in the light of the murder of Pat Finucane, she became the subject of a high profile international and national campaign designed to highlight her plight. 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, in a televised interview,

⁶¹ See Lawyers Committee (1996) above n57; Lawyers Committee for Human Rights (2003) above n54, and Geraldine Finucane, *The Long Road to Truth: PJ McGrory Memorial Lecture* (2004) for an overview.

⁶² Geraldine Finucane, *ibid.*

⁶³ Interview Belfast solicitor involved in the Finucane campaign, 21st February 2003. See also *Finucane v UK* (2003) 37 EHRR 29.

⁶⁴ Peter Cory (2004), above n49.

⁶⁵ Statement issued by 33 lawyers 14th January 1998, 'Equal Protection Under the Law.' – Available at <http://www.serve.com/pfc>.

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suggested that Mrs Nelson's life could be in particular danger.⁶⁶ In September 1998 she gave evidence to an American Congressional Committee reiterating her concern for her personal safety. Several organisations including Amnesty International, Lawyers Committee for Human Rights, British Irish Rights Watch and the Committee on the Administration of Justice wrote to the Northern Ireland Office and RUC and made known their concerns for her safety. Despite that campaign, in March 1999 Rosemary Nelson was murdered by a group calling itself the 'Red Hand Defenders'.⁶⁷ Despite a much more commendable reaction by the legal establishment to the Nelson murder, given that the Extraordinary General Meeting of the Law Society which was to discuss both murders took place not long after her the Nelson killing, feelings understandably continued to run high.

In May 1999 a group of twenty petitioners proposed three resolutions to the EGM: (1) to call for an independent inquiry into the circumstances surrounding the murder of Pat Finucane; (2) to call for an independent inquiry and investigation into the murder of Rosemary Nelson; and (3) to pass a motion of no confidence in the Council of the Law Society and to call for their immediate resignation.⁶⁸ The first motion was overwhelmingly carried, the second was also carried, but only by a narrow majority of only nine votes⁶⁹ and the third motion was defeated. Speaking after the vote, Law Society President Catherine Dixon said: *'I have never seen so many solicitors in my entire life. A third of our membership turned out and they all came out because these were big important and sensitive issues for them. We have espoused neutrality for 30 years but the Society has called for this so we must move with it.'*⁷⁰ While some prominent Unionist solicitors criticised the political 'take over' of the Law Society,⁷¹ Catherine Dixon herself commented on the 'constructive, sober and positive manner of the debate.'⁷²

The additional voice of the Law Society calling for such an inquiry did not immediately tilt the political axis. During the Weston Park political negotiations in 2001, the British and Irish governments agreed to appoint a judge of international standing to investigate allegations of state collusion with terrorists in the deaths of Pat Finucane, Rosemary Nelson, and four other cases and that "*in the event that a Public Inquiry is recommended*

⁶⁶ Param Cumaraswamy, *Report on the mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland, 5 March 1998, E/CN.4/1998/39/Add.4.* (1998).

⁶⁷ Peter Cory (2004) above n.49.

⁶⁸ The petitioners also issued a press release stating 'On March 11th the Council of the Law Society declined to support a call for an independent inquiry into the murder of Pat Finucane and the signatories of the petition feel that this view is unrepresentative of the feelings of the profession as a whole. The petitioners feel that it is astounding that the society, of which Pat Finucane was a member, is the only professional lawyers association in these islands that is refusing to endorse legitimate calls for an inquiry.' *Irish News* 1st May 1999, 'Solicitors Insist Law Society Council Resigns'; *Belfast Telegraph*, 11th May 1999, 'Lawyers' Society Facing Turmoil: Resign Demand to Officers at Crunch Meeting.'

⁶⁹ Many of those present argued that given the investigation into Rosemary Nelson's death was a mere two months old, it was perhaps premature to call for an independent inquiry at such an early stage. Interview with Solicitor, 14th February 2002.

⁷⁰ *Irish News*, 12th May 1999, 'Law Society U-turn over Nelson Death.'

⁷¹ Ms Arlene Foster MLA in *Belfast Telegraph* 12th May 1999, 'Unionists Hit Out As Law Society Backs Probe.'

⁷² *Irish Times*, 12th May 1999, 'NI Solicitors Overturn Council's Decision on Finucane Inquiry.'

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in any case, the relevant Government will implement that recommendation."⁷³ Former Canadian Supreme Court judge Peter Cory was appointed in May 2002 and delivered his findings in October 2003. In five of the six cases, including Finucane and Nelson, Cory found evidence of collusion and recommended public inquiries.⁷⁴ The establishment of the Finucane inquiry was originally delayed by ongoing police investigations. These obstacles were ultimately cleared with the conviction of UDA man and Special Branch informer Ken Barrett in September 2004 for his part in the murder.⁷⁵ The three other inquiries in Northern Ireland (including Nelson) were established with powers of subpoena equal to those of the Bloody Sunday Tribunal.⁷⁶ In April 2005, the British government introduced new legislation under which it said the Pat Finucane inquiry would be established. On April 7th 2005, – less than a week after the publication of the Cory reports and on the final day of session before Parliament closed – the government pushed through the repeal of the Tribunals of Enquiry (Evidence) Act 1921 (under which public inquiries such as the Bloody Sunday Tribunal had previously been established and which gave such tribunals the same evidential power as the High Court) with the Inquiries Act 2005. As is discussed in this volume by Anthony and Mageean, that Act arguably marks a significant move towards Executive control over many aspects of a public inquiry. The legislation has been opposed by many of the organisations and institutions who have been long involved in the Finucane case, by Judge Cory himself and by Lord Saville the current chairman of the Bloody Sunday Inquiry.⁷⁷ The Finucane family have continued to insist that they will not take part in an Inquiry established under the terms outlined in the Inquiries Act.⁷⁸ Their campaign continues.

While the Law Society EGM may not have had an immediate political effect, it was self evidently an important 'moment' in the legal history of Northern Ireland. In interviews with those who were at the meeting that night, it was clear that something historical was taking place. While the evening was not without its heated moments and some clear sectarian overtones,⁷⁹ those who made the arguments concerning the need for independent inquiries continuously stressed the point that the matters at hand were human rights concerns. While one solicitor made the argument that the demographic changes to

⁷³ Para 19. At <http://cain.ulst.ac.uk/events/peace/docs/bi010801.htm>

⁷⁴ Justice Cory defined collusion as the state security services 'ignoring or turning a blind eye to the wrongful acts of their servants or agents or supplying information to assist them in their wrongful acts or encouraging them to commit wrongful acts' (above n64 at p. 21).

⁷⁵ 'Finucane's Killer Jailed Amid Clamour for Inquiry' *The Guardian*, 17th September 2004.

⁷⁶ The Billy Wright Inquiry was established under the Prison Act (Northern Ireland) Act 1953. The Robert Hamill and Rosemary Nelson Inquiries were established under the Police (Northern Ireland) Act 1998. However the Wright Inquiry has since been redesignated to operate under the Inquiries Act.

⁷⁷ In a strongly worded letter to Baroness Ashton, minister in the Department of Constitutional Affairs, Lord Saville argued that the erosion of the powers of a Tribunal Chairman previously established under the 1921 Act '...makes a very serious inroad into the independence of any inquiry; and is likely to damage or destroy public confidence in the inquiry and its findings, especially in any case where the conduct of the authorities may be in question... As a judge, I must tell you that I would not be prepared to be appointed as a member of an inquiry that was subject to a provision of this kind.' 'Finucane Widow Urges Judges to Shun Inquiry.' *The Guardian* 14th April 2005.

⁷⁸ 'Family Reject Legislation.' 26th November 2004, Press Release, available at <http://www.serve.com/pfc/pf/inqubill/041126pf.html>

⁷⁹ *Sunday Tribune*, 16 May 1999 'Northern Solicitors Demand Inquiries.'

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the solicitors' profession had a considerable impact on the vote,⁸⁰ most of those we interviewed agreed that voting on the three resolutions did not split along sectarian lines. As one solicitor stated, the real recognition of the legal profession was 'that [calling for an inquiry into the murder of defence lawyers] was a human rights issue concerning a member of the Law Society and as such one which the Society could not fail to take a position on.'⁸¹ Certainly the human rights framework facilitated lawyers in debating a difficult and sensitive topic in a reasonably mature and considered fashion. The traditional refrain that the call for inquiries into state collusion was too 'political'⁸² or that the Law Society would split on sectarian grounds on the issue proved groundless.⁸³ Politically however, internationalising the campaign was absolutely crucial in shifting the position of the Law Society. Time and again lawyers interviewed for this research spoke of the sense of 'embarrassment', 'discomfiture' and 'pressure' on the Law Society from such a cacophony of international legal voices. In such a context the Northern Ireland Law Society's silence on the death of two of its own member became deafening and ultimately untenable.

Of course the internationalisation of the Finucane campaign for a public inquiry was but one part of a broader strategy which saw the Law Society shift its position. Criminal practitioners who had long felt isolated from the 'mainstream' of the bulk of solicitors who ran the Law Society had begun to use their own committees and groupings within the Law Society structure as a platform for mobilisation on this and other issues.⁸⁴ Two months before the EGM one prominent criminal practitioner Barra McGrory, himself a prominent target of death threats from the police and Loyalist paramilitaries similar to those that had preceded the Finucane and Nelson killings, took an unsuccessful judicial review action against the President of the Law Society.⁸⁵ The sobering reality should

⁸⁰ Interview with Solicitor, 25th November 2002.

⁸¹ Interview with Solicitor, 21st February 2003.

⁸² As the Law Society spokesperson interviewed for this research suggested, 'Well, at that time, it was felt that there was an overtly political dimension to all of this but some of our members took a different view...' Interview, 13th December 2002.

⁸³ For further analysis concerning the utility of the human rights framework in this regards, see Kieran McEvoy (2006) above n45. The significance of the move by the Law Society was not lost on those who had been involved in the Finucane Campaign for several years. For example, Amnesty International described it as 'an historic step forward in the impartial defence of human rights in Northern Ireland.' *Irish News* 17th October 1999, 'Amnesty Shocked at Rights Failures.'

⁸⁴ Interview Belfast Solicitor 25th November 2002. One other criminal practitioner described the rationale for the creation of one such grouping (the Criminal Bar Association) thus 'Everyone in that association is a member of the Law Society but really I think you can take it that if the criminal lawyers had felt that their interests would be fully ventilated and protected by the Law Society there would never have been any need for it.' Interview Belfast Solicitor, 21st February 2003.

⁸⁵ McGrory was chairman of the Human Rights Committee of the Law Society and he challenged the refusal by the Law Society President and two senior office bearers to allow the committee that he chaired to consider a recently published report by a prominent NGO into the allegations of collusion in the Finucane killing. The proceedings were abandoned when a full Council meeting of the Law Society was called which upheld the refusal to allow the Human Rights Committee to discuss the relevant document. *Irish News*, 10th March 1999, 'Law Body Blocking Report on Finucane.'; *Irish Times* 10th March 1999, 'NI Law Society Officers Trying to Stop Study of Murder Report.'; *Irish News* 12th March 1999, 'Lawyers Slam Finucane Hush-Up'; *Irish News* 16th March 1999, 'Law Society to Ignore Finucane Report.'

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also be noted that, in common with human rights defenders in many parts of the world,⁸⁶ the internationalisation strategy which contributed to raising the domestic profile of Rosemary Nelson has its risks – it failed to protect Mrs Nelson from her assassins’ bomb. With those caveats in mind however, it must be recognised that it contributed significantly to shifting the institutional position of a very conservative legal organisation – an organisation which some who had been heavily involved in the Finucane case for years had long viewed as hardly worth the effort.⁸⁷ It facilitated the Law Society of Northern Ireland in becoming, albeit belatedly, a voice of the collective conscience of a legal community speaking out that the killing of two of its own members in circumstances which suggested state collusion warranted an independent public inquiry. In ending that shameful organisational silence, it also removed any final vestige of respectability to the suggestion that there was a view amongst Pat Finucane’s fellow professionals that perhaps there was ‘no smoke without fire’ regarding his killers’ allegations that he was a member of the IRA.

Drafting the Charter: Women’s Mobilisation and the Collective Legal Conscience in Canada

“The greatest achievement of the women’s constitutional struggle may not have been the rewriting of the law, but the process of strengthening mass collective action whereby the anger of women crystallized into law.”⁸⁸

Like South Africa, Canada’s constitutional law underwent dramatic transformation with introduction of a new constitution that moved from a system of parliamentary sovereignty to a constitutionalism that emphasized entrenched rights -- the Canadian Charter of Rights and Freedoms (the Charter) in 1982.⁸⁹ The language of the Charter was the subject of intense negotiations as legal scholars, practitioners and activists sought to carve out a new role for themselves within a transformed constitutional order. For those invested in seeking equal status and equal benefits for all Canadians, the Charter was an opportunity to systematically revise how law afforded protection and access to resources to previously disadvantaged groups. Thus feminist groups, childrens’ advocates, first nations organisations, language lobbyists, gay rights groups and a range of others were

⁸⁶ UN Commission on Human Rights, *Promotion And Protection Of Human Rights Human Rights Defenders: Report Of The Special Representative Of The Secretary-General, Hina Jilani* (2004).

⁸⁷ ‘Well you see my own view was that I didn’t really expect the Law Society as a body to do anything, ... so I wasn’t really concentrating that much on the Law Society to be honest with you. Other people were more concerned about that, in fact other solicitors that I knew were more incensed about the fact that this wasn’t happening than I was. I was sort of taking a view well look, we’ve got every other human rights and legal group in the world taking an interest in this and it didn’t matter for me too much that the Law Society as a body wasn’t supporting it...I was sort of shrugging my shoulders, sort of saying ‘well look you know that is the type of body it is.’ Interview Belfast solicitor, 21st February 2003.

⁸⁸ Judy Fudge, *The Effect of Entrenching a Bill of Rights Upon Political Discourse: Feminist Demands and Sexual Violence in Canada*, 17 INT’L J. OF THE SOC. OF L. 445, 448 (1989).

⁸⁹ See generally Robert Sharpe and Kent Roach *The Charter of Rights and Freedoms* (3rd ed) (2005) ; Donald Abelson, Patrick James, Michael Lusztig *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (2002) ; Philip Bryden and Stephen Davis (eds) *Protecting Rights and Freedoms: Essays on the Charter’s Place in Canada’s Political, Legal, and Intellectual Life* (1994).

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involved in a lively and spirited process to seek maximise rights protections for their and other constituencies.⁹⁰

What is of particular interest for this chapter is the ways in which feminist lawyers organised in seeking to influence the drafting of the equality provisions of the Charter. The first draft of the Charter included a vague right to equality and did not include a right to sex equality.⁹¹ Yet when the process of drafting the Charter concluded in April 1982, the Charter was one of the most progressive constitutions in the world.⁹² The women's movement, lawyers as well as activists, employed innovative, collective methods to lobby for equality rights.⁹³ In particular we were struck in the Canadian context about the ways in which feminist lawyers circumnavigated the male dominated realms of the legal elite professional organisations such as the Law Society and Bar and instead adopted a strategy of *mobilisation* beyond the legal community.⁹⁴ In the Canadian context, the critical juncture for the Canadian legal feminist movement was its decision to work outside of the litigation system and focus its energies on creating popular support for women's rights. Once successful, women activists would find it another struggle to sustain the hard-fought ground of the Charter within the litigation system they circumvented.⁹⁵

Despite Canada's generally positive national and international image (which is inevitably juxtaposed to their neighbours to the south for good and ill),⁹⁶ pre-charter Canadian legal culture was little different than most common law countries where laws restricted women's participation in public life, prohibited the ownership of private property, and excluded women from professional life well into the twentieth century.⁹⁷ For example, it was only in 1930 that the Privy Council, sitting in London, held that the term "person" which was a Canadian requirement for standing for election also included women.⁹⁸ After divorce, fathers traditionally had legal authority over their children and custody was allocated accordingly.⁹⁹ The first significant overhaul of Canadian rape law in the 20th Century did not occur until 1983 when a range of evidential requirements (e.g. the

⁹⁰ See e.g. Rhadda Jhappan (ed) *Womens' Legal Strategies in Canada* (2002); Katherine Covell and Brian Howe, *The Challenge of Children's Rights for Canada* (2001); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2002); Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (1994); Kathleen Lahey, *Are We Persons Yet : Law and Sexuality in Canada* (1999).

⁹¹ Dale Gibson *The Law of the Charter : Equality Rights* (2001) ; Ian Binnie "Equality Rights in Canada : Judicial Usurpation or Missed Opportunity?" In Grant Huscroft and Paul Rishworth (eds) *Litigating Rights* (2002).

⁹² See Robert Sharpe and Kent Roach op cit n89

⁹³ Penny Kome *The Taking of Twenty-Eight : Women Challenge the Constitution* (1983).

⁹⁴ Sheila McIntyre 'Feminist Movement in Law : Beyond Privileged and Privileging Theory.' In Radha Jamma (ed) (2002) op cit.

⁹⁵ Gwen Brodsky and Shelagh Day *Canadian Charter Equality Rights for Women : One Step Forward or Two Steps Back ?* (1989)..

⁹⁶ See eg. Seymour Lipset *Continental Divide: The Values and Institutions of the United States and Canada* (1990).

⁹⁷ Diana Marjury 'Women's (In)Equality Before and After the Charter' in Radha Jamma (ed) op cit ; Lyn Smith and Eleanor Wachtel, *A Feminist Guide to the Canadian Constitution* (1992) at pp. 45-46.

⁹⁸ *Edwards v. AG of Canada*, [1930] AC 124 ("The Persons Case").

⁹⁹ Diana Marjury op cit n97 at p. 105.

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corroboration rule, the admissibility of evidence of ‘general sexual reputation’ and the marital rape exception) were modified in order to make successful prosecutions more feasible.¹⁰⁰ As one feminist lawyer interviewed for this research suggested to the authors ‘I know Canada has this reputation as a liberal enclave where the rights of women and other traditionally discriminated against groups are well protected. Let me tell you, Canada was no different. Any progress that has been made on women’s rights here has been hard won through blood, sweat and tears.’¹⁰¹

Perhaps unsurprisingly, the legal profession historically reflected the subordinate position of women more generally in society. Change occurred early in the 20th century when individual women lobbied provincial legislatures to force Law Societies to admit women.¹⁰² Like in South Africa, Canadian Law Societies are self-regulating monopolies of legal practice. Lawyers were affiliated, but not bound, by the policies of national organizations like the Canadian Bar Association and province-based law societies. Legal professional organizations formed to protect their members’ interests from government interference in a familiar exchange. These self regulating organizations could justify the power conferred upon them by the state (a monopoly over the delivery of legal services) in exchange for regulating the competence and admission of legal practitioners.¹⁰³ Until the last fifty years, those members were exclusively men and it behoved an elite profession to limit the admission to it. In this regard, a key historical role of the Canadian law societies, as elsewhere, was to exclude those believed to be of lesser character or less suited to law (in this case, women).¹⁰⁴ When individual petitions to provincial legislatures proved successful and a few women gained access to the profession, law societies changed education requirements so that women would find it more difficult to qualify for practice.¹⁰⁵

Despite the repeal of laws that banned women from the practice of law outright, women continued to be excluded in practice from the legal profession well into the 1980s. For example, in 1971, only 5% of lawyers were women. By 1981 this had risen to a mere 15%.¹⁰⁶ With lesser numbers, and a powerful male-dominated organisational culture, women struggled to have issues of gender discrimination taken seriously by the legal profession. Before the Charter (and well into its life), law societies responded to sexism with unenforceable policy guidelines relating to how firms should change their conduct towards women.¹⁰⁷ This disadvantage suggests that women within the legal profession (and thus within legal professional organizations) already work within a climate where their authority and competence was undermined. Under such continued conditions,

¹⁰⁰ See Maria Ros ‘The Struggle to Redefine Rape in the 1980s’ in Julian Roberts and Renate Mohr (eds) *Confronting Sexual Assault* (1984).

¹⁰¹ Interview with Mary Ebert 21st of June, 2002.

¹⁰² Fiona Kay, and Joan Brockman, “Barriers to Gender Equality in the Canadian Legal Establishment,” in Ulrike Schultz and Gisela Shaw, (eds) *Women and the World’s Legal Professions* (2003) at pp. 52-53.

¹⁰³ Joan Brockman, *The Use of Self-Regulation to Curb Discrimination and Sexual Harassment in the Legal Profession*, (1997) 35 Osgood Hall Law Journal, 209, at p213.

¹⁰⁴ Joan Brockman (1997) *ibid* at p215.

¹⁰⁵ Fiona Kay & Joan Brockman (2003) *op cit* n102 at p53.

¹⁰⁶ *Ibid*.

¹⁰⁷ Joan Brockman *Gender in the Legal Profession : Fitting or Breaking the Mould* (2001)

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women as potential agents of change faced an up hill battle in convincing traditional institutions like law societies to challenge the status quo.¹⁰⁸ Without such questioning from 'plausible' sources from within, the legal profession in the pre-Charter era largely continued to ignore women's multiple realities and failed to award credibility to such 'outsider's' stories.¹⁰⁹

Finding limited gains from work within legal professional organizations or within the legal profession, groups of feminists including feminist lawyers focused considerable energies and activities *outside* the legal profession – into grassroots and charitable organizations.¹¹⁰ In collecting and commemorating the stories of everyday women, a burgeoning women's movement began a process of making women's experiences 'mainstream' and women lawyers became prominent in that broader movement.¹¹¹ This modern, and more national, women's movement took shape in 1978 when the Canadian Parliament considered delegating the regulation of divorce to Canadian provinces. The Canadian Supreme Court had recently upheld a divorce decree of the Alberta provincial court that stripped a wife of ownership of a ranch she and her husband had worked jointly. In *Murdoch*, the Alberta court held that the wife had no legal rights to the ranch upon divorce because her name was not on the deed.¹¹² In response to Parliament's divorce proposals, women collected petitions and held public meetings against divorce reform.¹¹³ The Parliament withdrew its proposals on divorce.

Activism around the divorce issue achieved two important results. First, it created a small network of advocates who learned the skills necessary for lobbying the federal government.¹¹⁴ Because this network was successful in drawing public attention to women's rights, the government created the Canadian Advisory Council on the Status of Women (CACSW). Second, this network of women believed that changing the existing and widely discredited Bill of Rights was the first step to better protecting equality rights

¹⁰⁸ Regina Graycar, 'The Gender of Judgments: Some Reflections on "Bias,"' (1998) 32 University of British Columbia Law REVIEW, 1, at p3. Graycar argues that the process of 'letting women in' the legal profession presupposes a position of marginalization. This is seen in the ways that 'gender' is defined – it is only used when we are talking about women: 'The word does not appear in an all male context, the gender of participants there being seemingly invisible.'

¹⁰⁹ Regina Graycar *ibid* at p19.

¹¹⁰ Lynn Smith and Eleanor Wachtel, 'A Feminist Guide to the Canadian Constitution' CACSW: ISBN 0662197852, August 1992 at p 45.

¹¹¹ Sherene Razack *Canadian Feminism and the Law: The Womens Legal Education and Action Fund and the Pursuit of Equality* (1991).

¹¹² *Murdoch v Murdoch* [1975] 1 S.C.R. 423.

¹¹³ Doris Anderson, popularly conceived as the leader of these efforts, was also the long-time editor of *Chatelaine*, a hugely popular women's magazine. Doris Anderson and the magazine would become essential in the first stages of women's organization with respect to the Charter. Starting in the late 1960s, Doris used the magazine to raise women's interest in gender equality.

¹¹⁴ Anne McLellan, 'Women and the Process of Constitution-Making' in *Conversations Among Friends: Proceeding on an Interdisciplinary Conference on Women and Constitutional Reform*, ed. Ed David Schniederman. Centre of Constitutional Studies, Alberta Law Foundation: 1991 at p. 10. Women, and particularly women lawyers, organized along provincial lines to change bar admission laws and other province-specific policies. The divorce campaign was an opportunity to organize on the national level.

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and thus better protecting women's rights.¹¹⁵ For example, in the *Bliss* case (1978), the Canadian Supreme Court held that an employment policy denying pregnant women equal compensation was not discriminatory because it treated all pregnant women the same and made no distinction between male and females. As was happening in the US around the Equal Rights Amendment, lawyers decided that amassing public support for strong equality rights in the Charter would help them secure stronger women's rights and women's rights consciousness which could ultimately undo decisions like *Bliss*.¹¹⁶

This move – reliance on popular pressure to change the law rather than litigating under the law – would characterise the movements Charter campaign. As Beth Symes, a prominent barrister in the movement, told the authors :

It was literally going across Canada and speaking to whoever would hear us. We spoke to farm women, we spoke in church basements, in trade unions - we spoke to an incredible array of women and what was astonishing is how well it was received. People had the most galvanizing stories about discrimination in their own lives.¹¹⁷

While the focus of these feminist lawyers was primarily beyond the legal arena, they nonetheless made use of the professional resources at their disposal. For example they made liberal use of the supplies and mail offices of their firms to inundate Members of Parliament with letters and telephone calls. As another lawyer recalled, "*The major law firms had no idea of their contribution to the women's movement.*"¹¹⁸ These lawyers made similar use of whatever political facilities they could get access to including the congressional administrative facilities of the few woman MPs. Beth Symes recalled:

The few female members of Parliament opened their doors to us and every evening women poured in to use parliamentary resources – we used the phones, mail, and copy machines. We spent so much time there that the guards mistook us for MP staffers. So when we arranged the conference on the draft Charter in 1981, we could hand out invitations personally to members in the halls – just walk up to them in the voting halls as if we worked for them!

While their publicity campaign gained momentum, some remained sceptical that a Charter would actually produce enforceable equality rights in the context of a traditionally conservative bar and judiciary. Some feminists and others were fearful of creating a Charter that could not be repealed and the potential power of the judges under such a Charter. The disagreement caused a major split in Charter activists, causing some to abandon a constitutional project altogether. The pro-Charter movement quickly solidified, however, following the government's unexpected cancellation of a national

¹¹⁵ As Sharpe and Roach op cit n89 note at p. 278 , "...the courts performance under the Bill of Rights was generally regarded as a disappointment."

¹¹⁶ Mary Eberts, 'Sex Based Discrimination and the Charter', in Anne Bayefsky and Mary Eberts (eds) *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985).

¹¹⁷ Interview with Beth Symes, 21st June, 2002.

¹¹⁸ Interview with Mary Ebert, 21st June, 2002.

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event on women and the constitutional drafting process. The pro-Charter wing of CACSW formed the *Ad Hoc Conference of Canadian Women*¹¹⁹ which took on the mantle of planning the conference and using it as a platform to lobby Parliament for stronger equality rights.¹²⁰ Following the conference, Mary Eberts and Beverly Baines drafted a 'revised' Charter to present to Parliament. Conference delegates demanded that the Charter not only recognize "equality under the law" but also "equality before the law" and "equal benefit of the law." The Ad Hoc Conference called for the Charter to include a clear statement of equality between men and women. This separate right to sex equality would emphasize the importance of ending sexism in post-Charter Canada.¹²¹ Parliament revised the equality provision to include rights to substantive equality. Section 15 (1) of the Charter now reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹²²

As a result of women's lobbying efforts, Parliament also included a specific guarantee for equality between men and women. The draft subsequent to the final version allowed the legislature to suspend this right if necessary. After another round of lobbying, the exception was removed. Section 28 of the Charter reads:

'Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.'

For many, Section 28 signified an acknowledgement that "the basis of all groups are men and women."¹²³ Beverly Baines has argued, in thinking about the effect of the Charter, that the gender equality provision had an effect in terms of "naming male privilege":

¹¹⁹ Diana Majury, 'Women's (In)Equality before and after the Charter' in *Women's Legal Strategies in Canada*, ed. Radha Jhappan. University of Toronto Press, Toronto: 2002.

¹²⁰ At the conference, a participant asked then Minister of Justice Jean Chrétien what type of equality rights he thought the Charter should include. Chretien famously answered "*Listen ladies, you will just have to trust me - we know what we're doing*". His response provoked predictable outrage. Mary Eberts Interview, 21st of June, 2002.

¹²¹ Radha Jhappan, 'Appendix VII: Summary of the Resolutions Passed at the Ad Hoc Conference on Women and the Constitution, February 14 and 15, 1981' in Radha Jhappan (ed) op cit. at pp. 634-44. The Conference also recommended a right to reproductive freedom, a right to equality of economic opportunity and a non-discrimination statement that banned discrimination on the grounds of marital status, sexual orientation, and political belief that did not ultimately appear in the next draft of the Charter.

¹²² As Sharpe and Roach op cit explains at p. 279 *'The insistence in the careful wording of section 15 that the guarantee includes equality before and under the law as well as equal protection and equal benefit of the law was meant to signal to the courts that section 15 was intended to be a much more powerful instrument of protection than its predecessor. In particular, the reference to equal protection echoed the Fourteenth Amendment to the US Constitution which had proved to be a powerful tool in the fight against racial discrimination. ...the explicit protection in section 15 (2) of programs designed to ameliorate the conditions of disadvantaged individuals is intended to ensure that legislatures will not be discouraged from taking affirmative measures to enhance equality.'*

¹²³ Anne McLellan *Women and the Process of Constitutional Reform. A Discussion Paper Prepared for the Alberta Advisory Council on Women's Issues*. Edmonton: May 1991 at p.14; Jhappan at 634.

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“Charter litigation provides a vehicle for women to name ‘objective’ reality for what it is, a world organized consistently with male practices and beliefs.”¹²⁴ So whereas cases have not been litigated *under* Section 28, its language may have strengthened Section 15 rights indirectly by underscoring the importance of gender equality. The passage of Section 28 was heralded as a symbol of success for the women’s movement because the constitutional recognition of gender equality meant success regarding one of the movement’s primary goals: making gender concerns an issue of national concern.

The equality provisions did not come into effect for three years after Parliament ratified the Charter in April 1982. Parliament designed the delay to allow the government to amend existing laws as to be compatible with the new equality rights. In response, women’s rights lawyers focused on three main activities: organizing a major conference on how the Charter would change existing law; writing a book about equality rights; and starting a new organization that would pursue Charter litigation and education – the Legal Education and Advocacy Fund (LEAF). When federal and provincial governments were slow to repeal discriminatory laws during the three-year period, LEAF filed lawsuits the first day that the equality provisions became active. In many ways, the creation of LEAF and its accompanying litigation strategy marked a new era for the women’s rights movement in Canada. A movement which had relied on popular consent to meet its objectives now turned to a litigation strategy.¹²⁵

While the mobilisation and lobbying which led up to the Charter and the passage of the Charter itself with its strong equality sections should rightly be regarded as a significant moment in Canadian political and legal history, it would be wrong to convey the impression that those involved in the struggle for equality in Canada were entirely victorious. While early litigation suggested promising results,¹²⁶ and LEAF’s pursuance of Section 15 litigation has been widely discussed and applauded,¹²⁷ the consequences for women of Section 15 litigation is less than clear and hotly contested within the Canadian legal community.¹²⁸ Judy Fudge and Beverly Baines have suggested that while the inclusion of equality rights in Canada’s Charter was heralded as a political victory, the actual results of Charter litigation have been mixed.¹²⁹ Litigation of Charter rights has yet to make meaningful gains in reducing the feminization of poverty.¹³⁰ Cases regarding

¹²⁴ Beverly Baines, *Using the Canadian Charter of Rights and Freedoms*, in Beverly Baines and Ruth Rubio-Marín (eds) (2005) *The Gender of Constitutional Jurisprudence*, 54.

¹²⁵ Christopher Manfredi (2004) op cit n42

¹²⁶ For example, see Andrews v. The Law Society of Upper Canada, [1989] 1 S.C.R. 143. This case concerned a male British lawyer who argued that restricting the practice of law to Canadian citizens violated his equality rights under the Charter on the basis of citizenship. LEAF intervened in the case and the Canadian Supreme Court ruled that the purpose of Section 15 is to benefit those who have been historically disadvantaged. This decision meant that Section 15 would be interpreted in the way that activists intended: not only should similarly situated people be treated alike, but also that the special needs of disadvantaged groups should be considered in the context of their unique position

¹²⁷ See Christopher Manfredi op cit at n42

¹²⁸ See Bruce Porter, *Twenty Years of Equality Rights: Reclaiming Expectations*, 23 Windsor Year book Access Justice 145 (2005); Rosanna Langer, *Five Years of Canadian Feminist Advocacy: Is It Still Possible To Make a Difference?*, 23 Windsor Year Book Access Justice 115 (2005); Majury, 2002: 110.

¹²⁹ Judy Fudge op cit at 445.

¹³⁰ Beverly Baines op cit at 72.

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income tax breaks and child care deductions – cases designed to put more money in women’s pockets -- have not been successful under equality provisions.¹³¹ In addition, equality rights have been brought in many cases on behalf of men and not necessarily to further women’s interests. Of 591 cases decided during first three years, less than ten percent were based on sex, thirty five of which were brought by or on behalf of men.¹³² Male defendants have sought to invoke equality and fair trial rights to strike down aspects of previous sexual assault legislation.¹³³ As a result, and perhaps inevitably, feminist organizations are spending time and resources in the courts defending legislation that it took many years to pass.

Similarly within the ranks of the legal profession itself, the profession that feminist lawyers by and large chose to circumnavigate in pursuing their mobilisation strategy, change comes slowly. Some feminist lawyers have made inroads into the upper echelons of these traditionally male dominated domains.¹³⁴ Law Societies such as Ontario have established an equity office with quite a wide remit to tackle discrimination in the professions.¹³⁵ That said, women still face formidable obstacles. In 1993 Justice Bertha Wilson produced a report for the Canadian Bar Association that listed what she referred to as a ‘somewhat numbing’ list of barriers to women in the legal profession.¹³⁶ Similarly Joan Brockman’s study of female lawyers in British Columbia found that women in the legal profession continue to face gender bias and gendered obstacles to the practice of law.¹³⁷ Women continue to be the primary caregivers of children, interrupting the pursuit of a partnership or disabling women from accruing seniority on the job because of time taken for child care.¹³⁸ Of the women Brockman interviewed, 36% reported being the targets of sexual harassment.¹³⁹ The more formal attempts of law societies to respond to gender concerns appear empty without resources or support of law firms: As Brockman

¹³¹ Ibid.

¹³² Ibid. at 52.

¹³³ Ibid at 451.

¹³⁴ For example, Moore notes that ‘...while in 1987 women were about one fifth of practising lawyers, only 3 women were amongst the 40 ‘benchers’ who made policy for the Law Society of Upper Canada. By 1995 first time candidate Mary Eberts topped the poll and women became a third of elected benchers, actually ahead of their proportion in the profession...the core of this new caucus was female, but more than gender divided it from the old guard. “I was elected, I suspect, by lawyers who feel excluded from the Law Society and who serve clients who feel excluded from power” said one of them, family law practitioner Carole Curtis.’ Christopher Moore *The Law Society of Upper Canada and Ontario’s Lawyers : 1797-1997* (1997) at p. 319-320.

¹³⁵ The mandates of these programs are variously conceived but are primarily concerned with issues such as the diversity of the profession, employment equity initiatives within law firms, the development and implementation of workplace policies on discrimination and harassment, advice and support on the appropriate workplace accommodation for lawyers with special needs, offering training programs on equity and diversity, delivering public education, providing mentoring programs and, in some cases, community outreach and the like. See Rosemary Cairns Way, *Reconceptualizing Professional Responsibility: Incorporating Equality*, (2002) 25 Dalhousie Law Journal 27.

¹³⁶ These included sexual harassment, salary differentials, difficulties in obtaining articles, problems with work allocation, problems with promotion including partnerships, segregation into certain areas of practice and an unwillingness to accommodate female parents with family responsibilities. See Bertha Wilson *Touchstones for Change : Equality, Diversity and Accountability* (2003).

¹³⁷ Joan Brockman (2001) op cit n 107.

¹³⁸ Ibid. at 213.

¹³⁹ Ibid at 114-15.

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concludes, '...despite ongoing attempts to educate firms about human rights and diversity, it continues to be as nightmarish an experience for students from equality-seeking communities as it was twenty years ago.'¹⁴⁰

An awareness of the ongoing struggles to achieve real equality should not however detract from the achievements of those women who took the decision to go around their professional bodies and to mobilise thus circumnavigating the male-dominated structures which were unresponsive to the ways in which law excluded them. Their activism on a popular level was incredibly important in changing institutional language regarding and cultural receptiveness to sex equality. It made gender and other forms of equality in Canada become an intrinsic and impossible to ignore element of what Jeremy Webber has described as 'the Canadian Conversation.'¹⁴¹ Inevitably that movement now seeks to gain ground in infusing a language of rights with the resources and substance that make it more applicable to women's lives. After mobilisation, they have become increasingly involved in the drawn out business of legislation, litigation and ultimately trying to transform their own professional bodies from within. It is at this juncture that the strategy of Canadian feminists meets the problems of legal reform that this chapter has traced, namely, how the rule of law may actually become responsive to the experiences of marginalized groups. And perhaps more importantly, how a movement should deal with the vestiges of a legal system it worked so hard to change.

Acknowledging the Past and the Collective Legal Conscience in South Africa

The particular configurations of South African legal culture and the relationship between that culture and the development of the Apartheid regime has been well documented.¹⁴² As the South African Truth and Reconciliation Commission verified in impressive detail, quite apart from the invidious and well recorded outcomes of racial discrimination, detainees or suspected enemies of the state were regularly tortured or killed by the security forces, and state sponsored assassinations and murders occurred throughout the Apartheid years and particularly as the regime began to unravel.¹⁴³ The Commission did not only focus on those perpetrators and victims at the sharp end of the Apartheid regime. It also included an examination of the work of a range of institutions including business, labour, various government departments and, most interesting for current purposes, the judiciary and the legal profession.¹⁴⁴ Before we examine the background to a particular critical juncture (the disbarment of Bram Fischer) and the accounts given by the legal

¹⁴⁰ Ibid at 41.

¹⁴¹ Jeremy Webber (1994) op cit at p.310.

¹⁴² See, e.g. Hugh Corder, *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910-1950* (1998) and (ed.) *Essays in Law and Social Practice* (1988); Christopher Forsyth, *In Danger For Their Talents: A Study Of The Appellate Division Of The Supreme Court Of South Africa From 1950-80* (1985); David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); Karl Klare, 'Legal Culture and Transformative Constitutionalism.' (1998) 4 *South African Journal on Human Rights* 146; Richard Abel *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994* (1994). For an excellent discussion on pre-Apartheid legal culture see Martin Chanock, *The Making of South African Legal Culture 1902-1936 : Fear Favour and Prejudice* (2001).

¹⁴³ Truth and Reconciliation Commission South Africa, *Report Vols 1-5* (1998).

¹⁴⁴ See Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (2000).

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profession to the TRC in relation to it, it might be useful to offer some background to the particularities of South African legal culture.

The Apartheid system was not only unjust, it was also highly legalistic.¹⁴⁵ The chosen methods to achieve a societal hierarchy and the physical control of the living and working spaces of South African citizens based on racial categorisation were primarily legal and bureaucratic.¹⁴⁶ As Joseph Lelyveld has argued, South Africa's white rulers were '*...unusually conscientious about securing statutory authority for their abuses.*'¹⁴⁷ Until the Apartheid regime began to disintegrate, its oppressive power was characteristically imposed '*...not by the random terror of the death squad but by the routine and systematic processes of courts and bureaucrats.*'¹⁴⁸ As Stephen Ellman demonstrates meticulously with regard to the emergency law regime in South Africa, the manifest injustice of Apartheid did not necessarily imply lawlessness.¹⁴⁹ Rather, the architects and supporters of white supremacist South Africa had a number of practical and ideological reasons for their apparent adherence to law.

Firstly, law obviously had instrumental utility, both as a necessary systemic framework for the organisation of capital and as a mechanism of repression. With regard to the latter, such broad discretion was conferred on those involved in the sharp end of enforcing the regime that it verged on 'the legalisation of illegality'.¹⁵⁰ Secondly, the legitimating capacity of law spoke both to international audiences and to the self image of many supporters of the regime that South Africa was a country distinguished from much of the rest of Africa by its much vaunted commitment to the rule of law – it set South Africa apart as somewhere more worthy of being seen as part of the 'Western Anglo-Saxon club'.¹⁵¹ From the early part of the century, legalism was also, as Martin Chanock points out, utilised as a legitimating discourse *internally* amongst the white elites who ran the country to distinguish them from those that they ruled.¹⁵² Thirdly, as Ellman contends, different variants of adherence to legality were part of the historical powers struggles between white South Africans (English speaking and Afrikaners) wherein chauvinistic

¹⁴⁵ Interview with Chief Justice Arthur Chastelson, 16th August 2002.

¹⁴⁶ William Dean, 'The Legal Regime Governing Urban Africans in South Africa: An Administrative Law Perspective' (1984) 105 *Acta Juridica*, 106; Johannes Theodore Schoombe, 'Group Areas Legislation: The Political Control of Ownership and Occupation of Land' (1985) *Acta Juridica*, 77.

¹⁴⁷ Joseph Lelyveld, *Move Your Shadow: South Africa, Black and White* (1985) p 81.

¹⁴⁸ Martin Chanock, 'Writing South African Legal History: A Prospectus' (1998) 30 *Journal of African History*, 265.

¹⁴⁹ Stephen Ellman, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992).

¹⁵⁰ Stephen Ellman *ibid* p. 175. See also Mike Brogden and Clifford Shearing, *Policing for a New South Africa* (1997).

¹⁵¹ As one Nationalist MP opined in a parliamentary debate in 1985 : '*...the South African administration of justice and the judiciary stand out as symbols of hope and confidence. Even South Africa's severest critics readily concede that the standard of the administration of justice in South Africa is of the highest order. Mr Andrew Young [former US Ambassador to the UN] spontaneously and readily concurred that the South African administration of justice complied with the highest standards*' quoted in Abel 1995 at p. 13

¹⁵² '*...the judgements of the courts were a crucial part of the discourses which divided self and other; ruler and ruled; white and black.*' Martin Chanock, 2001 at p.31.

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reverence for their respective English common law and Dutch-Roman traditions meant that some *actual* adherence to law as a limitation on oppression was inevitable.¹⁵³

The effect of the particular variant of legalism in the South African context was that the application of the states considerable repressive powers was inevitably a honeycombed affair. As Abel argues, ‘...*the courts oscillated between being compliant, even enthusiastic instruments of white domination and erecting obstacles, if only temporary, to the apartheid project.*’¹⁵⁴ Similar to other contexts of social and political conflict, those opposed to the regime were highly conscious of the both the material and the symbolic potential of the law and the courtroom as an instrument and site of resistance.¹⁵⁵ Nelson Mandela, Oliver Tambo, Joe Slovo, and many other leaders of the resistance movement were themselves lawyers who, while understandably cynical, nonetheless took law seriously.¹⁵⁶ Political prisoners, land rights activists, trade unionists, anti-censorship activists and other involved in the broad liberation movement were all involved in sustained recourse to the courts in seeking to undermine the Apartheid legal apparatus.¹⁵⁷ Unlike for example in the Irish Republican tradition,¹⁵⁸ there were comparatively few of even the most militant activists who refused to either mount a defence at trial or to recognise the courts.¹⁵⁹ Of course in order for the resistant capacity of law to be properly exploited, there had to be lawyers willing to take on such cases.

Some of the most prominent jurists and lawyers in post Apartheid South Africa made their reputations by their willingness to take on cases which challenged the status quo. Lawyers such as Arthur Chaskalson, Leonard Hoffman, Van Zyl Steyn, George Bizos and others have become iconic figures to a new generation of South Africans. Although the prestige and status of the Bar in particular could arguably have largely insulated them

¹⁵³ Stephen Ellman (1992) above n151 , at p.187.

¹⁵⁴ Richard Abel (1995) above n 41 at p.14.

¹⁵⁵ See e.g. Isaac Balbus, *The Dialectics Of Legal Repression: Black Rebels Before The American Criminal Courts* (1973); Kieran McEvoy ‘Law, Struggle and Political Transformation in Northern Ireland’ (2000) 27, *Journal of Law and Society*, 542.

¹⁵⁶ ‘*The court system, however, was perhaps the only place in South Africa where an African could possibly receive a fair hearing and where the rule of law might still apply. This was particularly true in courts presided over by enlightened judges who had been appointed by the United Party [the previous government to the Nationalist party, the architects of Apartheid]. Many of these men stood by the rule of law. As a student I had been taught that South Africa was a place where the rule of law was paramount and applied to all persons, regardless of their social status or official position. I sincerely believed this and planned my life based on that assumption. But my career as a lawyer and activist removed the scales from my eyes. I saw that there was a wide difference between what I had been taught in the lecture room and what I learned in the court...I never expected justice in the court, however much I fought for it, and though I sometimes received it.*’ Nelson Mandela *The Long Walk to Freedom*, (1995) at p. 308-309.

¹⁵⁷ See generally David Friedrichs (ed.), *Law and the South African Legitimacy Crisis* (special issue) (1992), 16 *Law and Social Inquiry*; Abel (1995), above n 41; Fran Buntman, *Robben Island and Prisoner Resistance to Apartheid* (2003); Jurgen Schadeberg, *Voices from Robben Island* (1994).

¹⁵⁸ Kieran McEvoy (2000), above n. 157.

¹⁵⁹ Stephen Ellman, (1992) at p.181 Ellman notes a prominent exception in the trial of *S v Masina and others* where a group of *Umkhonto we Sezwe* activists (the military wing of the African National Congress) refused to recognise the right of ‘civilian courts’ to try them. They were ultimately represented by counsel in any case.

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from criticism and promoted a greater daring amongst its members,¹⁶⁰ as David Dyzenhaus points out, during the 1960s and 1970s it was well known that there were very few human rights lawyers (then known as ‘political lawyers’) prepared to take on the defence of those whom most white South Africans regarded as subversive.¹⁶¹ While that situation improved in the 1980s due to increased opportunities for funding and the development of a range of radical legal organisations, as is discussed below, the larger and more established collective voices of the legal profession are worthy of criticism for their stance during the struggle against Apartheid. Indeed to paraphrase Dyzenhaus, the visibility and vocality of those comparatively few outstanding lawyers who *did* take a stand (both inside and outside the court) has arguably allowed the silence of the many in the legal profession and their representative organisations (who said or did little) to escape without appropriate censure while continuing to pride themselves on their integrity and independence in maintaining the rule of law.¹⁶²

As in the case of Northern Ireland, the South African context provides a rich array of critical junctures through which one might explore the role of such legal collectives. For illustrative purposes however we have chosen to focus on one in particular – the decision by respected lawyer Bram Fischer to go underground rather than face trial and the response of the Johannesburg Bar to that decision.

Bram Fischer was a distinguished senior counsel of the Johannesburg Bar. Fischer was from an elite Afrikaner family, his father was Judge President of the Orange Free State and his grandfather had been a former prime minister of the Orange River Colony and a South African cabinet minister. In the 1950’s and the 1960’s Fischer, a lawyer specialising in mineral claims, became a prominent member of the South African Communist Party and a leading advocate against apartheid.¹⁶³ In 1956 he served as Counsel in the long running treason trial in which Nelson Mandela and several other ANC leaders were ultimately acquitted. In 1964 he took on the position of lead counsel for the defence for Nelson Mandela and his co-accused in their Rivonia trial in which they were sentenced to life imprisonment. Despite the urgings of his comrades on trial, he had initially been reluctant to take on the case because, as he and some of the accused were aware, some of the evidence uncovered at Rivonia actually implicated him

¹⁶⁰ Stephen Ellman (1992) *ibid*

¹⁶¹ David Dyzenhaus, *Judging the Judges: Judging Ourselves* (1998) at p. 105.

¹⁶² David Dyzenhaus, *ibid.* p.106-109.

¹⁶³ In the first Bram Fischer Memorial Lecture President Nelson Mandela described him thus. ‘*Even his political opponents would agree with us his comrades that Bram Fischer could have become prime minister or the chief justice of South Africa if he had chosen to follow the narrow path of Afrikaner nationalism. He chose instead the long and hard road to freedom not only for himself but for all of us. He chose the road that had to pass through the jail.*’ He concluded that memorial lecture by saying ‘*In any history written of our country two Afrikaner names will always be remembered. Happily, one is still with us, dear comrade Beyers Naude. The other is Bram Fischer. The people of South Africa will never forget him. He was among the first bright beacons that attracted millions of our young people to fervently believe in a non-racial democracy in our country.*’ Market Theatre Johannesburg, 9th June 1995. Fischer was also a model for the Dr Burger character in Nadine Gordimer’s novel *Burger’s Daughter* (1979).

<http://www.anc.org.za/ancdocs/history/mandela/1995/sp0609.html>

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personally.¹⁶⁴ In 1964, he was arrested under the Suppression of Communism Act 1950. Such was his standing at the Bar (Fischer was a member of the Johannesburg Bar Council for much of his legal career), that after he was initially arrested he was permitted to leave South Africa on bail to argue a mining case in England before the Privy Council. However, when he returned to South Africa, after much agonising, he went underground to work with the South African Communist Party, refused to stand trial, and the Johannesburg Bar, despite its reputation as being the most liberal Bar in South Africa,¹⁶⁵ struck Fisher from its rolls on the basis of 'dishonest conduct'.¹⁶⁶ The judge who presided over the trial to strike him from the Bar roll was the same judge who had presided in the Riviona trial. Fischer penned a letter in which he explained his decision to refuse to stand trial:

When an advocate does what I have done, his conduct is not determined by any disrespect for the law nor because he hopes to benefit personally by any offence he may commit. On the contrary, it requires an act of will to overcome his deeply rooted respect of legality, and he takes the step only when he feels that whatever the consequences to himself, his political conscience no longer permits him to do otherwise. He does it not because of a desire to be immoral, but because to act otherwise would, for him, be immoral.¹⁶⁷

Fischer was caught less than a year after absconding, tried and convicted for a range of charges including sabotage, and sentenced to life imprisonment. At his trial he again articulated his rationale for his decision to abandon his commitment to respect for the rule of law.

'My Lord when a man is on trial for his political beliefs and actions, two courses are open to him. He can either confess to his transgressions and plead for mercy, or he can justify his beliefs and explain why he has acted as he did. Were I to ask for forgiveness today, I would betray my cause. That course, my Lord, is not open to me. I believe that what I did was right, and I must therefore explain to your Lordship what my motives were; why I hold the beliefs that I do, and why I was compelled to act in accordance with them ...I accept, my Lord, the general rule that for the protection of a

¹⁶⁴ Stephen Ellman, 'To Live Outside the Law You Must be Honest: Bram Fischer and the Meaning of Integrity.' (2001) 26, *North Carolina Journal of International Law and Commercial Regulation*, 798.

¹⁶⁵ Stephen Clingman, *Bram Fischer: Afrikaner Revolutionary* (1988). That liberalism has been attributed in part to the high numbers of lawyers of Jewish origin in the Johannesburg Bar, a fact that had been a source of some disquiet amongst the more conservative judiciary under Apartheid. Reinhard Zimmermann, 'The Contribution of Jewish Lawyers to the Administration of Justice in South Africa' (1995) 29 *Israel Law Review*, 250.

¹⁶⁶ *Society of Advocates v Fischer* 1966 (1) SA 133. The ratio of the decision of De Wet, JP with Hill and Boshoff JJ concurring was that Fischer had breached his solemn assurance that he would stand trial and that such a breach was dishonest conduct, sufficient to warrant his removal from the Roll of Advocates, see Stephen Clingman *ibid*. In 1952 the Transvaal Branch of the Association of Law Societies had failed in a similar attempt to have Nelson Mandela struck from the Roll of Attorneys because of his role in the Defiance Campaign, a non-violent protest in defiance of racist law. In that instance Judge Ramsbotham rejected the application on the grounds that nothing Mandela had done reflected on his fitness to remain in the profession, *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (TPD).

¹⁶⁷ *Society of Advocates v Fischer* 1966 (1) SA 133 at p.135.

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society laws should be obeyed. But when the laws themselves become immoral, and require the citizen to take part in an organised system of oppression - if only by his silence and apathy - then I believe that a higher duty arises. This compels one to refuse to recognise such laws.'¹⁶⁸

Fischer died nine years later in prison from cancer, a condition exacerbated by gross misjudgement by his prison doctor. As has been well analysed elsewhere,¹⁶⁹ his decision to take his struggle in opposition to the Apartheid regime outside the courtroom illustrates perfectly the legal and moral dilemmas of lawyers operating in unjust legal systems. What is of equal interest for our discussion purposes however is the way in which the collective conscience of the legal community was expressed, both at the time and subsequently.

Briefly by way of background, as in Northern Ireland, the structure of the South African legal profession did not necessarily lend itself to organised collective dissent against state abuses. As in the British system, the profession was and is divided, in this instance between advocates (the 'Bar') who alone are empowered to argue cases in the superior courts and attorneys who appear in the lower courts but who generally do out of court work and instruct advocates.¹⁷⁰ Attorneys were organised into provincial law societies which formed the Association of Law Societies (ALS). Advocates were organised by city and belonged to the General Council of the Bar (GCB). The General Council of the Bar required consensus at the federal level for any public comment which inevitably meant a position of the lowest common denominator being adopted, with the Pretoria Bar in particular (the most conservative), continuously being able to block critical commentary.¹⁷¹ The Bar generally adopted a position of only concerning itself with technical issues relating to the administration of justice, and that it 'should not engage itself in "political" issues or matters of policy'.¹⁷² The Association of Law Societies too

¹⁶⁸ Stephen Clingman, above n. 165 at 409-10.

¹⁶⁹ See e.g. Stephen Ellman (2001), above n 164, Chief Justice Ismail Mahomed, *The Bram Fischer Memorial Lecture* (1998) 14, South African Journal of Human Rights, 209.

¹⁷⁰ Francis du Bois, 'Introduction, History, System and Sources' in C.G. Van der Merwe and Jacques Du Plessis (eds.), *Introduction to the Law of South Africa* (2004).

¹⁷¹ The Pretoria Bar only began to admit non-whites to the Bar in 1980. In the general GCB submission to the Truth and Reconciliation Commission, the Pretoria Bar made a specific apology for their previous behaviour. "*The Pretoria bar as an institution failed in its duty to fulfil the legal profession's role of custodian of individual rights and the rule of law. Its refusal to join the other bars in protest also prevented the GCB from speaking on behalf of the entire profession with one voice. We apologise to our colleagues, the judiciary, the attorney's profession, the public at large and in particular the victims of unjust laws for these failures.*" GCB Submission to the Truth and Reconciliation Commission, 1997 vol. 2 p 210.

¹⁷² *South African Press Association*, 'Bar Council Provides TRC with Three Volume Submission.' 21st October 1997. As one prominent advocate told the authors, 'So one did what one could but we could have done more, but on the other hand the Bar is not a political organ or instrument, it is a pretty blunt instrument from that point of view and in fact could lose its independence or credibility if it becomes too involved in one or other side of the divide.' Advocate Milton Seglison (former chair of the General Bar Council), 5th August 2002.

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claimed in its submission to the Truth and Reconciliation Commission that '*politics was not the business of the organised profession.*'¹⁷³

As noted above, the relatively enlightened Johannesburg Bar began the process of striking Fischer from its roll a mere two days after Fischer failed to appear for trial, a move which Fischer found deeply personally hurtful.¹⁷⁴ Fischer's decision not to appear for his original trial was framed in legal terms. As he indicated by letter to the Court which disbarred him, he found himself unable to partake in a legal process wherein confessions would be extracted after a 90 day detention and this evidence would then form the basis by which a Minister could impose an indeterminate sentence. The General Council of the Bar argued in their submission to the Truth and Reconciliation Commission, that the Johannesburg bar was faced with the invidious position that a senior practitioner had deceived the court by not appearing for his trial and therefore this justified his striking off – something they now recognised as 'a grave injustice'.¹⁷⁵ As Dyzenhaus argues however, what actually happened is that in exercising 'indecent haste' the Bar took the initiative from the government in discrediting Fischer, thus assisting in obfuscating his intended message to his fellow white South Africans. The GCB continued to insist in their evidence to the Truth and Reconciliation Commission that there was no political motivation behind the striking off, despite contemporaneous minutes of the period which showed direction communication between the Bar and the Minister suggesting how best to frame the affidavit to play down the politics of the application.¹⁷⁶ Of course, by acting as a proxy for the government (where they were in fact an applicant rather than implementing 'the law of the land'), narrowing the issue of Fischer's actions to one of personal integrity and abstracting his protest from the politics of South Africa, the actions of the Bar were *political* in the extreme.¹⁷⁷ Their continued denial of this some thirty years later is instructive. The Truth and Reconciliation Commission found that this continued failure of full acknowledgement to have been '*dishonest and to have besmirched the reputation of the bar even further.*'¹⁷⁸

As noted previously, Fischer's reputation has been restored posthumously by the new government in a number of ways including a very prominent series of lectures. In 2003 that restoration was formalised within the legal community when the Legal Resources Centre brought the first application of *The Reinstatement of Certain Deceased Legal Practitioners Act* on behalf of the daughters of Bram Fischer. This Act provides for the reinstatement on the roll of attorneys or advocates, of lawyers who were struck off the

¹⁷³ Association of Law Societies Submission to the Truth and Reconciliation Commission (1997), cited in Heide Rombouts, *The Legal Profession and the TRC: A Study of a Tense Relationship* (2002) at p. 22, available at <http://www.csvr.org.za/papers/papromb.htm>

¹⁷⁴ Stephen Clingman, above n 165.

¹⁷⁵ GCB, *Submission to the Truth and Reconciliation Commission* (1997), 2 pp. 193-197, cited in David Dyzenhaus above n.161 at p. 98.

¹⁷⁶ GCB Minutes for 2nd November 1965, GCB Submission to the Truth and Reconciliation Commission.

¹⁷⁷ See David Dyzenhaus, above n. 161, p 101.

¹⁷⁸ Cited in Heide Rombouts, above n.173 at p. 26.

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roll because of their opposition to apartheid. A full bench of the High Court, headed by the Judge President, granted the application.¹⁷⁹

In many ways, Fischer was a precursor to broader mobilization of the legal profession and to groups of lawyers who were dismissive of the notion that the legal profession could possibly exist as a site of political neutrality in such a context.¹⁸⁰ Other lawyers drew direct inspiration from the stance that this white Afrikaner lawyer had adopted in the 1960s.¹⁸¹ In the 1970s and 1980s new groups of progressive lawyers emerged such as the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (NADEL).¹⁸² Both saw themselves as counteracting the GBC and ALS which continued to refuse to take a stand on apartheid.¹⁸³ Such groups emerged in part precisely because of the failings of the established legal collectives. As one prominent human rights lawyer told the author ‘...of course part of the campaign of the BLA was to isolate the apartheid tradition nationally, it was also to isolate the South African Law Society and the Bar councils because of what we regarded them as, essentially as apologists for the apartheid regime.’¹⁸⁴ Indeed in some ways they succeeded in that process, in particular in the wake of the transition.¹⁸⁵ However many of the lawyers involved in these groups remain deeply cynical that the evidence given to the Truth and Reconciliation Commission by the General Bar Council and the Association of Law Societies was little other than ‘a naked attempt to rewrite history, to find the minutes of this meeting or that encounter with a minister to show that they were doing their bit, working away behind the scenes, making quiet representations. The reality is however, once the minister reassured them that there were genuine security reasons why this lawyer was being detained, or that defendants rights were being abused, they were all too happy to take such reassurances at face value to let the apartheid legal order continue unaffected with their feeble protests duly noted.’¹⁸⁶

In reviewing the submissions of the GBC and the Association of Law Societies as well as the secondary accounts of the oral evidence given, undoubtedly there is good reason for a degree of cynicism. Similar to many who appeared before the TRC,¹⁸⁷ both organisations attempted to put the best face possible on their organisational histories. However the

¹⁷⁹ Legal Resource Centre, *Posthumous Readmission of Fischer to Roll of Advocates* (2003), available at http://www.lrc.org.za/Features/Bram_Post_Readmission.asp, accessed 26 July 2006.

¹⁸⁰ Antje Krog, *Country Called My Skull* (1998) at p. 305.

¹⁸¹ Interview human rights lawyer, 3rd March 2006.

¹⁸² Blake:1997 see n. 183 at p 1)

¹⁸³ The BLA was established in the 1970s to resist the prosecution of black lawyers who were practising in the Central Business Districts of ‘white towns’ in contravention of the Group Areas Act. See Black Lawyers Association website <http://www.bla.org.za/>. See also Michael Blake ‘Rights Now’, Newsletters of Nadel’s Human Rights Research and Advocacy Project, September 1997 (Issue 1).

¹⁸⁴ Interview Vincent Saldana, 6th August 2002.

¹⁸⁵ For example membership in NADEL or BLA is now considered a qualification for the bench by the Judicial Service Commission who may ask nominees what they did during the Apartheid era concerning issues such as the detention or maltreatment of fellow lawyers. Interview Judge Dennis Davis, 7th August 2002.

¹⁸⁶ Interview with South African human rights activist, former member of NADEL.

¹⁸⁷ See e.g. Richard Wilson, *The Politics of Truth and Reconciliation in South Africa* (2001).

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importance of the process of acknowledgement entailed in the South African TRC should not be underestimated.

Firstly, the South African TRC was the first such body to attempt to include the conduct of the judiciary and the legal profession as significant institutional elements of the previous regime which should be called upon to account for their previous actions or inactions. Although as Dyzenhaus demonstrates, this largely failed with regard to the judiciary, the fact that the organisations of the legal profession gave evidence at all was significant. That example has been approvingly taken up in other jurisdictions currently considering whether or not to instigate a process of formal truth recovery.¹⁸⁸

Secondly, as evidenced by the case of Bram Fischer in particular, a formal process of acknowledgement of 'a grave injustice' perpetrated against a lawyer who took a stand against injustice was an important moment not only for Fischer's family in terms of the broader process of his professional reinstatement but also for the South African legal profession as a whole. One of the lowest common denominators of organisations of lawyers such as Bar Councils or Law Societies is their capacity to act like trade unions or to represent the interests of their members – in effect to 'look after their own'. In South Africa, as noted above, often the GBC and the ALS were timid in the extreme in standing up for lawyers who were detained, harassed or worse and in the Fischer case the GBC actually led the charge in going after a lawyer who had threatened the regime. An acknowledgement, (no matter how begrudging or minimalist) of having failed even this most 'thin' notion of the professional responsibility of any professional organisation of lawyers was nonetheless highly significant.

Thirdly and closely related is the fact that both the submissions of the GBS and ALS to the TRC contained an express acknowledgement that both had failed in their broader responsibility as organisations to, as the Pretoria Bar put it, fulfil the legal profession's role as 'custodians of individual rights and the rule of law.' True, the power of that submission was then somewhat undermined by the reiteration of the old adage that it was not the role of such lawyers' organisation to 'meddle in politics'. That said, the explicit acknowledgement of legal professionals as having such a broader responsibility is surely of wider significance in the longer term. Many of those we interviewed in South Africa argued that the mainstreaming of human rights discourses has been key to the attempts to transform the legal culture there. As Martha Minow and Richard Wilson have argued,¹⁸⁹ different variants of human rights discourses were also at the centre of the deliberations of the TRC. Based on the South African experience, there is a powerful argument to be made that the process of reconstructing fractured communal relations in post conflict societies which is based upon respecting the rights of the *other* must also entail some formal process of coming to terms with the past.¹⁹⁰ If lawyers are to fulfil their potential as the custodians of such rights, then they too must be the subject of an honest appraisal of their past misdeeds.

¹⁸⁸ See e.g. Healing Through Remembering, *Making Peace with the Past: Truth Recovery in Northern Ireland* (2006).

¹⁸⁹ Martha Minow, *Between Forgiveness and Vengeance: Facing History* (2000).

¹⁹⁰ See e.g. Priscilla Hayner, *Unspeakable Truths: Facing The Challenge Of Truth Commissions* (2001).

IV. Conclusion

As was noted at outset of this chapter, there is considerable cynicism amongst human rights and other progressive lawyers about the capacity of the legal profession to challenge the power of the state.¹⁹¹ In Northern Ireland, Canada and South Africa lawyers deployed a range of strategies designed to challenge, ignore, circumnavigate and ultimately shift the position of the professional organisations. They drew upon international resources and support to embarrass such bodies, they worked internal committee systems, they litigated, they mobilised in the communities, they established alternative organisations and, in the South African context, they lobbied for the professions to formally acknowledge their misdeeds of the past. In each jurisdiction, individual lawyers have stood out. Pat Finucane, Rosemary Nelson, Mary Ebert, Beth Symes and Bram Fischer came to embody direct challenges to the profession's complacency and occasional complicity in injustice. Such efforts to shift professional organisations were not an ends in themselves, rather they were part of larger political and social struggles. In Northern Ireland, the Finucane and Nelson cases speak directly to the issue of collusion and the culpability of the British state in murder. In Canada the struggle was to take advantage of a golden moment in legal and political history to maximise the chance for gender equality. In South Africa the Fischer case and the acknowledgement of the wrong that occurred was symbolic of the broader evils of Apartheid. In each instance, the position of the organisations of the legal profession themselves was but one battleground in a much bigger war.

Given the bigger issues at stake in each jurisdiction, one might well ask whether the positions adopted by the voices of the legal profession mattered so much in the grand scheme of things. The simple answer is that not only does law matter, but so do lawyers and so does what they say. They bring what Bordieu referred to as 'symbolic capital' to any debate – 'authority, knowledge, prestige, and reputation'¹⁹² – attributes which speak to the constitutive power of law (and lawyers) to shape difficult social and political debates. By way of example, as discussed elsewhere in this volume, the context of the War on Terror throws such matters into sharp relief. In the US, prominent lawyer and Harvard professor Alan Dershowitz has provoked considerable controversy by his suggestion that judges and lawyers should 'dirty their hands' by becoming involved in a system for the regulation of warrants for torturing terror suspects in certain specified instances.¹⁹³ On the other hand, the American Bar Association has won considerable plaudits from the human rights community for their firm stance in defence of human rights principles including their support for the McCain Amendment prohibiting torture, domestic surveillance, the treatment and classification of enemy combatants, the conduct

¹⁹¹ For a useful discussion of the definitional complexities associated with the notion of progressive law and progressive lawyering see generally David Kairys (ed.), *The Politics of Law: A Progressive Critique* (1998).

¹⁹² Pierre Bordieu *Outline of a Theory of Practice* (1977).

¹⁹³ See Alan Dershowitz, *Why Terrorism Works* (2002). For a range of responses to Dershowitz's suggestions see Sanford Levinson (ed.), *Torture: A Collection* (2004).

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of military tribunals and other issues.¹⁹⁴ Such organisations purport to speak ‘on behalf of the profession’. As such, both in the current context of the War on Terror and in each of the jurisdictions we examined, the support, opposition or sometimes acquiescence of the key voices of the legal profession is and was a highly prized asset for protagonists from all sides.

The tensions which manifest themselves between lawyers such as those discussed in this chapter and their professional associations have been well developed elsewhere. In particular the *cause lawyering* literature is particularly insightful. This important field of scholarship, most famously mapped out by Sarat and Scheingold, has included analysis of the relationship between the work of lawyers on behalf of their clients and the broader political and ideological context in which they operate.¹⁹⁵ Although the definition of what constitutes cause lawyering is itself contested, at its core cause lawyering is often seen as a form of ‘moral activism.’¹⁹⁶ It views the function of committed lawyers as elevating the moral self image of legal professionals beyond the instrumentalist ‘hired gun’ approach which sees lawyers selling their services without regard to the ends. It seeks to reconnect law and morality and to make real the notion of lawyering as a ‘public profession’ whose function is more than the deployment of technical skills but rather a vehicle through which to build a better society thus in turn legitimating the legal profession as a whole.¹⁹⁷ For example, lawyers involved in traditional ‘left of centre’ work on anti-racism, poverty, death penalty, feminist issues and indeed more recently more rightist orientated issues including anti-abortion and religious lawyering have all been the focus on cause lawyering scholars. What unites the analysis of these very different spheres of lawyering is a more open acceptance that the intersection between law and politics is a reality in these areas of practice which must be managed by those involved in it. To paraphrase Rick Abel, cause lawyering requires a much more open acknowledgement that the professional really is *political*.¹⁹⁸

Where the literature on cause lawyering is of particular interest for current purposes is in its analysis of the processes required to achieve an organised voice in the legal profession and the powerful force that such a voice can become. Thus, for example, Sarat’s fascinating account of the work of anti-death penalty lawyers in persuading the American

¹⁹⁴ Speech of Michael Posner Executive Director, Human Rights First to the American Bar Association Center for Human Rights, February 14, 2005 Salt Lake City, Utah.

¹⁹⁵ See generally Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974); Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities* (1998); Austin Sarat and Stuart Scheingold (eds.) *Cause Lawyering and the State in a Global Era* (2001); Stuart Scheingold and Austin Sarat, *Something to Believe In: Politics, Professionalism and Cause Lawyering* (2004).

¹⁹⁶ David Luban, *Lawyers and Justice: An Ethical Study* (1988) at p. vii.

¹⁹⁷ Sarat and Scheingold 1998 above n. 195 at p. 3. See also Robert Gordon, ‘The Independence of Lawyers’ (1988) 68 *Boston University Law Review*, 1. As Alifieri argues with respect to lawyers involved in anti-death penalty litigation in the US ‘...progress in law and politics, however slow and inconsistent, turns on moral vision...Professing moral theory in practice is our professional responsibility.’ See Anthony Alifieri, ‘Mitigation, Mercy and Delay: The Moral Politics of Death Penalty Abolitions’ (1996) 31 *Harvard Civil Rights-Civil Liberties Law Review* at 352.

¹⁹⁸ Richard Abel, ‘The Professional is Political’ (2004) 11, *International Journal for the Study of the Legal Profession* 131.

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Bar Association to call for a moratorium on state executions is instructive. As with the debates in Northern Ireland concerning the Finucane and Nelson cases, those who lobbied successfully for the ABA to adopt the moratorium were successful because their arguments centred on *legal* issues (e.g. the quality of defence counsel and executive erosion of fair trial protections on capital cases) rather than generic political or moral arguments concerning the death penalty itself.¹⁹⁹ The ABA's call for a moratorium has in turn been rightly credited with giving impetus and focus to the moratorium debate in the US, tailoring it to the issues outlined in their original report including racial and ethnic discrimination, competency and compensation of counsel, lack of meaningful review in capital cases, and the execution of mentally disabled and juvenile offenders.²⁰⁰ In short, and perhaps unsurprisingly, the lawyers who make up the membership of legal bodies *like* good legal argumentation and they *may*, in the final analysis, be persuaded by the value and power of a compelling legal case.²⁰¹

In discussing such notable 'successes' in Northern Ireland, Canada and South Africa (wherein established organisations within the profession have ultimately adopted a 'progressive' stance), a broader question arises as to whether such legal associations can fulfill the function of expressing the 'collective conscience' of the legal profession on a more sustained basis.

Some scholars have appeared to argue that lawyers' attainment of such an aspiration is indeed feasible. For example, Michael Perry has suggested an appealing vision of the legal profession as a 'moral community' wherein lawyers are the current bearers of a tradition wherein a 'moral evolution' takes place, old norms are replaced and new ones emerge as each generation of the Bar tests, changes and articulates that tradition as befits their era.²⁰² Similarly Croft has suggested that the American legal profession should be understood as a 'deliberative moral community' underpinned by four broad principles of a respect for truth, fidelity to the law, a mediative role and a commitment to public service.²⁰³ While he acknowledges that such benchmarks are somewhat vague, he contends that such a reconceptualisation would have a number of consequences including

¹⁹⁹ *The then President of the ABA spoke against the motion on the moratorium precisely because he argued the focus on the legal issues masked a broader political opposition to the death penalty. 'What you really have here is a vote up or down on the death penalty. Folks, bring it in the front door, don't try to get it in the back door... The Department of Justice thinks it's a bad idea. The White House thinks it's a bad idea. In my opinion our membership would think it's a bad idea... It is a wolf in sheep's clothing. The wolf is total opposition to the death penalty. The sheep's clothing is couched in constitutional rights.'* Despite his opposition, ABA delegates voted by 270 to 119 in favour of the resolution calling for a moratorium. See Austin Sarat, 'State Transformation and the Struggle for Symbolic Capital: Cause Lawyers, the Organized Bar, and Capital Punishment in the United States' in Austin Sarat and Stuart Scheingold (eds) (2001) at p. 203.

²⁰⁰ See ABA (2001) for a summary of the national and international response to the moratorium call.

²⁰¹ Stephen Ellman makes the same argument with regard to the ability of the Legal Resource Centre in South Africa to win the respect of the organised profession, in part because of the high quality of their legal work. Arthur Chaskelson, the LRC's founding director, later became the President of the Constitutional Court in South Africa. See Stephen Ellman, 'Cause Lawyering in the Third World' in Austin Sarat and Stuart Scheingold (1998) above n. 195 at p. 367 .

²⁰² Michael Perry, *Morality, Politics and Law* (1990) p.33-34.

²⁰³ Colin Croft, 'Reconceptualising American Legal Professionalism: A Proposal for A Deliberative Moral Community' (1992) 67, *New York University Law Review* 1256.

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transforming the organised Bar into a forum for promoting professional discourse and the vehicle through which ‘...a feeling of moral community’ is developed.²⁰⁴ Others appear more cynical. Citing Scheingold, Halliday asks ‘*what constitutes and enables professional collective action? What constitutes the profession as a political actor? Does a profession act collectively when it does so in the name of most lawyers, some lawyers, lawyers in general, organised legal professions... how is it possible for professions to act at all, given divisions within professions?*’²⁰⁵ In a similar vein Abel has suggested that ‘...*certainly no contemporary national legal profession constitutes a community*’²⁰⁶ Having completed this comparative project, on balance we would probably position ourselves on the side of the cynics, but only just.

In an increasingly diverse and fragmented legal profession, which is in turn faced with evermore complex political and ideological challenges, it is not feasible in our view that the organised profession will always find space *know* and to *speak* as lawyers’ collective legal conscience. However, based upon the experiences highlighted above, we would suggest that such ‘moments’ or critical junctures are possible when all or some of these elements are present. To recap:

First, the collective conscience of the legal profession is usually stirred into action by individual lawyers who demonstrate courage, integrity and commitment in their work or their own public utterances. The example set by such individuals may provide leadership to other like-minded lawyers as well as shine a harsh light on the actions or inactions of their more sedentary colleagues.

Second, an expression of the collective conscience by the organised profession may well require a specific combination of circumstances to be successfully achieved. Within the scholarship on conflict resolution and political transformation more generally, there is a considerable emphasis on the notion of ‘ripeness’²⁰⁷ Simply put, this is a view that *timing* is all. Conflicts may be ripe for resolution at a particular time because of a complex interaction of political, ideological, social, cultural, individual personalities and other factors. As noted above, it is certainly no accident that the arguably more progressive moves within the legal communities of Northern Ireland, Canada or South Africa all occurred at junctures wherein political transformation was arguably already well underway. In a sense, perhaps the organised legal profession is more likely to follow or at least move alongside rather than lead such processes of change.

Third, the extent of the organised legal profession to take on the mantle of the profession’s collective conscience will often be shaped by the skills, strategies and tactics adopted by those pressing for such a role. Like most social or political organisations, Bar Associations, Law Societies and the like respond to a combination of pressures from

²⁰⁴ Colin Croft, *ibid.* at p. 1345.

²⁰⁵ Terence Halliday, ‘Lawyers and Politics, The Politics of Lawyers: An Emerging Agenda’ (1999) 24 *Law and Social Inquiry*, 1005 at p 1006.

²⁰⁶ Richard Abel, ‘Taking Professionalism Seriously’ (1989) 41 *Annual Review of American Law* at p.59.

²⁰⁷ See e.g. Marieke Kleiboer, ‘Ripeness of Conflict: A Fruitful Notion?’ (1994) 31 *Journal Of Peace Research*, 109; Daniel Lieberfeld, ‘Conflict “Ripeness” Revisited: The South African and Israel/Palestine Cases’ (1999), 15 *Negotiation Journal* 63.

In J. Morison, K. McEvoy and G. Anthony (eds) (2007) *Judges, Human Rights and Transition* (Oxford, Oxford University Press, 275-314).

above, below and within. Thus the tactics of internationalisation, popular and political mobilisation, the creation of alternative organisations and the utilisation of internal committees and systems of governance may all be required. As noted above, they also respond best to styles of legal argumentation which resonate with their professional training, institutional culture and organisational sense of self.

Finally the expression of a collective conscience requires a much a deeper and arguably more honest notion of professionalism than that which has heretofore dominated the professions.²⁰⁸ The positivist myth of a politics-free legality amongst the legal professions in Northern Ireland, Canada and South Africa was a flag of convenience for an avowedly political alignment with the least progressive political forces in each of those jurisdictions. An acknowledgement of that fact, such as through the admittedly imperfect contribution of the South African legal professions to the TRC, would be a useful first step in other countries (such as Northern Ireland) which are still struggling to come to terms with a violent past. More generally with regard to the future of professional associations, what is required is not an intellectually untenable and politically anaemic version of 'neutrality'. Rather, what is needed is a framework which provides both substance and meaning for lawyers' groupings and which gives them a steer through shark infested political waters. That template is the international human rights framework. International human rights standards, both those which relate directly to the conduct of legal professional but also those of more general applicability can give lawyers the confidence to become involved in public conversations which they cannot and should not avoid.²⁰⁹ They provide the compass for an engagement in politics (which is inevitable) while avoiding the charge of political alignment (which is predictable). In the final analysis, it is ultimately through law that lawyers are enabled and emboldened to do the right thing.

²⁰⁸ One interviewee for this project described this eloquently to one of the authors. *'I think it requires a rejection of the idea that professionalism is about erasing those parts of yourself that link you to real human communities. I think it's only through human communities of meanings that norms make sense and the Bar is one such community and its why actually I think the idea that we should get rid of Bar Associations would be a bad idea. We should try to make better use of Bar Associations but we shouldn't get rid of them. But we should also encourage lawyers to be grounded in communities of meaning that extend beyond the profession and beyond their workplace so that they can use those normative commitments in a way to check or ground those much more abstract professional commitments.'* Interview Professor David Wilkins, March 5th 2002.

²⁰⁹ For further detailed discussion on the efficacy of the human rights framework in this context, see Livingstone et al 2006.