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Judges, Conflict, and the Past

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JUDGES, CONFLICT AND THE PAST

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Drawing upon interviews with senior judicial figures in Northern Ireland, South Africa and elsewhere, this article considers the role of the judiciary in a political conflict.¹ Using the socio-legal literature on judicial performance and audience as well as transitional justice, the article argues that judges in Northern Ireland ‘performed’ to a number of ‘imagined’ audiences including Parliament, ‘the public’ and their judicial peers - all of which it is argued shaped their view of the judicial role. In light of ongoing efforts to deal with the past in the jurisdiction, and the experiences of other transitional societies, the article argues that the judiciary can and should engage in a mature, reflexive and, where appropriate, self-critical examination of the good and bad of their own institutional history during the conflict. It also argues that such a review of judicial performance requires an external audience in order to encourage the judiciary to see truth beyond the limits of legalism.

INTRODUCTION

Neither I nor my brethren, much as I admire them all, are the heroes of this story. I am confident that our judicial brethren in England and Wales and in Scotland would cope equally well with our unusual problem if called upon. My object is simply to follow how the Courts have reacted to an extraordinary situation. For nearly eighteen years the Queen's Peace itself has had to meet in a part of her Kingdom a vigorous and continuous challenge, and the Queen's Justice had to be administered during that time without fear or favour.²

...the judiciary faced a tough decision: should it become involved in an intensely topical, political process [the South African Truth and Reconciliation Commission, ‘the TRC’]. After agonised debate and much controversy, the leaders of the judiciary decided not to appear. Their essential reason was fear that their independence would be compromised if they had to account for their actions... we think the judiciary's decision to stay out of the TRC was wrong. Judges should have attended the hearings voluntarily, and submitted to questioning. Their participation would have legitimated both the TRC and the judiciary itself. It would have countered the perception that judges viewed themselves as somehow separate from and above the politics of the rest of the country.³

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¹ We would like to thank all of the judges and lawyers who agreed to be interviewed for this research, Gordon Anthony, John Jackson, Hannah Quirk, Anne Marie McAlinden and the anonymous reviewers for their comments and assistance on previous drafts as well as Rachel Rebouche and Louise Mallinder for their research assistance on the original project. We are also grateful to the Atlantic Philanthropies (Grant Reference, *Judges, Human Rights and Political Change*) and the ESRC (Grant Reference ES/J009849/1 *Lawyers, Conflict and Transition*) which funded the research. This article is dedicated to the memory of Stephen Livingstone. Any mistakes are of course our own.

² Former Lord Chief Justice Northern Ireland Lord Lowry ‘Civil Proceedings in a Beleaguered Society’ (1986) 2 *The Denning Law Journal* 109 at 109.

³ Former South African Chief Justice P. Langa and Constitution Court Judge E. Cameron, ‘The Constitutional Court and the Court of Appeal After 1994’ (2008) *Advocate* April 28.

In recent decades, the role of judges in periods of authoritarianism, conflict and political transition has attracted much scholarly interest.⁴ The waxing and waning of judicial autonomy, the complex contours of judicial acquiescence in human rights abuses, as well as sometimes courageous defences of the rule of law, are well discussed in the literature on judges in authoritarian, post-authoritarian or transitional regimes.⁵ Hard questions have also been asked about the judiciary in established democracies in their response to post 9\11 counter-terrorist strategies.⁶ Although there are myriad differences between these different contexts, common and often overlapping themes emerge from this literature that resonate strongly with the Northern Ireland experience.

For much of the conflict judges in Northern Ireland sat in juryless ‘Diplock Courts’ established under emergency laws. Northern Ireland has had a system of emergency laws since its establishment as a state in 1921 which included the power to intern terrorist suspects without trial, a system which operated between 1971 and 1975.⁷ That system was refined by the British government through the Northern Ireland (Emergency Provisions) Act 1973. Following the recommendations of a commission chaired by Lord Diplock,⁸ the measures introduced were intended to facilitate a move away from internment without trial and to place greater emphasis on increasing the numbers of convictions secured against suspected paramilitaries. These measures included: the extension of police and army powers of stop, question and arrest; the imposition of limits on bail; a relaxation on the law governing the admissibility of confessions; and finally the suspension of jury trial for ‘terrorist related’ offences so that one judge alone (three on appeal) would determine both law and fact.⁹ The cumulative effect of this new strategy were to facilitate more coercive interrogation techniques with widespread abuses being documented at specialist interrogation centres such as Castlereagh and Gough Barracks in the 1970s, early 1980s and continuing even into the early 1990s.¹⁰

A number of commentators such as Korff,¹¹ Walker¹², Walsh¹³ and others have been highly critical of the willingness of ‘Diplock’ judges to accept evidence that had been

⁴ See e.g. T. Ginsburg and T. Moustafa (eds.) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008); G. Helmke and J. Rios-Figueroa (eds.) *Courts in Latin America* (2011); D. Kapiszewski, G. Silverstein and R.A. Kagan (eds.) *Consequential Courts: Judicial Roles in Global Perspective* (2013).

⁵ See e.g. G. Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (2005); L. Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (2007); D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998); R. Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (2013).

⁶ See e.g. H.L. Pohman, *Terrorism and the Constitution: The Post 9\11 Cases* (2008); F. De Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (2011) 214-280.

⁷ Internment without trial was introduced by the then Unionist government under Prime Minister Brian Faulkner and continued under Direct Rule from Westminster until 1975. See further K. McEvoy *Paramilitary Imprisonment in Northern Ireland*, esp. Ch 8 (2000).

⁸ Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal With Terrorist Activities in Northern Ireland*. (London: HMSO, 1972) p.1.

⁹ J. Jackson and S. Doran *Judge without Jury: Diplock Trials in the Adversary System* (1995).

¹⁰ See e.g. Committee on the Administration of Justice (CAJ), *Allegations of Ill-Treatment in Castlereagh* (Belfast: CAJ, 1991); Amnesty International, *United Kingdom: Allegations of Ill-Treatment in Northern Ireland* (London: Amnesty International, 1991).

¹¹ D. Korff, *The Diplock Courts In Northern Ireland: A Fair Trial?: An Analysis Of The Law, Based On A Study Commissioned By Amnesty International* (1984).

¹² C. Walker, ‘The commodity of justice in states of emergency’ (1999) 50 *Northern Ireland Legal Quarterly* 164.

¹³ P.J. Dermot Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (1983).

extracted through such mistreatment of paramilitary suspects. However, in reviewing their record, our own view mirrors that of Jackson, Dickson and Livingstone that while Northern Ireland's judges may not have been steadfast champions of human rights, neither were they pliant servants of the State.¹⁴ The judiciary were on occasion willing to impose some common law constraints on the interpretation and application of emergency powers, albeit as is discussed below, with less vigour than was legally viable. As Jackson notes, although judges did state in a number of cases that while they had little doubt as to the defendant's guilt, where there was a reasonable doubt, they did acquit. Furthermore, despite being given the power by parliament to draw adverse inference from the silence of a defendant, they showed little enthusiasm for using it to bolster weak prosecution cases.¹⁵ In addition, Northern Ireland's judges did eventually reject the controversial tactic of mass 'supergrass' prosecutions (discussed further below). Accordingly, a more rounded account of judicial behaviour during the conflict should seek to explain *both* the judiciary's deference to security imperatives *as well as* instances of judicial resistance to those imperatives.

Much of the literature on the judges is based on a close reading of their published judgements. Given that judges in Northern Ireland (like their colleagues in Britain) were historically very reluctant to be interviewed,¹⁶ scholars had little realistic alternative. However, this project succeeded in gaining interviews with Northern Ireland's judges as well as judges elsewhere, and thus we were able to take a different approach. With Livingstone and Rebouche, McEvoy conducted interviews with a range of senior judicial and legal figures in Northern Ireland in 2002-2003.¹⁷ The results of that research into the judiciary was never published due to the untimely death of Professor Livingstone in 2004. Although some elements of the fieldwork are over a decade old, the judiciary were being asked to 'reflect backwards' on conflict-related human rights themes - then eight to nine years after the cease-fires. Their comments remain particularly relevant as we struggle to address the legacy of the conflict and indeed their recollections then may have been fresher than they would be today. A total of 37 interviews were conducted in Northern Ireland with legal actors during that period, including 12 with senior judges (high court or above). In addition, a number of the lawyers interviewed have subsequently gone on to become judges. The original Northern Ireland component of the research was also supplemented by comparative fieldwork involving

¹⁴ S. Livingstone, 'And Justice for All? The Judiciary and the Legal Profession in Transition' in *Human Rights, Equality, and Democratic Renewal in Northern Ireland*, ed. C. Harvey (2001); B. Dickson, 'Northern Ireland's Troubles and the Judges' in *Northern Ireland: Politics and the Constitution*, ed. B. Hadfield (1992); J. Jackson, 'Many Years on in Northern Ireland: The Diplock Legacy.' (2009) 60 *Northern Ireland Legal Quarterly* 213.

¹⁵ Jackson id 220-223. See also Criminal Evidence (NI) Order 1988.

¹⁶ Despite significant effort on their part, Jackson and Doran were only granted interviews with 3 high court and 3 county court judges for their research. See J. Jackson and S. Doran, op. cit., n. 9. For an interesting discussion on similar difficulties for researchers trying to access the judiciary in Britain see J. Baldwin 'Research on the Criminal Courts.' in R. King and E. Wincup *Doing Research on Crime and Criminal Justice* (2008) and K. Malleon *The New Judiciary: The Effects of Expansion and Activism* (1999).

¹⁷ Interviews were almost all granted on condition of confidentiality and anonymity. Interviews were semi-structured, framed around key human rights and historical themes and usually lasted 1-2 hours. In common with much research into the judiciary and legal profession, a 'purposeful sampling' methodology was deployed where interviewees were chosen using a range of criteria including professional seniority, experience of working on conflict or human rights related cases or knowledge and experience of debates within the legal community. An initial 'wish list' of key interviewees was drawn up, these were written to and, after some negotiation, almost all agreed to be interviewed. McEvoy conducted a further 14 interviews with lawyers in Northern Ireland between 2008 and 2010, but none with judges. He has drawn on that and the earlier fieldwork to write about lawyers in the jurisdiction. See K. McEvoy and R. Rebouche 'Mobilising the Professions: Lawyers, Politics and the Collective Legal Conscience' in *Judges, Transition and Human Rights* eds. J. Morison, K. McEvoy and G. Anthony (2007) and K. McEvoy 'What Did The Lawyers Do During The 'War'? Neutrality, Conflict and the Culture of Quietism' (2011) 74 *The Modern Law Review* 350.

interviews with judicial figures elsewhere in 2002-2003.¹⁸ In 2014 McEvoy conducted a further 22 interviews with legal and judicial figures in South Africa, addressing amongst other things the ways in which judges there engaged with (or not) the Truth and Reconciliation Commission.¹⁹ As is noted below, senior jurists in both jurisdictions have talked to each other and taken a keen interest in each other's attitudes towards dealing with the past and, we will argue, there are real lessons to be learned in Northern Ireland from the South African experience.

While building on the doctrinal work of previous scholars, we analyse the interview data primarily through the socio-legal literature on judicial performance and audience as well as the broader transitional justice scholarship. Looking at the realities of judicial life during the conflict (including the very real danger of being killed by paramilitaries and the associated demands of security), we explore the ways in which judges in Northern Ireland were 'performing' to several 'imagined' audiences during the conflict including parliament, 'the public' and judicial peers - all of which we argue shaped their view of the judicial role. We conclude by making the case for including an examination of the role of the judiciary as a theme in the ongoing efforts to 'deal with the past.'

AUDIENCE AND PERFORMANCE

The nature of the job means that judges are aware that they are being observed even judged by different audiences. Thus one strong line of inquiry that has emerged on judicial behaviour is to explore how the relationship between judges and these different audiences may help us to better understand judicial behaviour.²⁰ Summarising for the sake of brevity, much of this literature examines the various audiences judges perform *to* or *for* and how issues of reputation or esteem among such audiences, both individually and institutionally, may influence judicial behaviour.²¹ Although this literature often has a sociological or 'socio-psychological' flavour,²² elements include the lens of 'rational choice' more familiar in political science and economics.²³ The central theme which runs through all variants of this literature is that the reaction of different audiences to judicial decisions – e.g. the media, politicians, lawyers, other judges – may impact directly on both the self-image and public reputation of a given judge.²⁴

¹⁸ A total of 57 interviews were conducted in the comparative fieldwork in 2002-2003 including with judges of the Supreme Courts of the United States, Canada, South Africa, The Republic of Ireland, Scotland and the then House of Lords in England some of which are referred to here.

¹⁹ Grant Reference ES/J009849/1 above n.1

²⁰ L. Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (2006).

²¹ See T.J. Miceli and M.M. Cogel 'Reputation and Judicial Decision-Making' (1994) 23 *Journal of Economic Behavior and Organization* 31; F. Schauer 'Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior' (1999) 68 *University of Cincinnati Law Review* 615; Baum, *id.*; N. Garoupa and T. Ginsburg 'Judicial Audiences and Reputation: Perspectives from Comparative Law' (2008) 47 *Columbia Journal of Transnational Law* 451.

²² Baum, *op. cit.*, n.20.

²³ Garoupa and Ginsburg *op. cit.* n. 21, 452-453 See also R.A. Posner 'What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)' (1993) 3 *Supreme Court Economic Review* 1. There is also an evaluative and managerial variant of literature on judicial 'performance', particularly in the US, in states where judges are directly elected by the public. In such context, ongoing evaluations on issues such as case management, clarity of explanations, court room demeanour etc. are used to inform judicial elections. See R.L. Kourlis and J. Singer 'A Performance Evaluation Program for the Federal Judiciary' (2008) 86 *Denver University Law Review* 7 for an overview). No such judicial surveys were done in Northern Ireland and thus our notion of performance is sociological, socio-psychological and political.

²⁴ Garoupa and Ginsburg, *op. cit.*, n.21, pp. 452-53.

In addition to these instrumental or strategic ‘pay offs’, the pursuit of judicial esteem and reputation is also bound up with social relations and social status. Constructing and maintaining professional and personal esteem and a sense of professional legitimacy is a fundamentally social process which requires validation from others.²⁵ Dating at least to Goffman’s classic *The Presentation of Self in Everyday Life*, much of the literature on such matters inevitably focuses on what Goffman referred to as the ‘theatrical’ and the ‘dramaturgical’ which, as was noted above, lends itself well to an analysis of the judiciary.²⁶ However, there is more to this notion of performance than simply the more obvious dramatic aspects of the judicial function.

Borrowing insights from this social psychology literature, Lawrence Baum observes that judges, like people in general, presumably want to be liked by other people, especially by those with whom they share salient social identities.²⁷ Writing primarily about judges in the United States, he argues then that judges, like all of us, engage in acts of ‘self-presentation’ (or ‘impression management’) to project a desirable image of themselves.²⁸ Such acts might range from stylistic flourishes in a written decision to deciding the outcome of a case with a clear eye on a particular audience. The broadest possible audience for acts of judicial self-presentation is the ‘public’. However, beyond a general desire for public approval, judges may have special regard to certain particular ‘reference groups’. For Baum, such reference groups might include politicians, important media outlets, legal professionals, legal academics, and other influence formers.²⁹

While of course the context is very different, the themes of audience and performance are especially relevant in the case of Northern Ireland’s judiciary given the political charged nature of conflict related cases. For example, the judges who presided over Diplock trials for the most serious of offences were involved in what Douglas has termed performing a ‘spectacle of legality’.³⁰ These trials (and related legal actions such as civil suits or conflict related judicial reviews) were intense and high stakes legal dramas where, with republicans at least, the legitimacy of the state itself was being challenged by the defendants or litigants.³¹ Despite the ritual judicial insistence that such events were the law running its course,³² these were intense sites of legal and political drama with the judges given a starring role. More broadly, as we explain below, the ways in which judges performed their role in and beyond the court – shaped as these were by the realities of the security situation and other factors – created powerful norms and values about what it meant to be a judge and how judges ‘imagined’ certain audiences.

Having reviewed the secondary literature and our own interview data, we argue that Northern Ireland judges were, for a mix of socio-psychological and rational-strategic reasons, performing to at least three key audiences during the Northern Ireland conflict. These were: (i) *Parliament* – or as it was often expressed, the ‘Will of Parliament’; (ii) *the Public* – broadly

²⁵ C. Johnson, T. Dowd, and C. Ridgeway ‘Legitimacy as a Social Process’ (2006) 32 *Annual Review of Sociology* 53.

²⁶ E. Goffman, *The Presentation of Self in Everyday Life* (1959) xi.

²⁷ Baum, op. cit., n.20, pp. 25 – 50.

²⁸ id., pp. 32-39. See also Posner op. cit. n. 23.

²⁹ Baum op. cit. n.20, pp. 88-118.

³⁰ L. Douglas, *The Memory of Judgement. Making Law and History in Trials of the Holocaust* (2001) 114.

³¹ K. McEvoy ‘Law, Struggle, and Political Transformation in Northern Ireland’ (2000) 27 *Journal of Law and Society* 542.

³² For further detailed discussion see K. Boyle, T. Hadden and P. Hillyard (1980) *Ten Years on in Northern Ireland: The Legal Control of Political Violence* (1980). Jackson and Doran, op. cit. n 9.

understood as those who supported the rule of law and did not endorse political violence; and (iii) *other judges* – both in Britain and on the bench in Northern Ireland.

Performing for Parliament

Perhaps the most obvious audience to which the Northern Ireland judiciary were performing during the conflict was Parliament, or as it was expressed in the fieldwork by the judges, the ‘will of Parliament’. With the devolved assembly in Northern Ireland suspended from 1972, the specific parliament to which they were performing was the Westminster legislature which governed Northern Ireland throughout the rest of the conflict.³³ Of course, the particularities of judicial performance to this audience were explicitly framed around the judicial understanding and interpretation of the constitutional relationship with the Westminster Parliament, in particular the doctrine of parliamentary sovereignty.

To summarise briefly, the orthodox interpretation of parliamentary sovereignty, popularized by A.V. Dicey, maintains that Parliament can make (or unmake) any law whatsoever and that no institution or official may lawfully overturn or disregard an Act of Parliament.³⁴ Increasingly, in particular since the late 20th century, this orthodox interpretation has been challenged by both legal academics and the courts.³⁵ While these debates are of course an interesting prism through which to view contemporary judicial performance towards Parliament as ‘an audience’, it is important to stress that it was the orthodox version of parliamentary sovereignty that informed judicial performance during the conflict in Northern Ireland. During that period (1969-1998), judges in Northern Ireland (and Britain) were working without the benefit of either a constitutional or statutory bill of rights (such as the Human Rights Act 1998) to empower them. Accordingly, from such a vantage point, they quite clearly understood themselves as being constitutionally bound to implement the legislative commands of Parliament.

As one judge summed up in speaking about the ways in which the judges viewed the relationship with parliament:

I think we were all concerned both in our training and in our judicial viewpoints, always concerned about not trespassing into political fields in areas where there is democratic mechanism for determining matters of policy ...judges were reluctant to take on the role of the policy makers in areas where Parliament has seen fit to enact legislation or pursue policies.³⁶

³³ The Government of Ireland Act 1920 which established the Stormont Parliament had actually placed the Northern Ireland courts in the constitutionally unusual position (in the UK) of being able to review and invalidate the legislation of the devolved legislature. However, in practice, judges during this period showed little appetite to use this power, particularly to challenge the inequalities of Unionist dominated regime. See H. Calvert *Constitutional Law in Northern Ireland* (Stevens, London, 1968) p.289

³⁴ A.V. Dicey *Introduction to the Study of the Law of the Constitution* (8th Edition) (1915).

³⁵ For a succinct overview of these challenges, see M. Elliot, ‘United Kingdom: Parliamentary Sovereignty under Pressure’ (2004) 2 *International Journal of Constitutional Law* 545. For a modern defence of the doctrine, see J. Goldworthy, *The Sovereignty of Parliament: History and Philosophy* (2001). For example, under the banner of ‘common law constitutionalism’, public law scholars have advanced a revisionist interpretation of UK constitutionalism that places the courts (via the common law) as the ultimate guardians of constitutional principle which in turn refashions the authority of Parliament as an artefact of the common law, one which the courts may lawfully alter or curtail when, for example, fundamental individual rights are threatened – as was the case with emergency legislation during the ‘Troubles’ in Northern Ireland. See T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001).

³⁶ Interview with senior Northern Ireland judge, 5 December 2002.

The detailed case-law on conflict related cases in Northern Ireland which reveals the ways in which the judges viewed the will of Parliament through their judgements has been extensively reviewed elsewhere by Jackson,³⁷ Dickson,³⁸ Livingstone,³⁹ Quirk⁴⁰ and others and is beyond the scope of this article. Needless to say, while they report some complex and occasionally contradictory patterns, some common themes do come through. A couple of illustrative examples are sufficient for current purposes.

As noted above, a key element of the state's counter-insurgency was the extraction of confessions from paramilitary suspects.⁴¹ Early on in the conflict LCJ Lowry rejected certain police interrogation techniques as contravening the common law principles of 'voluntariness test'.⁴² However, this test was specifically replaced in the Northern Ireland Emergency Provisions Act so that confessions would be admitted 'unless there was prima facie evidence of torture, inhuman or degrading treatment'.⁴³ The Courts held that while an overall discretion to exclude statements remained, 'this should not be exercised so as to defeat the will of Parliament'⁴⁴ which had clearly intended to change to law to 'render inadmissible much that previously must have been excluded'.⁴⁵ In practice, as Livingstone notes, the residual judicial discretion was rarely used.⁴⁶

Again by way of illustration, the courts took a similar position with regard to police powers under the emergency legislation to exclude solicitors from interview. The provisions specified that such access could be delayed for up to 48 hours if the police had a reasonable suspicion that evidence might be interfered with or other suspects alerted. In practice, denying terrorist suspects access to their lawyer became routinised – with consultations often being allowed for 30 minutes only and then the lawyer being re-excluded.⁴⁷ Again, the courts upheld such practices.⁴⁸ For example, in *Re Russell's* application, LCJ Hutton confirmed that allowing solicitors to be present during the questioning of terrorist suspects would be 'contrary to the general intent of parliament'.⁴⁹ As Dickson has argued with regard to this case and its associated line of reasoning, '...the court's decision, alas, is the epitome of how deferential, even as recently as the mid-1990s, courts could be to police and government anti-terrorist policies'.⁵⁰ In a similar vein, John Jackson has characterised the judiciary as having a 'rather compliant' attitude towards emergency law, displaying little willingness to criticise or curtail the emergency powers, consistently denying themselves the space to use their undoubted

³⁷ *id.*

³⁸ B. Dickson, 'The House of Lords and the Northern Ireland Conflict—A Sequel' (2006) 69 *Modern Law Review* 383.

³⁹ *op. cit.*, n.14 also S. Livingstone, 'The House of Lords and the Northern Ireland Conflict' (1994) 57 *Modern Law Review* 333.

⁴⁰ H. Quirk 'Don't Mention the War: The Court of Appeal, the Criminal Cases Review Commission and Dealing with the Past in Northern Ireland.' (2013) 76 *Modern Law Review*, 951

⁴¹ In evidence to an Inquiry into alleged abuses in interrogation centres, the DPP reported that the prosecution case rested wholly or mainly on confessions in 75-80% of cases. Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland (Bennett Report) Cmnd 7497 (1979) Para 30.

⁴² *R v Flynn and Leonard* [1972] NIJB.

⁴³ Section 6 (Emergency Provisions Act) 1973.

⁴⁴ *R v McCormick* [1977] NI 105; *R v Howell and others* (1987) 5 NIJB 10.

⁴⁵ *R v Corey and others* 6 December 1973, unreported; [1979] NI 49.

⁴⁶ Livingstone *op cit.*, n.14.

⁴⁷ Lawyers Committee for Human Rights, *Human Rights and Legal Defense in Northern Ireland* (New York: Lawyers Committee for Human Rights, 1993) 71.

⁴⁸ *In Re Floyd's Application* [1997] NI 414, approving *R v Dougan* (1995, unreported). See further Quirk *op cit* n.47.

⁴⁹ *Re Russell's Application* 1996 NI 310.

⁵⁰ B. Dickson *The European Convention on Human Rights and the Conflict in Northern Ireland* (2009) 182-183.

discretion [e.g. to exclude confessional evidence, to reinvigorate the judges rules which had ‘lay dormant’ or to assert the rights of solicitors vis a vis their clients] ‘in view of the need to adhere to the will of parliament.’⁵¹

In seeking to better understand this compliant or deferential attitude amongst the judiciary towards the will of Parliament, reflected both in our own interviews and their written judgements, we have examined some of the comparative literature on courts and judicial behaviour.⁵² That literature identifies several *possible* ways in which the ‘political’ branches of government may threaten or curtail judicial power.⁵³ In some instances, judges may be ignored,⁵⁴ over-ridden (e.g. by passing new legislation or even amending the constitution)⁵⁵ or in extremis, ‘punished’ by freezing salaries, impeachment or the Executive making fresh appointments to ‘pack’ a more docile court.⁵⁶ There is compelling evidence from elsewhere that such ‘threats’ do sometimes induce strategic judicial behaviour, leading judges to shape their decision-making in *anticipation* of the expected responses of other actors or institutions.⁵⁷ In the context of Northern Ireland, however, overt ‘court curbing’ was not a plausible influence on judicial behaviour. Like their counterparts in Britain, Northern Ireland’s judges have historically enjoyed a great deal of formal independence and, unlike judges in other conflicted societies, they had little fear of direct retaliation by politicians for unwelcome decisions.⁵⁸ Quite apart from this formal legal independence, the sincerity of the judges’ commitment to judicial independence in the interviews was palpable.

Thus, rather than any real or direct ‘threat’ from Parliament or the Executive to judicial independence, the source for this broad culture of compliance or deference is more complex and subtle. Instead we would argue that the ‘will of Parliament’ became one way for judges to imagine a democratic state ‘doing its best’ to respond to a very real terrorist threat while still adhering to the basic precepts of the rule of law. At one level, such a reading was true. The British government did not simply abandon the rule of law in its response to political violence.⁵⁹ At another, it was a classic example of the gap between what Roscoe Pound famously referred to as ‘the law in books and the law in action’.⁶⁰

As we now know, the state did engage in widespread human rights abuses including torture of suspects in police custody, extra-judicial killings of paramilitary suspects, the killing of

⁵¹ J. Jackson, *op. cit.* 14, p. 22.

⁵² T. Ginsburg, *Judicial Review in New Democracies* (2003).

⁵³ Ginsburg, *id.*

⁵⁴ G. Vanberg, *The Politics of Constitutional Review in Germany* (2005).

⁵⁵ J. Ferejohn and B. Weingast. ‘A Positive Theory of Statutory Interpretation’ (1992) 12 *International Review of Law and Economics* 263; A. Harvey and B. Friedman, ‘Pulling Punches: Congressional Constraints on the Supreme Court’s Constitutional Rulings, 1987–2000’ (2006) 31 *Legislative Studies Quarterly* 533.

⁵⁶ See K. Whittington ‘Legislative Sanctions and the Strategic Environment of Judicial Review’ (2003) 1 *International Journal of Constitutional Law* 446.

⁵⁷ For a review of the literature, see L. Epstein and T. Jacobi, ‘The Strategic Analysis of Judicial Decisions’ (2010) 6 *Annual Review of Law and Social Science* 341.

⁵⁸ On ‘court curbing’ and judicial independence see Epstein, Knight and Shvetsova *op. cit.* n.8; Ginsburg *op. cit.* n.7; Helmke *op. cit.* n.5; R.B. Chavez, J. Ferejohn, and B. Weingast ‘A Theory of the Politically Independent Judiciary’ in *Courts in Latin America*, eds. G. Helmke and J. Rios-Figueroa (2011).

⁵⁹ F. Ni Aoláin and C. Campbell ‘The Paradox of Transition in Conflict Democracy.’ *Human Rights Quarterly* (2005) 27, 172.

⁶⁰ R. Pound ‘Law in Books and Law in Action.’ (1910) *American Law Review* 44, 12. Pound referred specifically to disparity between legal rules which ostensibly protected the accused ‘...and police officers and police detectives [who] do not hesitate to conduct the most searching, rigid and often brutal examinations of accused or suspected persons, with all the appearance of legality and of having the power of the state behind them.’ (p.17).

civilians, collusion with Loyalist paramilitaries in serious crimes including murder and systematic attempts to cover up all of these activities.⁶¹ While none of these activities were formally authorised by Parliament, they happened and it is a legitimate question (to which we shall return in the final section) to ask whether judges could have done more to prevent or expose them. At some level, performing to their version of a rule bound and democratic Westminster allowed the judges to imagine away some of the realities of the political conflict outside the court and the inevitable role that law was playing in that conflict.⁶² As Livingstone concluded, the judges displayed ‘...no sense of wonder as to whether anything has ever been wrong in the state of Northern Ireland, no sense of any alternative perspective on the evil of terrorism and the right of the state to combat it even in such a divided polity.’⁶³

Performing for ‘the Public’

Our interview data also intimates a complicated, nuanced relation with ‘the Public’ as an audience for judicial performance. Research from elsewhere suggests that judges may have narrow instrumental reasons for bearing the views of the public in mind (e.g. elected judges whose sentencing patterns will feature in re-election campaigns) but also, at a broader strategic level, maintaining public support for the institution is often expressed by judges as vital to retaining their legitimacy and independence.⁶⁴ Furthermore, a key feature of the ‘judges and the public’ literature is its focus on the fact that judges work and live in the communities which they serve. For example, even in the more well-heeled communities in which judges inevitably live, Peltasson has provided fascinating detail about the social and political pressures faced by Southern judges in the United States as they ruled on controversial civil rights matters.⁶⁵ In the case of Northern Ireland, the political context of the conflict had (at least) two important consequences for the judiciary’s relationship with its public audience. First, the realities of the security context had a direct effect on the material relations between judges and the community and (we would argue), on the ways in which the judicial notion of the public was conceived. Thus, the ways in which Northern Ireland’s judges could practically engage with the public were heavily circumscribed. Second, the importance that judges typically ascribe to projecting a neutral or apolitical image to the public was undoubtedly heightened by the divided and often sectarian nature of society in Northern Ireland.

The personal consequences for serving as a judge during the Northern Ireland conflict should not be underestimated. At least 18 republican paramilitary attacks were carried out against the judiciary, resulting in the murders of two magistrates and the daughter of another one, two county court judges, and Gibson LJ and his wife.⁶⁶ Judges were (and indeed some still are) assigned 24 hour security protection by the police, restrictions were necessarily placed upon their movement and social habits, and their families were inevitably affected by

⁶¹ I. Cobain *Cruel Britannia: A Secret History of Torture* (2012) Chap.6; M. Urban *Big Boys Rules: The SAS and The Secret Struggle Against the IRA* (1992); Lord Saville *Report of the Bloody Sunday Inquiry* (2010); D. De Silva *The Report of the Patrick Finucane Review* (2012).

⁶² As one veteran lawyer told one of the authors; ‘*My concern was that some of the judges sometimes appear to accept too uncritically the good faith of politicians and administrators and were reluctant to intervene too actively in these matters.... For own part, I believe that because of the nature of the British system, Parliament is not in practice a very effective instrument for restraining the excesses of government*’ Interview, 14th November 2002.

⁶³ Livingstone op. cit., n.14, p.153.

⁶⁴ See J.L. Gibson, G.A. Caldeira and L.K. Spence, ‘Measuring Attitudes Toward the United States Supreme Court’ (2003) 47 *American Journal of Political Science* 354; T. Bingham, *The Rule of Law* (2010). See also Vanberg op. cit. n.54.

⁶⁵ J.W. Peltasson, *Fifty Eight Lonely Men: Southern Federal Justices and School Desegregation* (1971).

⁶⁶ Further discussed below, see C. Blair, *Judicial Appointments: Research Report 5 Criminal Justice Review of Northern Ireland* (2000) 29.

the realities of being constantly under threat. The attendant anxieties came out in the interviews:

I think it is very hard on families. Since we are all men, well on the High Court I mean, I would say wives are the people who have the hardest time because they have security all day.⁶⁷

It is particularly difficult for my wife I think because of the restrictions that there are on your movements. She finds that she can't go out and about as she would like without someone being around. There are restrictions of course on you going to regular places at particular times and so on - that is quite a strain.⁶⁸

It hasn't perhaps borne in on me as much as it has on some of my colleagues... we have people [police officers] who live in the house, not in the house but in the garden all the time. I don't find it obtrusive because I've sort of got used to it, although other colleagues find it absolutely suffocating...⁶⁹

One can't just decide to drop down into town and meet somebody outside the Opera House, and go and have a drink, and go to the performance, and maybe go and have supper afterwards with half a dozen of your old friends, it's not as easy as that.⁷⁰

While no-one would dispute the inevitable personal and familial challenges of the security context, the key issues for current purposes is what impact (if any), the enforced isolation from aspects of normal community life had upon the judges' performance of their duties on the bench. One senior lawyer, himself now a judge, suggested a number of subtle ways in which the security context may have influenced some judges at the height of the conflict. His detailed reasoning is worth including in full:

Well there were indirect threats, there were direct threats and people had their families, judges' families, relatives and friends getting murdered. So firstly it was a very real threat. Now the effect, I think there were direct effects and there were indirect effects and the indirect effects were probably the more dangerous of the two. The direct effects obviously were the surrounding the judges in cotton wool, policemen appearing everywhere with them, on social occasions, at golf clubs etc... I would not like to think that that these would have a direct impact on the judge except obviously he was being kept out of an ordinary normal culture. They just were not mixing with normal people and they weren't living a normal everyday life. The indirect effects I would say is that certain judges started to show degrees of paranoia. It began to affect them I think. I think there are some judgments, particularly away back in the supergrass days, at the height of the terrorist threat, in which you can say judges were clearly being influenced. I am not saying that judges were being got at in the popular sense that people were

⁶⁷ Interview with senior Northern Ireland judge, 13 December 2002. The gendered dimensions of judicial performance during the conflict was not an issue explored in the fieldwork. While we did ask questions about gender and judicial appointments given the lack of women on the bench, these are not reported in this research. For further analysis see D Feenan 'Women Judges: Gendering Judging, Justifying Diversity.' (2008) *Journal of Law and Society* 35, 490.

⁶⁸ Interview with senior Northern Ireland judge, 23 April 2003.

⁶⁹ Interview with senior Northern Ireland judge, 9 December 2002.

⁷⁰ Interview with senior Northern Ireland judge, 8 October 2002.

being influenced by nameless people rushing in and out of their rooms but I think mentally many of them and many of their judgments paid the penalty.⁷¹

Certainly some judges themselves expressed concern about precisely the dangers of their enforced social isolation because of the security threat:

[W]hat worries me about it is getting isolated, so when I am out of here I always travel on buses and trains I like it when you can go round talking to people. And I think that is the danger, that judges will be in this sort of a cocoon...⁷²

I've always taken the view, I don't want to know about any security threats to me, I don't want to know if I've been identified in documents or anything like that, unless I have to. I've also recognised right from the start that there's a real danger of becoming institutionalised in this security ...⁷³

Judicial sensitivity to the perceived dangers of social isolation and proximity to (and reliance upon) the security forces for protection were of course allied in the Northern Ireland context to the importance of the community background of the judiciary themselves. While to this day the community background of judges is not published, discerning such information is fairly straightforward in practice in a place where the skills of 'ethnic cognition' are well honed.⁷⁴ In the early 1970s the Protestant and Unionist background of the majority of the judiciary was an issue of longstanding concern.⁷⁵ Although research conducted in the 1970s, 1980s, 1990s⁷⁶ failed to find compelling evidence of systematic Unionist bias on the part of the judges in the Diplock system (e.g. of pro-loyalist/anti-republican sentencing patterns), accusations of such bias were a staple of republican discourses throughout the period.⁷⁷ By the late 1980s and early 1990s, as Jackson and Doran note, '*in recent years the composition of the bench has been brought more into line with the balance of religious persuasion in society*' (1995: 30). Nevertheless, regardless of the actual religious make-up of the judiciary, community background was an issue about which the judges were sensitive. Thus, according

⁷¹ Interview with senior Northern Ireland lawyer, now a judge, 25 November 2002.

⁷² Interview with senior Northern Ireland judge, 13 December 2002.

⁷³ Interview with senior Northern Ireland judge, 9 December 2002.

⁷⁴ P. Shirlow, 'Fear and Ethnic Division.' (2001) 13 *Peace Review* 67 at 72.

⁷⁵ As Boyle et al note, of 20 High Court judges appointed since the formation of the state, 15 had been openly associated with the Unionist Party, two of the three judges in the Northern Ireland Court of Appeal were ex-Attorneys General in Unionist Governments, one of the four High Court judges was likewise an ex-Attorney General and another the son of a Unionist Attorney General. *Op. cit.*, n.32. See also K. Boyle, T. Hadden and P. Hillyard, *Law and State: The Case of Northern Ireland* (1975) 11. Hadden and Hillyard further note that while a convention had emerged to ensure that at least one senior judge was Catholic, such judges were widely seen by nationalists as 'Castle Catholics, more likely than not to support the government which had promoted them', see T. Hadden and P. Hillyard, *Justice in Northern Ireland: A Study in Social Confidence*. (1973) 11. This was a view echoed by one lawyer interviewed, himself now a judge: 'At the start of the troubles the bench was predominantly Protestant. This changed and all levels of the judiciary now seem to reflect a religious balance comparable to the population. The reality was, though, that appointments were establishment Catholics who turned out to be more right wing than the Protestant judges. Protestant judges didn't have anything to prove' (Interview, 20 November 2002). 'Castle Catholics' is a derogatory term for Catholic Unionists who are deemed 'loyal' to the Unionist political cause.

⁷⁶ Boyle, Hadden and Hillyard, *op. cit.*, n. 32. Walsh, *op. cit.*, n.13; Jackson and Doran, *op. cit.* n.9.

⁷⁷ Boyle, Hadden and Hillyard, *op. cit.*, n.32 and Walsh, *op. cit.* n.13, both point to some evidence of disparities in charging by the Director of Public Prosecutions at the lower end of the spectrum of offences (i.e. Protestants being charged with lesser offences than Catholics) but provide no detailed findings on discriminatory sentencing patterns by judges.

to one, judges in Northern Ireland should take special care to explain and emphasise the ostensibly legal basis for their decisions, so as to prevent any accusation of political bias:

Because there's so many things in this society, somebody would be bound to say, 'oh he would say that, wouldn't he, look where he comes from', and if you're going for good judicial reasons the way that people say, 'well that's his background, he's bound to say that, you want to make sure that you have expressed the proper reasons, the judicial reasons, and sometimes it's quite hard to get it across.'⁷⁸

In a similar vein, another judge expressed the view that judicial decisions should be purposively tailored for the benefit of audiences in the public and the media, so that 'the public listening and the press noting can see as clearly as possible where your reasons are without having to go away and dig for it and they don't always.'⁷⁹ He went on to acknowledge that he sometimes included a special paragraph at the end of his judgments, particularly in 'political' cases, in which he took care to explain how the case was decided within what he termed 'the four corners of the proper judicial role'.⁸⁰ In a similar vein, another judge echoed the need to be conscious of how the press will report judicial decisions to the public. Thus, to his mind, judges should write clear and careful reasons that discourage the press from reducing complex legal issues to simplified 'banner headlines.'⁸¹

For some judges the cumulative effect of the security situation and the politically charged nature of many of the conflict-related cases appeared to encourage a very cautious view of the judicial role beyond the courtroom. Senior judges interviewed for the comparative part of this project were clear that measured engagement in public debates about human rights and the rule of law was actually a key part of the judiciary's educative function.⁸² However, the opposite was the case in the Northern Ireland context. While judges did give some public lectures in both Northern Ireland and Britain, there was a discernible aversion to judicial engagement during the conflict with the public through lectures, media and the usual ways in which judges seek to 'reach' the public other than through their judgements. One judge was adamant that the judiciary ought to avoid being seen to pursue 'a particular political agenda', that they should be 'very, very careful' to avoid being identified with any particular political view, and, consequently, should refrain from expressing their views in public.⁸³ The same judge even cautioned against judges participating in consultation processes in which they would be required to voice opinions on matters of legal reform.⁸⁴ Another judge said the

⁷⁸ Interview with senior Northern Ireland judge, 8 October 2002.

⁷⁹ *id.*

⁸⁰ *id.*

⁸¹ Interview with senior Northern Ireland judge, 9th December 2002. These views are echoed by former Lord Chief Justice Lowry when he wrote that Northern Ireland judges need to be aware that their judgements would be scrutinised not only by the appellate courts but also potentially by 'well-informed and possibly hostile critics' see Lord Lowry 'National Security and the Rule of Law' (1992) 26 *Israel Law Review* 117 at 131.

⁸² E.g. interviews with US Supreme Court Justice Ruth Ginsberg, 19 December 2002, US Supreme Court Justice Sandra Day O'Connor, 7 November 2002, Chief Justice of the Supreme Court of Canada, Beverly McLachlin, 20th June 2002, Justice Claire L'Heureux-Dubé of the Supreme Court of Canada, 19 June 2002. As the then Lord Chief Justice of England and Wales Sir Harry Woolf summed up; '...the judgement has got to be the explanation and I don't believe that you should start and discuss those. However, discussing issues generally and explaining the law, it's really important on human rights issues to get across that the difficult decisions are really important ones and they're usually very unpopular ones and these are the things that I think, we've got to explain, it's part of the job.' Interview, 30 October 2002. These interviewees all waived their right to anonymity.

⁸³ Interview with senior Northern Ireland judge, 5 December 2002.

⁸⁴ *id.*

judiciary should largely refrain from participating in public debates less it impugn judicial independence.⁸⁵ In a similar vein, another judge explicitly identified public appearances and statements as presenting a danger to the judiciary's esteem among the public.⁸⁶ In light of what he called the 'undemocratic position' of judges, he reasoned that the judiciary is 'probably not very highly regarded at all but ... would be less so if [they] exposed [themselves] too much'.⁸⁷

In short, the way in which the judges imagined the 'Public' and their relationship to it was, perhaps inevitably, shaped by the social and political contours of the conflict and the divided society in which they lived and worked.⁸⁸ Indeed, the 'Public' was probably a problematic mental construction for judges during the conflict. Although references to 'right thinking' people in Northern Ireland are replete in judgments throughout the conflict⁸⁹ – a term apparently deployed as being synonymous with an opposition to political violence and support for the rule of law – in reality significant elements of the public did not fit into such palatable categories. Once Sinn Féin began to contest elections in the early 1980s, their electoral support was to remain steady at approximately one third of the nationalist community.⁹⁰ While loyalist paramilitary organisations or their political counterparts never enjoyed such support in the Unionist community, attitudes towards state violence were much more ambiguous with the two main Unionist parties (the Ulster Unionist Party and the Democratic Unionist Party) constantly calling for ever more vigorous security policies including the use of the supergrass system and 'shooting to kill' republican paramilitary suspects.⁹¹ Mindful of the security risks posed by normal social interaction and conscious that their public pronouncements would inevitably be read through the competing narratives of the conflict, judges had an uneasy relation with the 'public', one which often appeared to be shaped by distrust or overt suspicion.

Performing for Peers

Finally, the third key audience for whom judges appeared to be performing during the Northern Ireland conflict was the judiciary itself. As Baum points out, over and above esteem among regular lawyers, judges are likely to ascribe special value to the opinion of other judges.⁹² Judges have similar educational backgrounds and similar professional experiences and, perhaps most importantly, share in the prestige of occupying a special position within an already high status profession. Moreover, because of their professional proximity and the degree of specialism involved in their job, judges are particularly well-positioned to evaluate one another's performance.⁹³ Hence, being seen as technically and legally skilled by one's

⁸⁵ Interview with senior Northern Ireland judge, 9 December 2002.

⁸⁶ Interview with senior Northern Ireland judge, 13 December 2002.

⁸⁷ *id.*

⁸⁸ For the classic account of the way in which the relationship between individual, community and state is imagined see B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1991 revised ed).

⁸⁹ See for example *R v Shaw and Another* [1989] unreported, Hart, J. The case involved a petrol bomb attack on the home of a police officer. 'The police are in the front line in the struggle against terrorism in Northern Ireland and like members of the Regular Army and the Ulster Defence Regiment they are constantly exposed by virtue of their duties to the risk of grave injury and death. They are entitled when this kind of offence occurs to look to the courts to show the disgust which right thinking members of the community must show for this type of cowardly and despicable behaviour...'

⁹⁰ B. Feeney, *Sinn Féin, A Hundred Turbulent Years* (2003).

⁹¹ E. Graham, 'A Vital Weapon in the Anti-terrorist Arsenal' (1983) *Fortnight* 10; P. Robinson, W. McCrea, J. Allister and I. Foster, *A War to be Won* (1984).

⁹² Baum, *op. cit.*, n.20, pp. 103-104.

⁹³ Baum, *op. cit.*, n.20.

peers - 'professional pride' - is a key part of the judicial socialisation process.⁹⁴ This impulse is both social and professional – a desire to be respected and esteemed by other judges with whom one works on a frequent or daily basis.⁹⁵ In short, being a judge is a conspicuous part of social identity and so the approval of other judges is of course important to a judge's sense of self-worth.

Research from various jurisdictions has explored the importance of collegiality and the sense of professional 'role' to the working culture of judges. In the United States, it is argued that collegiality provides an important counter-balance to the otherwise highly politicized and ideologically charged work of the federal courts.⁹⁶ With respect to Canada, Emmett Macfarlane concludes that norms of consensus and collegiality infuse judicial role perceptions at the Supreme Court and drive the process and outcome of decision-making.⁹⁷ In a similar vein, Alan Patterson, in his interviews with the UK's Law Lords, found that their most important audience was their fellow Law Lords; given their relatively "cloistered" lives, "the one group that a Law Lord interacts with, with the greatest frequency, is his colleagues".⁹⁸ Hence, according to Patterson, a strong collegial dynamic was reflected in the Law Lords' deliberation, decision writing, and subtle efforts to win the approval of their peers (or in some cases sanction their colleagues for 'deviant' decision-making).⁹⁹

The small size of the Northern Ireland jurisdiction could only serve to enhance the importance of collegiality and the salience of the intra-court audience for Northern Ireland's judges. While the etiquette that judges should not enter each other courts was the same in Northern Ireland as in England and Wales, the novel requirement for Diplock judges to produce written judgments meant that they would have been conscious that their reasoning was open to greater scrutiny at appellate level.¹⁰⁰ They would also have been aware that their judicial colleagues could read and evaluate each their judicial work in more 'run of the mill' terrorist cases. In addition, in a small jurisdiction, particularly during the conflict, the decision to become a judge inevitably involved a greater degree of personal and professional isolation. A number of the judges interviewed spoke explicitly about the realities of such isolation of being on the bench, how this was so markedly different than being at the bar and how in effect the judges themselves became a small community within the broader legal system.

Yes, it's very different. It took about a year actually to get accustomed to it because if you've been in the Bar Library, there's such a buzz in the Bar Library, there's 500 people working in there, scampering round every day and coming out in the hall and trying to get everything organised and you are plucked out of that *torrent*. So it's a very quiet and solitary life by comparison, it's quite a transformation ... Certainly one's judicial colleagues become an important source of support.¹⁰¹

There's a dramatic change in lifestyle, I mean you go from ordinary daily practice in the Bar Library to the rare upright atmosphere of the back corridor which is physically quite different and emotionally quite different from practice at the bar

⁹⁴ Posner, *op. cit.*, n.23.

⁹⁵ Baum, *op. cit.* n.20 pp. 53-57; H. Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) 151 *University of Pennsylvania Law Review* 1639.

⁹⁶ Edwards *id.*

⁹⁷ E. Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (2013).

⁹⁸ A. Patterson, *The Law Lords* (1982), p. 32.

⁹⁹ *id.* p. 33.

¹⁰⁰ Jackson and Doran *op. cit.*, n.9 noted the tendency to 'appeal proof' reasoning at p. 282.

¹⁰¹ Interview with senior Northern Ireland judge, 23 April 2003.

and then you've got changes in lifestyle, the security situation and all of us [judges] are in the same boat.¹⁰²

It was very lonely at first, after the gregarious life at the Bar and when I came first we used to sit in our own rooms having lunch on our own Now if we can we [the judges] will have lunch or a coffee together, have a chat and so forth – and it's actually really quite good ... and you hear ... 'I've got a case like that', sure I did that last week and so on ...¹⁰³

But the pull of collegiality and professional pride may not always be in harmony. While a judge might be motivated by professional pride to write clever and creative decisions, collegiality with colleagues may be undermined if those opinions stray too far from established doctrine or if, at the appellate level, he or she dissents too frequently.¹⁰⁴ Again, especially when one considers the relatively small size of the Northern Ireland bench, one might broadly expect acts of judicial self-presentation intended for an intra-court audience to have a generally conservative flavour, eschewing radical new interpretations in favour of consensus and well-worn doctrinal tropes.

Judges were also of course aware that their decisions were open to scrutiny by judicial colleagues elsewhere, particularly in Britain. Throughout the conflict, the House of Lords remained the final appellate court in the United Kingdom for decisions made in Northern Ireland courts. As Livingstone noted writing in 1994 (the year of the cease-fire declarations), at that time only 13 conflict related cases had actually been appealed to the House of Lords from Northern Ireland.¹⁰⁵ Indeed, in reviewing those cases, Livingstone concludes that they suggest a lack of judicial willingness [on the part of the House of Lords] to engage with the human rights aspects of the conflict and that the Northern Ireland Court of Appeal had been more effective in upholding human rights standards.¹⁰⁶ Hence, any notion that the 'fear' of the highest appellate court looking over the shoulder of the Northern Ireland judges could have shaped judicial performance would appear to be largely misplaced. That said, the notion of judicial performance to other judges is broader than the formal appellate mechanisms. The use of supergrass evidence in Northern Ireland is an instructive example.

During the early 1980s, over 500 paramilitary suspects were charged on the basis of evidence from 27 so-called 'supergrasses'.¹⁰⁷ Often the charges laid were based exclusively on the evidence provided by these 'co-operating witnesses' – in practice, usually paramilitary suspects or sometimes state agents who gave evidence in return for immunity and resettlement

¹⁰² Interview with senior Northern Ireland judge, 5 December 2002.

¹⁰³ Interview with senior Northern Ireland judge, 13 December 2002.

¹⁰⁴ L. Epstein, W. Landes R. Posner, 'Why (and When) Judges Dissent: A Theoretical and Empirical Analysis' (2011) 3 *Journal of Legal Analysis* 101

¹⁰⁵ S. Livingstone 'The House of Lords and the Northern Ireland Conflict' 57, *The Modern Law Review*, 333..

¹⁰⁶ Livingstone, id. p.351. In a subsequent article which reviews post 1994 Northern Ireland cases at the House of Lords, Dickson largely agrees although he does argue post ceasefires, the House of Lords has 'begun to demonstrate that they appreciate the historical and political background to the conflict-related cases brought to them from Northern Ireland' and have shown a 'freshness and sophistication' not apparent during the conflict, see B. Dickson, 'The House of Lords and the Northern Ireland Conflict—A Sequel' (2006) 69, *The Modern Law Review*, 383. p. 414.

¹⁰⁷ D. Bonner, 'Combating Terrorism: Supergrass Trials in Northern Ireland' (1988) 51 *The Modern Law Review* 23.

by the state.¹⁰⁸ Despite their initial acceptance of the tactic, the Northern Ireland courts (at both trial and appellate levels) eventually began to subject uncorroborated accomplice evidence to much more exacting standards. By the mid-1980s, achieving a conviction in such cases became virtually impossible. Ultimately, all convictions based on the uncorroborated evidence of supergrass informants were over-turned on appeal and no new supergrass trials were initiated between 1986 and the cease-fires in 1994.¹⁰⁹

In his extensive study of the rise and fall of the supergrass trials in Northern Ireland, Greer examines the factors which led the judges to reject the evidence of the supergrasses.¹¹⁰ Greer accepts the argument, presented by judges themselves, that they became increasingly uneasy that they were becoming complicit in a strategy designed to take large numbers of individuals off the streets without sufficiently robust evidence to convict them.¹¹¹ Significantly for current purposes, Greer suggests that the growing judicial unease regarding supergrasses was probably influenced by a highly critical report on the phenomenon authored by Labour Peer Lord Anthony Gifford.¹¹² Gifford's report was launched in a press conference in the House of Lords. Unlike many of the critical reports on the supergrass system which had been aimed at either Northern Ireland or international audiences, this report by a prominent British lawyer offered largely legalistic criticisms in a carefully measured and neutral tone, and in particular, invited lawyers and judges 'on the mainland' to conclude that the Diplock courts had handled the supergrass cases in ways that were incompatible with common law standards of fairness and due process.¹¹³ Greer notes that this view was eventually subtly endorsed by judges sitting in the Northern Ireland Court of Appeal who had themselves previously convicted on similar uncorroborated supergrass evidence.¹¹⁴ Several of the prominent lawyers interviewed for this research concurred. As one veteran human rights lawyer summed up:

Gifford's report was crucial in changing the mood music. He is a respectable peer and a prominent human rights lawyer. He wasn't just some mad lefty or some Irish American that could be easily dismissed as a Brit basher... I know for a fact because I was there that the report started getting discussed at conferences in England at which our judges were also attending and in sensible and well-reasoned way, taking apart all that was wrong with the supergrass system. It made them very uncomfortable, looking bad in front of judges across the water, they simply couldn't ignore it.¹¹⁵

To recapitulate, we have argued here that better understanding the notions of performance and audience helps illuminate judges behaviour during the conflict. In particular,

¹⁰⁸ P. Hillyard and J. Percy-Smith, 'Converting Terrorists: The Use of Supergrasses in Northern Ireland' (1984) 13 *Journal of Law and Society* 335; J. Jackson, *The Use of Supergrasses as a Method of Prosecution in Northern Ireland*, *Annual Report of the Standing Advisory Committee on Human Rights* (1984).

¹⁰⁹ S. Greer, *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (1995). In 2012 a new so-called supergrass trial also collapsed because of the unreliability of the two principal witnesses. See *R v Haddock* [2012] NICC 5.

¹¹⁰ *id.*

¹¹¹ As one barrister, now a senior judge, described to one of the authors: '... the supergrass cases may not have created a great deal of public confidence. However, the judges showed that they weren't there just to be messed about and do the Executive's business, that they were going to apply it [the rule of law] as they saw it and that they weren't going to be party to a type of judicial internment'. Interview, 28 February 2003.

¹¹² Gifford, A (1985) *Supergrasses in Northern Ireland*.

¹¹³ Greer, *op. cit.*, n.109, p.114.

¹¹⁴ *id.* p. 174.

¹¹⁵ Interview with Northern Ireland solicitor, 11 October 2004.

we believe that the judges were ‘performing’ to at least three audiences - *Parliament, the Public* and *fellow judges*. In the case of both Parliament and the Public, these audiences were socially and politically constructed, or ‘imagined’, by the judiciary. A desire to please these various audiences would not always pull in the same direction, but the net effect was, in our view, to contribute to a conservative judicial culture – what Dickson has described as ‘pro-establishment attitude’ – a worldview which, as Dickson rightly points out, hardly distinguishes Northern Ireland’s judges from judges in other jurisdictions.¹¹⁶

As we have made clear throughout, we do not take the view that judges in Northern Ireland were slavishly subservient to the desires of the Executive, or that they never ‘did the right thing’ in terms of protecting human rights or upholding the rule of law. We have also explicitly recognised the very real dangers faced by judges and the price paid by some of them and their families as a result of their decision to serve on the bench. That said, as we argue below, there is a strong case to be made for a more systemic analysis of the role of the judiciary in the conflict.

Conclusion: Judging and the Past?

Informed by this closer understanding of how the judges themselves appeared to view their role, the final part of this article explores the complex issue of whether and how judicial performance during the conflict might be addressed more formally by others as part of such broader efforts to deal with the past. In particular we are interested in the potential to examine the role of judges not simply as arbiter of the past who are deemed axiomatically ‘above the fray’ (for example in charring judge led inquiries or commissions) but also as actors in an institution which was itself an important part of the conflict and transition.

In the absence of an overarching mechanism established as part of the Good Friday Agreement, there has been a piecemeal approach to examining the legacy of the conflict.¹¹⁷ This has included a range of measures – including judge led public inquiries into controversial events, civil actions, inquests into controversial killings, referrals from the Criminal Cases Review Commission into alleged miscarriages of justice and other measures – many of which have placed judges front and centre. In recognition of the limitations of this fragmented way of dealing with the past, there have also been a number of initiatives which attempted to devise more holistic approaches.¹¹⁸ Most recently, following lengthy political negotiations in 2013¹¹⁹ and again in 2014, the Stormont House Agreement was agreed by the British and Irish governments and the five political parties in the Northern Ireland Executive.¹²⁰ That Agreement is scheduled to be implemented in legislation in Westminster which will come into effect in 2016. It commits to the establishment of a number of bodies including an Implementation and Reconciliation Group (IRG) which will determine a range of themes related to the conflict shall be explored by a group of academic experts.¹²¹ The Agreement

¹¹⁶ Dickson, op. cit. n.14, p.142.

¹¹⁷ C. Bell, ‘Dealing with the past in Northern Ireland’ (2002) 26 *Fordham International Law Journal* 1095

¹¹⁸ For an overview see Healing Through Remembering, *Making Peace with the Past, Options for Truth Recovery in and about Northern Ireland* (2006); Healing Through Remembering, *Dealing with the Past in Northern Ireland: An Overview of Legal and Political Approaches* (2013).

¹¹⁹ R. Haass and M. O’Sullivan, *An Agreement Among The Parties of The Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending With The Past* (2013).

¹²⁰ The Stormont House Agreement (2014).

¹²¹ Stormont House Agreement (2014), para 51.

stipulates that ‘This process should be conducted with sensitivity and rigorous intellectual integrity, devoid of any political interference’. The process is designed to ‘promote reconciliation’ and a ‘better understanding of the past’ and ‘reduce sectarianism.’ It also states that ‘In the context of the work of the IRG the UK and Irish Governments will consider statements of acknowledgement and would expect others to do the same.’¹²²

Given the likelihood that issues such as torture, shoot to kill, collusion, the mistreatment of prisoners and detainees will feature, it is difficult to imagine how such analysis would be done without exploring the role played by the judiciary. Indeed it is clear that a number of important local NGOs intend to lobby that the judiciary should be the subject of precisely such a thematic review.¹²³

Similar questions related to judicial performance during a period of conflict or authoritarian rule have been addressed by truth recovery bodies elsewhere. For example both the Argentinian Comisión Nacional Sobre la Desaparición de Personas (CONAPED) and the Rettig Truth and Reconciliation Commission in Chile explored and were explicitly critical of the failure of the judiciary to protect human rights and the rule of law during the military dictatorships in those countries.¹²⁴ The Reception, Truth and Reconciliation Commission (CAVR) in East Timor was similarly critical of judges for, amongst other things, failing in their duties to provide independent and objective adjudication in political trials and handing down disproportionate sentences.¹²⁵ More recently, the Truth and Reconciliation Commission in South Korea slated the role of the judiciary during a number of periods of emergency which in turn led to an official apology from the Korean Chief Justice for judges have failed to maintain judicial independence, protect citizens’ rights and uphold the rule of law.¹²⁶

However, it is the debates concerning the institutional hearings on the judiciary and legal profession by the South African Truth and Reconciliation Commission (TRC) which are probably most germane to the Northern Ireland context regarding the performance of the judges. The Northern Ireland judiciary were and are very well aware of the issues raised by the South African TRC, indeed the TRC was a the key reference point during the fieldwork for this article when the issue came up.¹²⁷ Thus their experience with regard to the judiciary and the past is worth examining in a little detail for its read-across value.

¹²² id para 52-53.

¹²³ Interview with Director of Committee on the Administration of Justice, October 12th 2014.

¹²⁴ The CONADEP (1984:392) report concluded, ‘*The Judicial Power, which should have set itself as a brake on the prevailing absolutism, became in fact a simulacra of the jurisdictional function to protect its external image....the reticence, and even the complacency of a good part of the judiciary, completed the picture of abandonment of human rights*’. CONADEP (1984) *Nunca Más, Report of the National Commission on the Disappeared*. Rettig (1991) *Report of the National Commission for Truth and Reconciliation in Chile*. R Barros *Constitutionalism and Dictatorship: Pinochet, the Junta and the 1980 Constitution* (2002).

¹²⁵ CAVR (2005) *Report of the Timor–Leste Commission for Reception, Truth and Reconciliation*, chapter 7.6) However, as Linton, one of the legal advisors to the Commission acknowledges, the CAVR did not actually interview any Indonesian judges. S Linton and F. Tiba, F ‘Judges and the Rule of Law in Times of Political Change or Transition’ in MC Bassiouini, G Joanna and P Mengozzi (eds), *The Global Community Yearbook of International Law and Jurisprudence* (2013) at p. 219.

¹²⁶ P. Hanley ‘Transitional Justice in South Korea: One Country’s Restless Search for Truth and Reconciliation.’ (2014) 9 *University of Pennsylvania East Asia Law Review* 138.

¹²⁷ E.g. ‘*I would talk to Albie Sachs about that [a truth commission] because he could persuade me to do anything. He is pretty persuasive! ...If you had your wife or husband killed, you don’t know who did it or why they did it or what is the explanation for it. Surely it is helpful to actually know...However, on balance, I am probably slightly against it because I think where would we then go? Where would you begin? Where would you end? ... Inquiries do not always provide universal satisfaction no matter how hard you try.*’ Interview Northern Ireland Judge, 13 December 2002. Albie Sachs is a former South African political prisoner, exile and

Section 3, 1 (a) of the Promotion of National Unity and Reconciliation Act (which set out the remit of the TRC states that its key objective of the TRC ‘was to establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights..’. In order to get as complete a picture as possible of the past the TRC’s Committee for Human Rights Violations organised a number of ‘institutional hearings’ towards that end. The TRC invited participants from the legal community to address a range of themes on the role of the judiciary and legal profession.¹²⁸ The letters of invitation made clear that the purpose of the hearings was to understand the broader role of the legal system during Apartheid and specifically not to ‘establish guilt’ or hold individuals responsible. Despite the best efforts of the TRC Chair Archbishop Tutu, and other Commissioners, no judge gave evidence in person to the TRC. While the TRC did have the power to subpoena witnesses, this power was not utilised to compel judges to attend. A number of written submissions were received, including from the new Chief Justice Ismail Mahomed, Arthur Chaskelson President of the Constitutional Court and several others.¹²⁹

In replying to the original invitation from the TRC, outgoing Chief Justice Michael Corbert (an apartheid era judge) argued that while it would be ‘foolish’ to claim that the courts did all they could have done under Apartheid, ‘the broad picture is, in my estimation, a favourable one’.¹³⁰ He defended the ‘bad spots’ on the judiciary’s Apartheid record on the grounds of the fact that Parliament was supreme, and hence judges were bound to interpret the law as they found it. He also objected to the judges attending on two grounds – ‘unfeasibility’ (i.e. that the TRC would have to review every judicial decision without counsels arguments to determine if justice was done – ‘a mind-boggling’ undertaking’) and second, that judicial attendance would encroach upon judicial independence, ‘a key element of the constitutional separation of powers’.¹³¹ To this day in South Africa, the decision by the judiciary not attend the TRC remains a highly controversial issue.¹³² Some commentators view it as a pragmatic decision by a judiciary struggling to hold together a mixture of ‘new’ judges, some of whom had been very prominent in the anti-Apartheid struggle as well as judges from the old order.¹³³

For others, it has been a source of significant criticism. As another former Law Professor and ANC Minister Kadar Asmal summed up, it represented on the part of apartheid era judges ‘a calculated refusal to take on board the full extent of their culpability in the policies of the past’.¹³⁴ As detailed above, former Chief Justice Langa and his Constitutional Court colleague Justice Cameron have since made public their conclusion that the decision not to attend was wrong.¹³⁵ South African judges interviewed more recently by McEvoy have taken a similar

judge on the post-apartheid Constitutional Court – South Africa’s Supreme Court. Justice Sachs, who waived his right to anonymity, was interviewed by McEvoy August 12th, 2014. He spoke at length about his interest in Northern Ireland and his views that the jurisdiction needed some form of truth recovery process to come to terms with its past.

¹²⁸ SATRC Institutional Hearing Report, (1998) p. 94.

¹²⁹ Dyzenhaus op. cit. n.5; H Rombouts, *The Legal Profession and the TRC: A Study of a Tense Relationship* (2002).

¹³⁰ Chapman, A ‘Truth Recovery through the TRC’s Institutional Hearings Process’ in AR Chapman and H van der Merwe (eds), *Truth and Reconciliation in South Africa: Did the Truth Deliver* (2008).

¹³¹ Dyzenhaus op. cit. n.5 p.37.

¹³² Interview Justice Sachs, op cit., n.127.

¹³³ Interview Prof. Hugh Corder, 12th August 2014 (waived right to anonymity).

¹³⁴ Asmal, K (1998) ‘Foreword’ in Dyzenhaus op cit n.5 p. x.

¹³⁵ Langa, P and Cameron, op cit., n.2.

view. As one argued in response to the inter-related questions as to whether the judges should have appeared and if they had, whether it would have been possible to maintain judicial independence:

It was an absolutely right thing for lawyers and the Law Society and the Bar Councils and the judiciary to be called to the TRC... Some of the judges said 'they want us to come and justify our judgements in the TRC, we're not going to do that'. But they missed the point. The issue was accountability of the judiciary [speakers emphasis], not on particular judgements, sentences or decisions but rather how they allowed the judiciary to be part of the edifice of apartheid...we had to do it and it could have been managed. The judges of old ought to have accounted, not individually but as the collective, as the institution. And that, if anything, would have strengthened the ethical position of the judiciary around independence.¹³⁶

Of course one cannot make simplistic comparisons between Northern Ireland and Apartheid era South Africa in general or indeed about the role of the judiciary in the two jurisdictions. That's said, the broad themes at stake, are similar and indeed the debate in South Africa encapsulates perfectly the issues which would be raised by a process involving an examination of the past role of the judiciary. In reality, there is little prospect that the Implementation and Reconciliation Group envisaged under the Stormont House Agreement will be able to compel anyone to attend, make submission or be interviewed – let alone the judiciary. Rather, like judges and lawyers in South Africa, individuals or institutions may be *invited* to make submissions, presentations or have discussions with those undertaking the analysis of the past. Even such a comparatively 'light touch' approach raises challenges with regard to the judiciary. For example, how does one protect the independence of the judiciary if judges are asked however politely to account for past behaviour to a body established by the British government and Northern Ireland Executive? What would be the consequences for current confidence in the judiciary if there were to be a very public conversation about how well (or not) judges performed their role during the conflict? How would the judiciary avoid becoming overtly politicised by competing political or communal narratives on the past? What would be the consequences amongst the judges themselves with perhaps some judges being willing to participate in such a process and others not? These and other questions underline that the issues involved are both complex and sensitive.

Having invested significant time and energy in talking to judges themselves, as well as reviewing a broad range of their legal judgements and relevant academic literature, we have come to the conclusion that including the judiciary as an element of dealing with the past in Northern Ireland is both manageable and necessary. Of course, the judiciary would have to be persuaded of the bona-fides of the structure as well as the operating rules of any past facing process. Providing that appropriate mechanisms were devised to ensure that this challenge could be met, we see no compelling reason for the judiciary to be exempt from any broader process. A central tenet of what Mayer-Rieckh and Duthie refer to as a 'justice sensitive approach to institutional reform' is that an honest appraisal of the past is required in order to underpin and strengthen contemporary and future public confidence in that institution.¹³⁷ One of the charges most often levelled by politicians against the judiciary in Northern Ireland is that they are too sensitive to any sort of criticism. Participating in such a process would

¹³⁶ Interview High Court Judge, 11th August 2014

¹³⁷ A. Mayer-Rieckh and R. Duthie (2009) 'Enhancing Justice and Development through Justice-Sensitive Security Sector Reform' in *Transitional Justice and Development: Making Connections*, eds. P. De Greiff and R. Duthie (2009).

underline the capacity of the judiciary as an institution to engage in a mature, reflexive and where appropriate self-critical discussion about the good and bad of its own history. Taking the importance of judicial independence as a given,¹³⁸ institutionalising that independence requires more than a legislative and policy framework, it also requires an historical and contemporary public understanding of why it really matters.¹³⁹

Apart from serving to further underpin judicial independence, we would argue that another reason for addressing the judicial past in Northern Ireland emerges is contained in our own fieldwork. One insightful anonymous reviewer for this paper noted the ‘ordinariness’ of many of their judges’ responses regarding their role during the conflict, despite the extraordinary circumstances through which they lived and worked. Operating in a juryless emergency law environment for a quarter of a century, judges oversaw thousands of trials of politically motivated offenders. They were under constant threat from paramilitaries – these are not ‘normal’ activities for any United Kingdom high court or appellate level judges. Such an apparent lack of self-reflection may be a by-product of inherent judicial reserve, a reflexive discomfiture at moving beyond legalistic discussions which is part of the ‘self-legitimation’ work of judges or of their ‘working personalities’ which have become too deeply engrained to shake off in an interview.¹⁴⁰ Alternatively, perhaps judges, like people in other walks of life in Northern Ireland or similarly conflicted societies, were involved in ‘negotiating normality’,¹⁴¹ wherein conflict related work and its consequences did in fact become ‘normalised’ as an additional subset of work alongside all the tort cases, commercial decision, family law and so forth which of course continued. Or indeed perhaps judges were and indeed continue to be involved in what Cohen has termed a ‘state of denial’¹⁴² about their role in the conflict.

Regardless their reasons, to paraphrase Laurence Douglas, the judges were in fact involved in both ‘making law and making history’ and an awareness of that dual function remains social and politically important.¹⁴³ Facilitating such self-awareness amongst the judges would be augmented by engagement with others, in this instance the academic experts who it is envisaged in the Stormont House Agreement will research and write the thematic analysis on the past. As Maxwell has argued recently in her insightful discussion on Arendt’s account of the Eichmann trial, sometimes it requires judges to engage with a non-legal audience in order that we and they can ‘see truth’ beyond the law.¹⁴⁴ Engagement with an external audience through a past facing mechanism could similarly assist the judges to move beyond legalism in address their own history.¹⁴⁵

In the pre-conflict era, judges came largely from the Unionist establishment and, rightly or wrongly, their background and proximity to Unionist politics meant that, for some nationalists at least, they were viewed as an integral part of the ‘Orange State.’¹⁴⁶ During the

¹³⁸ Bingham, op. cit. n. 64, p. 25.

¹³⁹ G. Tarr, *Without Fear or Favour: Judicial Independence and Judicial Accountability in the States* (2012).

¹⁴⁰ R. Barker *Legitimizing Identities: The Self-Presentations of Rulers and Subjects* (2001); P. Darbyshire *Sitting in Judgement: The Working Lives of Judges* (2011).

¹⁴¹ See I. Maček *War Within: Everyday Life in Sarajevo under Siege* (2000) for an interesting discussion on similar impulses in the most extreme of circumstances.

¹⁴² S. Cohen *States of Denial: Knowing About Atrocities and Suffering* (2001).

¹⁴³ Douglas op. cit., n.30.

¹⁴⁴ L. Maxwell *Public Trials* (2015), p. 141. H Arendt *Eichmann in Jerusalem* (1963) esp. Ch. XIV

¹⁴⁵ See K. McEvoy ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice.’ (2007) *Journal of Law and Society*, 34, 411.

¹⁴⁶ Boyle, Hadden and Hillyard, op. cit., n.32; M. Farrell, *The Orange State* (1980).

conflict, judges were at the apex of a transformed criminal justice system which included internment without trial, emergency laws, supergrass trials and other developments which undoubtedly led to human rights abuses.¹⁴⁷ Moreover, the judiciary themselves were never completely ‘above the fray’, simply interpreting the rule of law as detached, scientific legal technicians. Real people were involved. Being on the bench had very direct human consequences. Judges and their family members were murdered. Their daily lives, the performance of their judicial function and their understanding of the community which they served were all shaped by the conflict. A balanced, fair and objective exploration of the complex contours of this judicial history should be part of the broader mosaic of dealing with the past in Northern Ireland. Michael Ignatieff has famously offered a rationale for engagement with truth recovery that, whilst one may never get the complete truth about any conflict, such a process does reduce the opportunity for what he termed ‘permissible lies’ about the past.¹⁴⁸ By including the role of the judiciary in such a process it would no longer be politically or intellectually tenable to describe the judges in monochromatic terms as either ‘heroes’, who were beyond reproach, or the supine lackeys of Unionism or the British state. Narrowing the space for such versions of history about such a centrally important institution should be a key element of coming to terms with our collective past.

¹⁴⁷ Amnesty International, *Report of an Amnesty International Mission to Northern Ireland* (1978); Amnesty International, *United Kingdom: Killings by Security Forces and Supergrass Trials* (1988); Amnesty International, *United Kingdom: Allegations of Ill-treatment in Northern Ireland* (1991).

¹⁴⁸ M. Ignatieff, ‘Articles of Faith’ (1996) 25 *Index on Censorship* 110.