No Foundations 18

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Editorial

Law and emotions – new paths for research?

> In the conventional story, emotion has a certain, narrowly defined place in law. It is assigned to the criminal courts, it is confined to those – like witnesses, the accused, the public, without legal training. In this story, there is a finite list of law-related emotions – anger, compassion, mercy, vengeance, hatred – and each emotion has a proper role and a fixed definition. And it is portrayed as crucially important to narrowly delineate that finite list and those proper roles so that emotion doesn't encroach on the true preserve of law: which is reason. (Bandes 1999, 2.)

Since the 1990s, research on law and emotion has emerged as a distinct field encompassing analyses of legal theory as well as empirical studies (Abrams & Keren 2010; Maroney 2006; 2016; Grossi 2015). Of course, legal realists have long since recognized that sometimes legal decision making is coincidental and affected by different kinds of emotional biases (law in books vs. law in action), and, according to Pasquetti (2013), it would actually make more sense to 'speak of a renewed analytic focus on the link between law and emotion' since 'it is above all the works of Durkheim that theorize the emotional foundations of legal procedures, punishment, and penal institutions'. Indeed, emotions have not been completely disregarded as unimportant, but none the less considered as nonlegal factors which impact legal decision making in unsuspected and legally unfounded ways. (See Mindus 2015.) In fact, the need to challenge this pervasive distinction between reason and emotion, and the marginalization of emotion from legal reasoning and

its aspired objectivity, motivated many of the theoretical and empirical studies on law and emotion, as we can see in the opening quote from the 1999 seminal collection of essays, *The Passions of Law* (Bandes 1999). It is in this fascinating field of research that two of the articles in the issue of the No Foundations at hand have their focus.

Law and emotion scholars have challenged the exclusion of emotion in law and studied the relationship between law and emotion from different perspectives, researching topics such as the effect of emotions on different legal actors and emotion in legal decision making; (Bandes 1996; 2006; Bornstein2010; Dahlberg 2009; Douglas, Lyon, & Ogloff 1997; Feigenson 1997; Little 2001; Myers, Lynn, & Arbuthnot 2002; Nussbaum 1996; Sanger 2013) emotional experiences of law in legal proceedings; (e.g. Deflem 2017) and emotions in different legal fields such as criminal law, family law and transitional justice (Abrams 2009; Becker 2002; Goodrich 1998; Huntington 2008; Nussbaum & Kahan 1996; Seuffert 1999; Van Roekel 2016). The roles of particular emotions, such as fear, shame, empathy, love, disgust and hope, have also been studied in the context of law (Abrams & Keren, 2007; Bandes 2004; Goodrich 1996, 1998, 2002, 2006; Henderson 1987; Kahan 1998; 1999; Massaro 1991; Nussbaum 1999; Peterson 1998; Seuffert, 1999).

The emergence of the law and emotion scholarship coincides with a proliferation of inquiries focusing on emotion and affect in social and cultural studies, sometimes described as the turn to affect (e.g. Ahmed 2004; 2014; Bens 2018; Bens & Zenker 2019; Frevert 2010; 2014a; 2014b; Gregg and Seigworth 2010; Rosenwein 2002; Rosenwein and Cristiani 2018; Matt and Stearns 2014; Nussbaum 2001; Reddy 2001; Scheer 2012; Stearns and Stearns 1985). Unsurprisingly then, as Maroney (2016, 4) points out, contemporary scholarship recognises 'law as a flexible, context-driven mechanism for reflecting, managing, nurturing, or (dis)incentivizing specific emotions in specific situations for specific purposes'. In recent years, the literature on law and emotion has expanded, diversifying the research about the nature of emotion and its role in law and making the analyses increasingly nuanced (Maroney 2016). However, despite the growing awareness concerning the relevance of emotions to cognition in general and to law specifically, the relationship between law and emotion remains undertheorized (Grossi 2015).

The two articles by Emma Jones and Antti Malinen make invaluable, yet completely different, contributions to the law and emotions scholarship. In her article, Jones challenges the assumption that only some legal professionals are affected by emotions, drawing on original empirical data concerning the intersections between emotions and lawyers' work and well-being. The study is a pilot for a larger project on the role of emotion in the solicitor's profession, and makes a contribution to empirical research on law and emotions. In the study,

twenty solicitors from different areas of practice were interviewed about if and how, in their view, emotions were involved in their work. Jones argues that paying greater attention to the various ways in which emotions pervade all areas of legal practice is urgent, because such attention would allow individuals to question situations in which emotional experiences bring about harm or might enable empowerment.

The article by Malinen studies the emotional dynamics of seeking justice in postwar Finland of the 1940s by analyzing a case in which the staff of a reform school was accused of wrong-doings against former inhabitants of the institution. The article studies the role that emotions and feelings of injustice played in care-leavers' efforts to seek justice and in the formation and activities of a protest group. Situating the case in its historical context, Malinen looks at how members of the protest group dealt with, shared and negotiated their feelings.

Common to both articles is the view that emotions define communities as well as the rationality of the law. In Jones' article the community in question is the legal profession, whereas Malinen shows interestingly how an emotional community functions as an epistemic community. Both articles thus refer to the broad cultural and historical work on affect and emotion, in which emotions are viewed not merely as psychological states that individuals or collectives have (Frevert 2010, 96), but as something that, in Ahmed's words (2014, 10), produce 'the very surfaces and boundaries that allow the individual and the social to be delineated as if they are objects.' Indeed, emotion and affect are interesting for socio-legal analysis because they generate meaning, take part in the production of the ordinary and produce investments in social norms, as well as because of their power to shape communities through hierarchies of belonging (Ahmed 2014; Frevert 2014a; 2014b).

Constructionist and relational approaches to emotions emphasise discourses or cultural codes in which meaning is attached to emotions, and highlight the fact that the ways in which emotions are expressed is socially and culturally prescribed (Rosenwein and Cristiani 2018, 29; Frevert 2010, 96). Carol and Peter Stearns, for example, studied the history of emotion through an approach they called 'emotionology' (Stearns and Stearns 1985), an examination of 'how social norms about emotional expression changed in reaction to transformations in family life and law, economic growth, and political upheaval' (Matt and Stearns 2014, 4). Focusing on elites and hegemonies, William Reddy (2001) emphasised the political and controlling effects of emotions. He coined the term 'emotional regime', referring to a set of normative emotions, official practices, and rituals of expressing such emotions. Scheer (2012, 200) emphasizes that emotions depend on socialisation, 'a learned, culturally specific, and habitual distribution of attention to "inner" processes of thought, feeling, and perception", which are not universal traits of personality or subjectivity. The history of feeling can and should

be integrated into the study of socially produced subjectivities (Scheer 2012, 206).

Barbara Rosenwein's notion of 'emotional community' sheds light on the modes of emotion valued or considered inappropriate in different social communities in different times, and the variety within seemingly coherent social systems (Rosenwein & Cristiani 2018). An emotional community is a group that adheres to the same valuations of emotions and how they should be expressed, and thus constitutes a community of emotional styles and norms (Plamper 2010). As such, this concept could well be of relevance also in understanding how and why members of the legal profession hold particular attitudes towards emotions. Indeed, the analysis provided by Jones demonstrates how the professional legal community takes form as an emotional community pertained by systems of feeling, which are defined by what this profession sees as valuable or harmful to it, the nature of the affective bonds between people that it recognises, and the modes of emotional expression that are expected, encouraged, or tolerated (Rosenwein 2002, 35). Such a perspective might be useful in future endeavours to understand for example the emotional intelligence appreciated by lawyers.

The notion of emotional community is essential for Malinen as he uniquely links it to Miranda Fricker's theoretical work on epistemic injustice. Fricker originally distinguished between two forms of epistemic injustice: testimonial and hermeneutic (Fricker 2007). When an audience's prejudice concerning the speaker's social identity (that can show in their habitus, for example through emotional expression considered inappropriate) causes the speaker to be recognised as non-credible, the speaker will suffer testimonial injustice. Malinen shows how emotions in the studied case had a central role in how the individuals and groups broke out of existing hierarchies relating to their position as credible knowers and thus 'tried to come to terms not only with war and its social effects, but also with other more deeply rooted grievances and injustices related to social class and positions'.

But Malinen's analysis also speaks of hermeneutical injustice, which Fricker defines as 'the injustice of having some significant area of one's social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource' (2007, 155). As the concept of childhood trauma had not yet been introduced in the psychiatric or mundane vocabulary, the experiences of the former inmates, whose credibility as knowers was disputed from the outset (they were children, former inmates, and of low social backgrounds), were unknowable to the broader community. The struggle over the appropriate emotional response of the former inmates could be seen as a struggle over affective reorientation (Ahmed 2014), which eventually broadened the scope of possible knowledge and allowed the children's experiences to be seen, believed, validated and

respected. In this sense, the case was a step towards fuller legal subjectivity of the child, and children's stronger position as members of the epistemic community. This interlinkage of the work on the history of emotions and epistemological justice can well be considered ground-breaking, and definitely calls for future research.

In addition to the articles by Jones and Malinen, this issue features a fascinating study by Nadia Tapia and a book review by Jukka Viljanen. Tapia scrutinizes the category of 'victims of mass atrocity' and the ways in which it is utilized in the Colombian context. In the process, an identity is being shaped, but this identity remains in dispute and never fully achieved. She suggests that the most empowering attitude for victims might be dis-identification. Demonstrating the strategic uses of the concept of victim in the decades-long internal armed conflict involving the Colombian state, insurgent guerillas, and paramilitary groups, Tapia shows how the victims of the conflict have sought recognition as victims on the one hand, and challenged, re-interpreted and dis-identified from the legal concept of 'victim' on the other. The concept of victim empowers those who have suffered from the conflict, as it allows them to insert certain claims into the political discussions, but the outcome of these claims remains out of their control. For the state, the strategic adoption of international law reaffirms the legitimacy of the state and the concept of victim 'allows it to respond to the challenge without necessarily addressing the victims' deeper claims'.

In his insightful review, Viljanen provides a sophisticated reading of the recent edited volume *Research Handbook on Law and Courts* (2019), edited by Susan M. Sterett and Lee Demetrius Walker. The book introduces innovative approaches to research on courts as governing institutions. The volume addresses contemporary trends in research in a context in which courts face new global challenges, such as digitalization or populist attacks that aim to decrease the legitimacy of the courts. Viljanen points out that a central question of our time is how courts manage attacks that explicitly question the interlinkage of democracy, human rights and the rule of law, and recommends the book to anyone seeking new approaches to research on law and courts.

This issue of the *No Foundations* comes out in exceptional times. During the publication process of this issue, the world has experienced different stages of the global pandemic, including two periods of full lockdown in most countries. As academics, we stand in a privileged position compared to many others who cannot work remotely, or who in their daily life fight the pandemic in the front line. However, many of us also face the effects of isolation, loneliness and the niggling feeling of losing a sense of meaning in our work. We cannot but hope that interactions will soon revive and that meanwhile we all stay healthy and sane – an emotional thought that demonstrates how dependent our capability of being rational is on a feeling of connectedness.

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The role and impact of emotions within everyday legal practice

Emma Jones*

1. Introduction

In just over twenty years, the field of law and emotions has developed exponentially as a site of scholarship and research (Bandes 1999; Maroney 2006). Within this field, there has also been an emerging interest in the varying ways in which emotions intersect with the work of legal professionals. For example, Pierce's (1995) ethnography of life in two US law firms, Silver's (2004) work on the role of affect and 'emotional competence' in the roles of US lawyers and Bergman Blix and Wettergren's (2019) exploration of the role of emotion in the Swedish courtroom. With the early exception of Pierce (1995), the work situated within this law and emotions paradigm has tended to focus on those areas of legal practice which are most explicitly emotive in content, involving potentially traumatising emotional experiences, such as criminal and asylum work. For example, in the UK context, Westaby (2020, 2014, 2010) has produced a body of work on the emotional labour involved in working in the criminal justice system and advising

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clients' seeking asylum (see also Graffin 2019; Baillot et al 2013). However, there is still relatively little work examining the role of emotions within day-to-day legal practice, especially within areas of work that may be seen as more 'commercial' or 'corporate' (and thus less overtly emotive) in nature.

An additional, relatively discrete, body of work has also evolved focusing on the psychological wellbeing of legal professionals (Krieger & Sheldon 2015; Kelk et al 2009). A common theme within this work is that legal professionals experience higher levels of stress, anxiety and depression and lower levels of wellbeing than the general population (Jones et al, 2020). The focus of discussions in this area has tended to be on a meta-level review of broad factors impacting on psychological wellbeing, such as the notion of 'thinking like a lawyer' (James, 2005) rather than the detailed micro-level of daily practice. Although there are some studies focused on the more 'commercial' or 'corporate' areas of practice, following the general trend of this corpus, these have tended to highlight the broader structural and cultural elements influences on wellbeing, such as the billable hour model of legal practice (Bergin and Jimmieson, 2014) or to focus on specific populations, such as entry-level lawyers (Holmes et al, 2012). Although many of the factors implicated in poor levels of wellbeing often implicitly have emotional aspects, such as the common emphasis on the emotional impact of interactions with clients and colleagues (Jones et al 2020), there is surprisingly little explicit discussion of the intersections between emotions and wellbeing within this literature.

Both of these bodies of work (and this study itself) are situated against the wider backdrop of general scholarship on the role and purpose of emotions. There is a strong tradition of emotions being perceived as forms of animalistic instinctual responses or evolutionary throwbacks that are largely irrational and require control through the application of cognition and reason (Darwin, 1872; Tomkins & McCartur, 1964; Ekman, 1992). In keeping with this characterisation, law and emotions scholars have commonly observed that the law in general often attempts to suppress or ignore emotions, viewing them as antithetical to the forms of reason and rationality which are often seen as the hallmark of both legal scholarship and legal practice (Maroney, 2006; Abrams & Keren, 2010; Grossi, 2015). However, recent work on emotions generally clearly demonstrates a more complex relationship between cognition and emotions, with emotions viewed as intertwined with, or even a part of, cognition and thus forming an integral part of reasoning (Nussbaum, 2001; Damasio, 2006; Feldman-Barrett, 2018). The implications of this shift in understanding are summarised well by Bandes and Blumenthal who state that emotions:

> [I]nfluence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate. (Bandes & Blumenthal, 2012: 163-4)

Given the ways in which emotions influence so many processes of motivation, judgement and decision-making, it is perhaps unsurprising that their role within a range of workplaces has increasingly been explored (Fineman, 2003; Fosslien and West Duffy, 2019). However, as noted above, in relation to legal practice this exploration has remained largely focused on overtly emotive areas of practice or on meta-level factors impacting psychological wellbeing. This can be attributed, at least in part, to the traditional resistance of law and legal practice to the acknowledgment and acceptance of emotions (Maroney, 2006; Grossi, 2015). In relation to the legal profession, such resistance appears to have generated an unstated assumption that only certain populations of the legal profession are vulnerable to the experience of, or impacted by, emotions.

This paper therefore provides a unique contribution to the existing body of research on emotions in legal practice by challenging this unstated assumption and providing original empirical data exploring the intersections between emotions and the day-to-day work and wellbeing of legal professionals within a broad range of areas of private practice, including those with a 'corporate' or 'commercial' focus. Drawing on the findings of interviews conducted with twenty solicitors practising in England it provides an insight into the complex and nuanced ways in which emotions pervade all areas of legal practice and life in the law. In doing so, its exploration of emotions encompasses the ways in which individual legal professionals experience, regulate, manage, suppress and display emotions, as well the ways in which they identify and manage emotions in others, notably clients and colleagues. Exploring the fine-grained emotional experiences of individual legal practitioners reveals the significance and value of emotions and emotional competencies within the legal workplace, together with the impact of legal practice on the emotional wellbeing of individuals. The findings also highlight the problematic ways in which the affective domain (emotions, feelings and moods) is still conceptualised, in particular, the tensions between legal professionals' use of emotions and their understanding of workplace professionalism.

Overall, this paper will argue that legal professionals need to pay greater attention to the varied and rich ways in which emotions interact with the routine legal practices undertaken within individual areas of practice. Such attention would allow individuals to question and

challenge when emotional experiences negatively drift into harm (for example, via increased emotional labour or inappropriate expectations in the workplace) and empower them to challenge assumptions of professionalism which disregard the use of emotions. Such a detailed scrutiny has the potential to challenge individual practitioners' absorption and perpetuation of deeply embedded cultural norms within legal practice and encourage emotionally and psychologically healthier ways of working within law.

2. Methodology

Definitions of the legal profession in England and Wales are evolving due to imperatives such as the incursion of lawtech and digital lawyering and increased de-regulation through the Legal Services Act 2007 (Ching et al, 2018). Nevertheless, the two dominant branches remain those of barristers and solicitors (Legal Education and Training Review ('LETR'), 2013, Chapter 3). Solicitors form the largest branch, with 183,286 individuals listed on the Law Society of England and Wales' 'Find a Solicitor' database (2020) at the time of writing. They are commonly the first point of contact for a client with a legal issue and will frequently work with their client through to resolution of their issue, instructing barristers and other third parties when required (Prospects, 2020). The significant role of solicitors within the justice system of England and Wales, and their typically close and sustained contact with clients, influenced their selection as the population for this study. Given the size of this overall population, the sample selection was limited to solicitors working in private practice either within a firm (of any size) or as a sole practitioner.

A stratified purposive sampling technique was used, based on data freely available from the Law Society of England and Wales's 'Find a Solicitor' service, including basic contact details (supplemented by searches of firms' websites where required). Excluding solicitors working in the public sector, in-house or in consultancy roles resulted in the identification of 100,072 individuals working in private practice as a solicitor. Using the searchable categories available on the service, approximately 20 solicitors from each of the following categories were selected – 'consumer and civil rights', 'family and relationships', 'accident and injury', 'company and commercial' and 'dispute resolution (business)'. This was to ensure that a broad range of practice areas were covered, including both contentious and non-contentious work whilst the potential number of interviewees still remained manageable in terms of workload for the project. Where possible, within these categories, individuals were selected to represent a wide range of post-qualification

experience ('PQE') and different sizes of practices (from sole practitioners to large city firms). They were also selected to represent different geographic locations, including major cities (London, Manchester and Sheffield), a large town (Oxford) and provincial areas in the vicinity of these locations. In addition, one trainee was included after being personally suggested by one of the other interviewees, introducing an element of 'snowball' technique to the methodology (Atkinson & Flint, 2001).

Each solicitor in the sample was sent an invitation email and a project information sheet which introduced the author and her research assistant, set out the aim of the research, why the individual had been selected, what the research involved and addressed issues of confidentiality. They were informed that the study's purpose was to 'understand whether solicitors in a range of differently sized firms and a variety of practice areas perceive emotion as being relevant to their work and what (if any) emotions practising law can involve'. The information sheet also referred to the study as focusing on 'whether various emotional competencies (sometimes collectively known as "emotional intelligence") are relevant to solicitors in private practice'.

Where no response was received from a solicitor, follow-up telephone calls were undertaken, reiterating key points from the project information sheet. Following these emails and calls, twenty participants agreed to be interviewed, including fifteen males and five females with PQE's ranging from 1 year to 36 years PQE (plus the aforementioned trainee). Several participants had also worked in the legal profession in different roles, prior to qualifying as a solicitor, including one former barrister and several former paralegals. Practice areas included Commercial Contracts, Commercial Property, Consumer Protection, Corporate Law, Family Law, Employment Residential Property and Tax. Nine participants specialised in litigation, however, the types of litigation varied from general Commercial and Private Litigation through to specialisms in Media Law, Insurance Law and Trusts and Probate. For the purposes of this paper, each participants' quotations are identified by a pseudonym, job title, years of PQE and primary practice area(s).

The interviews were conducted by a research assistant in June and July 2017 either face-to-face or via telephone. They ranged in length from around 20 minutes to around 62 minutes, with an approximate average of 36 minutes. They were semi-structured in nature with the following 9 core questions being used as a framework:

1. Please can you briefly explain how you ended up as a solicitor?
2. Please can you describe your main area of practice and the type of work you do.

3. Do you see there as being any emotion involved in the above work?
4. Have you dealt with any clients that you would describe as "vulnerable"? If so, did you receive any specific training or support in dealing with these clients?
5. Do you think there are any advantages or benefits to using emotional skills and competencies in legal practice?
6. Do you think there are any disadvantages or potential difficulties with using emotional skills and competencies in legal practice?
7. The Legal Education and Training Review in 2013 suggested that "emotional intelligence" could be a key competency for solicitors. Do you agree?
8. The Legal Education and Training Review and the Bar Standards Board have also both referred to empathy as important within legal practice. Do you agree?
9. This research project is designed as the pilot for a larger project on the role of emotion in the solicitors' profession. Do you think there are any specific topics relating to this that need investigating further?

Although notes were made of potential follow-up questions, the research assistant was briefed to encourage naturally-flowing dialogue and discussion, based on the answers of participants.

The recordings of the interviews were transcribed by a professional service, resulting in approximately 325 pages of transcription (around 129,409 words). The transcripts were subjected to an inductive thematic analysis by the author (Braun and Clarke, 2006), using NVIVO software. This involved reading each transcript closely several times before undertaking a systematic coding exercise on them all. The codes were then examined to search for potential themes and the themes reviewed before clear definitions and names were affixed to them (Braun & Clarke, 2006, p.87; Clarke et al, 2015, p.230). Unfortunately, one recording was corrupted, meaning only the first twenty minutes of the interview could be analysed. The overall analysis resulted in six themes: attitudes towards emotions and empathy; factors influencing the role of emotions in legal practice; solicitors' characteristics and skills; the role of emotions in client care; interactions with colleagues, employers and third parties; and training needs and gaps. It was felt an 'inductive thematic' saturation point had been reached at an analytic level - in terms of the development of codes and themes in response to the aim of the research project (Saunders et al, 2018, p.1897). However, the breadth of participants involved and areas of practice covered mean that there are a myriad of potential additional research topics for future exploration.

For the quotations in this paper, the articulations such as 'um' or 'er' contained in the verbatim transcripts have been removed, as have repetitions of words. A bracketed ellipsis '[…]' is used to replace incidental phrases such as 'you know' or 'I mean'. Where larger edits have been made, non-bracketed ellipsis '…' have been used. Quotations of five words or under have not been attributed to a specific participant, unless necessary for context.

The relatively small number of participants can be viewed as a limitation of this study. The aim of achieving a broad range of PQE's in diverse areas of private practice was achieved, but it is arguable that this also meant that discussion of a particular area of practice was limited to the views of one or two individuals. In addition, the gender divide between participants was unequal, leading to the voices of female participants potentially being under represented. This was an unexpected outcome, given previous findings that indicate emotions are often perceived as gendered within legal practice, commonly associated with areas of practice perceived as more 'feminine' in nature, such as family law (Webley and Duff, 2007; Pierce, 1995). The self-selecting nature of participants also suggest that they may, at least in some cases, have a pre-existing interest in the topic of emotions (with one participant referring to various literature on emotions they had previously read). However, in other instances it appeared that the invitation to interview itself had provoked an initial interest in the topic:

> Before you sent me that email […] I knew in the back of my mind that there is, there are emotions, we get involved emotionally and we do need help sometimes. But I never thought that there can be a structure for this or there can be… this can be addressed some way. (Jin, Solicitor, 2 years PQE, Commercial and Residential Property).

Overall, the findings provide a valuable initial picture of a range of areas of legal private practice where the role of emotions is under-explored. This could be developed further by subsequent research targeted at specific target areas of practice and key themes which have been identified.

3. Attitudes towards emotions and empathy

One of the paradoxes when speaking, or writing, about the emotions and affect is that terms such as 'emotions', 'emotional intelligence' and 'empathy' are frequently used throughout the public domain, often with an accompanying assumption that there is a shared understanding of the term. In contrast, these (and other) terms are contested and potentially

problematic within academic literature. The Introduction to this paper touched upon the different perceptions over the relationship between cognition and emotions, but more generally emotions have been characterised in myriad ways, from socially constructed experiences to individual appraisals of external events through to basic programmed responses (Oakley et al, 2006). Vocabulary such as this can be termed as 'suitcase words' (Cambria et al, 2012, p.144) because of the way each term contains a myriad of meanings.

In this study participants were asked questions relating to the role of emotions generally. They were also asked specifically about both 'emotional intelligence' and 'empathy'. These concepts were chosen because of their inclusion in a list of affective and moral competencies required by legal professionals devised by a recent and influential review of legal education and training in England and Wales (LETR, 2013, Table 4.3). Participants were not provided with a specific definition of any of these three terms. Although most of the participants appeared to assume a shared understanding of these terms, some of the discussion around them indicated particular forms of characterisation of the concepts.

There was a tendency among some participants to view emotional intelligence and empathy as fixed personality traits, rather than abilities that could be fostered and developed over time:

> You've either got it or you haven't (Jamil, Partner, 36 years PQE, Family and Employment)

> You can't teach somebody emotional intelligence… (David, Solicitor, 1 year PQE, Commercial Litigation)

Two participants also queried whether it would be possible to assess emotional intelligence accurately or appropriately if it was introduced as a key competency.

Participants also tended to see emotional intelligence and empathy as things that would be 'just picked up over the years' (Harry, Solicitor, 1 year PQE, Commercial Property), sometimes contradicting their own characterisation of these as fixed personality traits. A similar approach could be discerned in relation to competencies with emotional components, such as communication skills, with one Partner suggesting in relation to these:

> [I[t's something that's an ongoing part of growing up and learning […]. You get better at it the older you get. When you get to my age you get better at it than you are when you're in your 20s. (Donald, Partner, 23 years PQE, Insurance Litigation)

At the same time, another participant suggested that the older generation of solicitors was less likely to display emotional intelligence,

indicating '…they work in a certain way and they're from a different generation and they don't understand the emotional drivers that the generation we are faces today' (Ali, Solicitor, 2 years PQE, Commercial Contracts).

These individual characterisations of emotional intelligence and emotional competencies in many ways run contrary to an increasing emphasis within occupational psychology on the use and application of emotions within the workplace as a set of teachable, mouldable skills or competencies (Goleman 1998; Gendron 2004). When asked explicitly about the use of 'emotional skills and competencies' participants commonly referred to 'interpersonal' and 'listening' skills, rather than using more explicitly emotional and value-laden terminology such as 'caring' or 'compassion' (terms more frequently referred to within healthcare settings - Powell et al 2015). Whilst this can be interpreted as acknowledging the emotional component within these skills, the identification of skills commonly acknowledged as key for lawyers (LETR 2013) often readjusted the focus of the discussion onto skills which can (and frequently are) constructed as cognitive and value-neutral in nature within legal practice (Westaby and Jones 2017). This emphasis on the cognitive and value-free appeared to frame the everyday legal skills that solicitors most prized and sought to develop, with participants in general discussion referring to the importance of problem-solving and commercial awareness too.

When considering the role of emotions within their work, participants indicated, on occasion, a reluctance to accept their presence in everyday working life:

> [W]hat I've been trained to believe is that you keep emotions to one side, keep them parked and focused on commercial objectives. (Ali, Solicitor, 2 years PQE, Commercial Contracts)

> [I]t's just a job. I don't get emotionally involved with the work. (Imran, Solicitor, 4 years PQE, Residential Property)

> I'm at the fairly rational side of practice… (Angus, Partner, 9 years PQE, Private and Commercial Litigation)

This view appeared to be linked to notions of professionalism within law, implying that emotions are commonly viewed as irrational or unprofessional within legal settings:

> You can say emotional are irrational whereas, with law, legal solutions are very prescriptive (Ali, Solicitor, 2 years PQE, Commercial Contracts)

> I've always found that if you show any emotion in the workplace you're kind of written off as a human being, which is very sad, but

> has been in my experience true, (Rosie, Senior Solicitor, 8 years PQE, Employment)

Such initial statements diminishing or denying the role of emotions were often qualified as the interviews progressed, with participants typically going on to recall times when they had experienced particularly strong emotions within the legal workplace. Such emotions were usually connected to a specific case or client, for example, Imran, the solicitor who referred to their role as 'just a job' went on to indicate that they were personally impacted by the emotions of clients - 'So if someone's shouting at me that obviously makes me quite upset'. However, the initial rejection of, or caution over, the role of emotions emphasises some participants' lack of acceptance of emotions as a valid part of professional legal practice. There is a sense of emotions being, at best, irrelevant and, at worst, antithetical to legal practice, despite the evidence that emotions pervade all aspects of life and the workplace (Fineman, 2003; Bandes & Blumenthal, 2012).

A small number of participants approached emotions in a notably different way, explicitly acknowledging they had a relevance, even importance, within their everyday work. For Laila, the trainee solicitor who participated, this was about channelling their emotions, particularly compassion, into their work:

> It makes me want to do my job more, and it makes me want to help people more, especially when I hear [...] client X has had mould in her house for how many years and it's damaged their carpets and [...] they haven't got any money to pay for it, and it, your heart just, your heart bleeds and you want to help that person more by hearing that story.

For several of the other participants, the relevance of emotions lay in being able to regulate their own emotions and manage those of others, to enable them to provide appropriate client care and display appropriate responses and reactions within different situations:

> I think you need to be able to manage [...] sort of things such as frustration, stress, pressure. Those types of emotions which can play on the way you deliver your advice, your sort of demeanour in a room with a client for example I think is [...] you need to be able to manage that in a way that keeps it professional at all times. (Ali, Solicitor, 2 years PQE, Commercial Contracts)

> I mean, there's two aspects of emotion, isn't there, there's my emotion and then there's the client's emotion. So from my perspective I have to try and not to, I mean, one has to be sympathetic or, to a certain extent empathetic where appropriate, but I think the role of an advisor is to be as neutral as possible... I

> mean, you have to be, […] smiley and […] as nice as possible but, you know, try to remain fairly neutral and a listener. (Chandra, Partner, 32 years PQE, Tax)

These quotations explicitly acknowledge the role of emotions within professional practice, but at the same time emphasise the need for a legal professional to remain 'professional' and 'neutral' (arguably a core professional value for lawyers (Boon, 2005)). As a result, emotions experienced internally cannot be openly displayed, instead there is a need to regulate and control emotional responses to enable the solicitor to portray what is perceived as an appropriate demeanour. In other words, there is a division between the individual's internal emotional experience and the external persona displayed to the client. That is not to say that the external persona presented would necessarily be emotionless, it could involve demonstrating a friendly, approachable and 'sympathetic' demeanour to build rapport. However, the quotations suggest that any such emotional display would be carefully regulated to ensure that the solicitor preserves an appearance of detachment and professionalism.

Maintaining this form of division can be characterised as a type of emotional labour (Hochschild, 2012; Westaby et al, 2020). Hochschild (2012) describes emotional labour as 'the management of feeling to create a publically observable facial and bodily display' (2012, p.7), such as when an air steward projects a calm and friendly exterior throughout a flight, regardless of their personal feelings or challenges. She categorises this either as 'surface acting', where a person deliberately and knowingly will 'deceive others about what we really feel' and 'deep acting', where a person also 'deceives oneself' by altering their actual feelings (Hochschild, 2012, p.34). Hochschild views both these forms of acting as having potentially negative consequences in estranging people from their true feelings and requiring them to relinquish their 'healthy sense of wholeness' (2012, p.183). She argues this could lead them either to separate their sense of self from their job role in a way which leads them to view their role as inauthentic or to burnout, suffering extreme emotional exhaustion (Hochschild, 2012, p.187).

Yet another characterisation of emotion was discussed by one Senior Solicitor who suggested that it was the ability to manipulate the emotions of others which was a common characteristic of highly successful solicitors:

> I definitely think there are huge benefits of using emotional skill. I think some of the best lawyers out there use emotion […] as a key driver to their success and, but […], as I said, I think it's more that they play on clients' emotions and others, well, maybe on junior associates or Senior Solicitors if it's partners, so people more junior

> to them, they will play on their emotions to get them to do more work. (Rosie, Senior Solicitor, 8 years PQE, Employment)

The same participant made reference to the need to make 'make your clients happy, make them sort of feel like you love them and care for them'. Whilst this acknowledges the importance of emotions, the underlying assumption seems to be that some solicitors' are able to utilise their cognitive skills to manipulate those whose reliance on emotions made them more malleable or vulnerable, whilst the solicitor's emotions remain highly regulated and controlled.

Interestingly, despite the mixed attitudes towards emotions, there was less ambivalence amongst participants over the role of empathy within legal practice. Virtually every participant acknowledged it as important, even vital, within their everyday work. For some, an empathetic response appeared to be an instinctive reaction to the situation in front of them:

> You can't keep yourself completely divorced from what's going on and it is natural for you to identify with your client and to want to achieve the best for your client (Ivan, Partner, 26 years PQE, Media and Commercial Litigation)

Whereas, for a larger number, empathy appeared to be employed as a deliberate strategy or tool, either for dealing with clients, or in negotiations with others:

> [I]nwardly I'm a bit of a cold fish, but not to the client. (Senior Partner, 36 years PQE, 13)

> [Y]ou have to understand what that client's needs are constantly otherwise you will lose that client and if you lose a client you lose revenue and you might lose your reputation as well, so it's always very important to, try to understand the client. (Jamil, Partner, 32 years PQE, Family and Employment)

> Very often you gain their cooperation and at least you get to talk to them and if you get to talk to them things can happen. If you don't get there they're not going to happen so empathy for me, is a key tool and I probably use it subconsciously now (Angus, Partner, 9 years PQE, Private and Commercial Litigation, discussing the use of empathy in negotiations)

The closest that participants came to acknowledging the affective domain as part of an adaptive skillset was arguably within such discussions of empathy. This is perhaps unsurprising given that empathy is often characterised as having cognitive as well as emotional elements (Smith 2006). Indeed, there is evidence that the notion of empathy within the legal profession is one that focuses heavily on mental

'perspective taking' (cognitive empathy) rather than the 'affective empathy' that incorporates emotional connection (Westaby & Jones 2017). This is echoed in the discussion of empathy as a 'key tool', a form of cognitive tactic employed deliberately to enhance the solicitor-client relationship.

Whilst acknowledging the value of displaying empathy, several participants suggested that to over-empathise could lead to you being viewed unprofessional and result in blurred or non-existent boundaries with clients. A significant number of participants indicated that the use of empathy was part of a complex 'balancing act' they had to navigate with their clients:

> [T]he difficulty being a lawyer is you can't turn around and say well, ah, I'm really sorry you feel that way. Don't worry it won't matter anymore. We don't need to deal with this issue. Unfortunately, the issue still has to be dealt with in many occasions. (Angus, Partner, 9 years PQE, Private and Commercial Litigation)

> There's a balance to be struck between not necessarily pandering to but taking into account and being considerate of a client's feelings and what their motivations are for the actions that they want me to take, and on the other hand being quite matter of fact about certain things and being clear as to what my opinion on, on the law and the prospects of success are. (Hugh, Solicitor, 7 years PQE, Private Litigation)

> It's a mixture, really, because you, you do need to give them that best advice and, kind of, often take the heat out of a situation for them, but at the same time, you know, it's important to be able to empathise with your clients, and to an extent, put yourself in their shoes, because in that way, you know, you can understand where they're coming from, why they feel so strongly, (Ivan, Partner, 27 years PQE, Media and Commercial Litigation)

These quotations give the sense of solicitors using empathy and emotions in careful controlled ways, designed to build the solicitor-client relationship and assist them in understanding the client's needs. However, it also suggests that solicitors perceive a need for their internal reasoning and problem-solving processes to remain unemotional and 'matter of fact'. This requires significant emotional labour in effectively balancing two different aspects of legal practice – the realities of the presence of, and need for, emotions and the perception of emotions as potentially undermining the detached legal reasoning and adherence to professional norms which enables the effective provision of legal services.

Concerns about over-empathising and this focus on a balancing act may, at least in part, have been influenced by participants' characterisation of the term 'empathy'. There was a notable tendency to use the term 'empathy' as one which was synonymous with 'sympathy' in general discussion, with both words sometimes being used interchangeably within one sentence. This is in contrast to the wider literature, which tends to frame 'sympathy' as a 'heightened awareness' of someone else's distress, prompting a desire to alleviate it, in contrast to empathy's attempt to 'understand the subjective experiences of another' (Wispe 1986). Only one participant impliedly drew a distinction between the two stating:

> If empathy means trying to understand the other person's perspective then I think that's important, if it means sharing that other person's perspective then, you know, being sad when they are sad then [...] I don't think that's going to do you any good at all. (Chandra, Partner, 32 years PQE, Tax)

This appears to be a re-wording of the form of 'balancing act' participants often alluded to. Overall, the discussion of the 'balancing act' required between empathy and the need to avoid over-identifying with clients demonstrates solicitors struggling to reconcile a form of dualism or dissonance between an internalised notion of legal professionalism as synonymous with unemotional, rational objectivity and the realities of legal practice as involving emotional experiences and requiring the use, regulation and management of their own and others emotions.

4. Factors influencing the role of emotions in legal practice

Throughout the interviews, a number of factors were raised by participants as influencing the extent to which emotions played a part in the everyday work of solicitors, sometimes referring to themselves personally, sometimes to the legal profession more broadly. There is a significant body of work suggesting that workplaces, including legal workplaces, are inherently emotional places (Pierce 1995; Fineman 2003; Silver 2004). However, perhaps mirroring the ambivalence displayed in attitudes towards emotions, a number of the participants' comments suggested that they perceived emotions as more (or even only) relevant in specific contexts within legal practice.

The most commonly raised factor influencing the presence of emotions was that of different practice areas. Family, employment, private client, personal injury, defamation, fraud and legal aid work were all highlighted as particularly emotive areas of work with corporate

and commercial work frequently given as an example of a less emotive specialism. Indeed, one participant indicated they had chosen to specialise in commercial property work, rather than family law, because it was 'less emotionally taxing I think' (Harry, Solicitor, 1 year PQE, Commercial Property). Whilst legally aided work and family law have commonly been identified as identified as particularly emotive areas of practice (Westaby 2010; Melville & Lang 2007), the other areas identified have not. A possible common denominator is the involvement of individuals rather than corporate clients (the solicitor who referred to fraud spoke about particularly about the worries and fears of individuals who had either been accused of fraud or been defrauded).

However, some of the realities described by participants actually working in areas seemingly perceived as less emotive indicated that it would be erroneous attempt to draw any general distinctions between emotional and unemotional areas of practice. For example, one solicitor working within general litigation speculated '…if there's a more corporate based environment there's going to be no emotion whatsoever…' (Wendy, Solicitor, 1 year PQE, Civil Litigation). However, a partner undertaking litigation work for corporate clients suggested '..even […] when I'm dealing with business clients, they still want a person there, you know, they still want to see that you're concerned' (Jerry, Partner, 7 years PQE, Civil Litigation). Perhaps the most striking example of this was a Partner discussing acting in mortgage proceedings and commercial litigation who spoke movingly about the difficulties they faced when acting for mortgage companies in residential repossessions against families:

> Some cases you think, well that's just the way it is but others when you see a genuine plight there, you struggle with it. (Angus, Partner, 9 years PQE, Private and Commercial Litigation).

Several participants characterised the differences in areas of practice slightly differently, focusing on the differing emotional needs generated within individual specialisms:

> I think that if someone is a corporate solicitor, his needs in terms of emotional support would be different than someone who is working in a legal aid firm and is dealing with a housing client who has three kids, one of them is vulnerable or one of them has special medical needs and they're going, they have got the warrant of eviction and they're looking for a house. (Jin, Solicitor, 2 years PQE, Commercial and Residential Property)

In wider discussion, this solicitor referred to both different emotional 'needs' and also the requirement for different emotional 'support'. Whilst this contains an implicit acknowledgment that emotions are present across legal practice, it echoes the contributions of other

participants in highlighting the need for a nuanced approach to be taken when considering the role of emotions in legal practice, taking into account the differing needs and demands of individual specialisms.

Another factor identified as influencing the presence of emotions was gender. This is perhaps unsurprising given evidence demonstrating the legal profession remains highly gendered. In 2010, Sommerlad et al (in a report for the Legal Services Board, the regulator with oversight of legal services in England and Wales) observed that 'white female lawyers tended either to work in areas which are gendered female, such as residential property, personal injury, family or education law or on the "softer side" of more atypically "male" specialisms' (p.25; see also Sommerlad 2016; Sterling & Reichmann 2016). Two (male) participants speculated on whether being a younger female could generate specific problems, including a lack of respect or the potential for actions to be misinterpreted by older male clients. One female participant also indicated that she felt men were less willing to display emotions in the workplace than women:

> Well, in my experience women in the workplace can go two ways. Either they […], they harness that emotion and proceed that way […] and learn to cope with their emotions, perhaps if they had someone to lean on at work to talk about it, or perhaps they bottle it up and deal with it at home […], or conversely they might just completely go to jelly […] and find that they have to find another career, or, on the other side, they try to basically behave like men, which I find very strange because I don't really know how to cope with that. (Rosie, Senior Solicitor, 8 years PQE, Employment).

The underlying assumption that men and women experience (or at least display) emotions differently was echoed by a (male) Partner who, when discussing empathy, indicated 'some men perhaps aren't that way' (Jamil, 36 years PQE, Family and Employment). Such comments suggest a perception of emotions that is gendered and which (for the Senior Solicitor) is clearly linked to career progression – it is the male who has chosen to 'bottle up' or 'harness' their emotions who can progress within law, it is the more emotional female who will 'go to jelly' and leave. The implication, seems, once again, to be that openly showing emotions is a form of unprofessional conduct. An alternative interpretation could be that a lack of skill in regulating emotions can be detrimental to emotional wellbeing, leading individuals to feel unable to cope in the workplace.

5. Solicitor characteristics and skills

Participants' discussion highlighted individual characteristics and skills they viewed as necessary, or important, to succeed within the legal workplace. It was previously noted that, when asked if they perceived there to be 'any advantages or benefits to using emotional skills and competencies in legal practice', interpersonal and listening skills were raised by a majority of participants. The emphasis in these discussions was on being able to ask the right questions, obtain relevant information and understand the client's position in a patient and courteous manner:

> The most important thing you can do as a lawyer is be a good and active listener and I think that's a baseline which I can apply to any situation (Ali, Solicitor, 2 years PQE, Commercial Contracts).

> But I think you need to know how to deal with situations and how to, not necessarily make people do what you want, but influence them. (Harry, Solicitor, 1 year PQE, Commercial Property)

A number of participants closely linked these skills with the use of empathy, again emphasising its purposeful use in legal work. However, two participants in particular indicated that they did not view this as being a natural part of a lawyer's personality (highlighting once more its characterisation as a form of fixed personality trait). Several participants compared working as a solicitor to working as a doctor, referring to the need to set aside emotions when treating a patient, but also display an appropriate 'bedside manner'. Overall, it was the cognitively-focused skills that were once again emphasised, and prized, in this discussion – the ability to extract and interpret information and 'influence' people. It therefore echoed, in perhaps a more acceptable manner, Rosie, the Senior Solicitor's, suggestion that solicitors have to manipulate their clients' emotions.

The comparisons to the medical profession were in contrast to the way participants' characterised lay persons' perceptions of lawyers. This included suggestions that they may be viewed as 'money-crazed' (Laila, Trainee Solicitor, Various), 'floating in and out and having rather a nice life' (Rosie, Senior Solicitor, 8 years PQE, Employment) or, particularly in the case of clients, as 'a bit of a barrier to what they want to do', for example, by requiring specific legal procedures and protocols to be followed (Harry, Solicitor, 1 year PQE, Commercial Property). The common denominator appeared to be a sense that solicitors were misunderstood or their work undervalued, perhaps explaining participants' emphasis on the need to use their skills and competencies to 'influence' clients and obtain the information required, rather than characterising it as a more reciprocal mutual exchange. This could also

be linked to notions of professionalism, where the solicitor's status as a professional depends, at least in part, upon their possession of specialist knowledge (Rhode & Hazard, 2007, p.1). In contrast to the altruistic motivations commonly attributed to doctors, it may also demonstrate the lack of altruistic stereotypes within many specialisms in law (particularly those which are more 'corporate' or 'commercial' in nature) (Jones et al, 2020; Salzmann & Dunwoody, 2005).

Although individual participants referred to the importance of traits such as commercial sense, resilience, flexibility, a sense of humour and confidence, several mentioned self-doubt as a pervasive part of legal practice:

> You are concerned about [...], what's going to happen next in the case, whether you've given the right advice, whether [...] something's going to happen that you hadn't foreseen [...] whether you're complying with all your professional requirements at the same time (Ivan, Partner, 27 years PQE, Media and Commercial Litigation)

> You question yourself, should I try to change this or should I try to keep it the same? (Sami, Solicitor, 6 years PQE, Personal Injury)

> [A]dverse moments do come to your mind quickly as opposed to the successful ones. (Philip, Solicitor, 6 years PQE, Consumer Protection)

Only one participant referred to perfectionism expressly:

> There is a huge level of perfectionism and sometimes you do have to rein that in, because, you know, whether it's by budget or time constraints and you have to say no [...], this is good enough, it's not perfect, but it will do, and it's very hard learning to do that (Rosie, Senior Solicitor, 8 years PQE)

However, the more frequent discussion of self-doubt could be viewed as a manifestation of this form of perfectionism, a desire to always perform at your best and a concern that you had failed to do so by overlooking or failing to foresee an issue. It is possible that the regulatory framework, with the potential for client complaints, disciplinary proceedings for errors and the spectre of professional negligence claims, exacerbate this tendency (Boon 2017). In terms of emotional wellbeing, such a trait can be concerning, as perfectionism has been linked to poor levels of wellbeing and mental health (Flett et al 2014; Blatt 1995).

6. The role of emotions in client care

The ways in which emotions and client care are intertwined were discussed by all the participants in this study. The strong emotions experienced by clients were frequently referred to, with descriptions used including clients' dealing with 'high levels of emotions', 'massive, massive amounts of emotions', experiencing a 'rollercoaster', being in a 'terrible state' and finding the situation 'incredibly difficult'. Echoing the discussion on different practice areas above, certain types of legal practice, such as litigation, were highlighted as particularly emotive. However, the consensus appeared to be that most clients would have at least some level of emotional involvement in a claim, even those that were commercial in nature:

> I have found that clients engaged in commercial litigation also tend to get very… are deeply involved in it on a personal level, that they don't just see it as something that, […] their company is doing and they can stand back from. (Ivan, Partner, 27 years PQE, Media and Commercial Litigation)

> The emotions run high, particularly when issues arise which involving quite substantial sums of money… (Angus, Partner, 9 years PQE, Private and Commercial Litigation)

In terms of dealing with the emotions of clients, several participants emphasised the need to preserve a certain level of detachment to enable them to effectively resolve their client's issues, with one explaining that the focus was 'acting in their best interests' which 'doesn't actually require any emotion'. At the same time, that participant indicated that 'good client care' required 'an emotional awareness, an emotional sensitivity' (Jerry, Partner, 7 years PQE, Civil Litigation). This echoes the discussion above, in relation to the characterisation of emotions and empathy, where solicitors are attempting to balance a need to be emotionally aware and attentive when communicating with clients, while at the same time retaining their sense of detachment and neutrality, viewed as necessary to act professionally and legal problem-solve effectively.

A number of participants indicated that their role involved proactively managing, or even absorbing, high levels of client emotions. For several, this was about working to diffuse the client's emotions and 'take the emotion out of that situation' (Ali, Solicitor, 2 years PQE, Commercial Contracts) or taking on the client's stress and removing from them 'the burden of dealing with the matter' (David, Solicitor, 1 year PQE, Commercial Litigation). One participant, Toby, who specialises in contentious wills and probate, also referred to acting 'as a

sort of filter or a shock absorber' allowing clients to off-load the details and context leading to a claim (Solicitor, 7 years PQE). These forms of emotion management seemed to be a response to the expectations of particular clients. While for some participants their clients simply required them to solve a particular legal problem, for several others it was about providing their clients with reassurance, in some instances verging on the participant acting as a counsellor.

A number of participants explicitly referred to the use of emotions, but most particularly empathy, as an important part of providing appropriate client care, for example, in terms of factoring a client's emotional needs into the strategy taken in a claim and to assist in gaining the client's trust:

> I'm constantly having to respond to, try and feed into [...] their emotional needs, which feeds in very often to the kind of strategy that you take in a particular case. (Sami, Senior Solicitor, 6 years PQE, Personal Injury)

> You have to break down the wall with that lay person, get their trust and work harder to do that than with a professional. (Angus, Partner, 9 years PQE, Private and Commercial Litigation)

The most unguarded expression of this was given by Laila, the trainee solicitor, who suggested:

> I have to remember that I'm working for, you know, for a firm, so if I'm empathetic to the client and, you know, it's good feedback, they'll feel safe and they'll feel like they'll be able to trust the firm as well, so it's sort of like a wider implication as well.

This extends the idea of professionalism beyond the individual solicitor to their employer, as here Laila is protecting the professionalism of her firm. It also touches on the commercial imperatives which are an important part of everyday private practice in law. Firms are profit-making entities and therefore need to seek to both maximise their client retention and market themselves to potential new clients, at least in part through the development of their reputation (Sommerlad et al 2015; Wallace and Kay 2008). At the same time, a couple of participants referred to the need not to give clients' 'false hope' and the need to be 'blunt' to ensure client expectations were realistic.

Participants' shared sense of a solicitor acting as some form of emotional 'shock absorber', buffer or bulwark resonates strongly with legal professionals own documented perception of the need to present a form of strong and controlled persona to clients (Jones et al 2020). In other words, to wear a 'professional mask' (Elkins, 1978, p.735) which covers their authentic emotional reactions and responses. At the same time, it indicates that, underneath their outward façade, individual

practitioners will be actively monitoring, responding to and managing their clients' emotions. In addition, they will also be regulating their own emotions to enable them to build rapport with the client and to assist them in retaining their sense of professionalism. All of this once again indicates that solicitors are expending significant amounts of emotional labour when dealing with clients' emotions.

A number of participants referred to the particular issue of dealing with rude, angry or upset clients, indicating a range of different approaches. Several emphasised the need to remain calm and detached:

> You might like clients, or we might not like clients, and it doesn't really matter, it's not our job to like them or dislike them…. they're your client and you just have to do your best for them, so […] you have to work alongside that client, you have to understand what that client's needs are constantly otherwise you will lose that client and if you lose a client you lose revenue and you might lose your reputation as well, so it's always very important to try to understand the client (Chandra, Partner, 32 years PQE, Tax)

However, other participants indicated that such situations did have an emotional impact upon them, although they sought to regulate it:

> I think frustration is a very difficult emotion at times and that can lead you to make snap decisions which if a client's annoyed you for example or the other side have annoyed you, they've said something which is aggressive or a bit passive aggressive or a bit counterproductive you can kind of be unhelpful back and that can, um, damage your own professional reputation. (Ali, Solicitor, 2 years PQE, Commercial Contracts)

This suggests yet another form of emotional labour for solicitors in seeking to regulate their responses appropriately. Here, this is explicitly linked to the need to preserve a 'professional' reputation, once again emphasising the importance of professionalism as a determining factor in how solicitors choose to respond to emotions.

There was no single clear indication of to what extent the participants' use of emotions and empathy within client care involved a genuine affective involvement, or was instead a more calculated cognitive response based on commercial considerations. It appeared that, for some participants, there was an authentic emotional involvement in at least some files:

> [Y]ou become kind of desensitised to it in many respects because obviously you've got a job to do so you're just kind of focussing on that […] but […] there are moments sometimes where you do build a particular rapport with a client or the story is particularly touching or poignant, where, you know, you do find yourself kind

> of having to hold back the tears sometimes [...] in these things. (Sami, Senior Solicitor, 6 years PQE, Personal Injury)

A striking example was given by another Senior Solicitor, Rosie (8 years PQE, Employment), who referred to a reciprocal sense of caring for her clients, leading to several contacting her to wish her luck when she left for maternity leave and one reminding her to 'take some big pants with you to the hospital'. However, at the same time, the same participant was aware of the constraints of being in a professional, fee-paying relationship with their clients, as illustrated when discussing written communications with clients:

> I find that if you sound too formal you can sound archaic and in my experience the more archaic you sound the less you actually know and you're just hiding behind language. If you're able to put things into normal modern day language so that people understand it, it means you really understand what you're talking about, but you still have to have that balance so that you don't stray into being too familiar with them, because if you do that then they don't feel that they're actually getting legal advice, they feel like they're just having a chat with you and they just don't feel they should pay for it.

Interestingly, this was the same participant who also highlighted the elements of manipulation involved in having to 'play on the emotions of your clients to reel the work in'.

A final area that emerged when discussing the role of emotions in client care was the emotions generated by receiving positive client feedback. Several participants appeared to attribute this to their emotional competency, with one suggesting that:

> I think that's me, probably [...] the way I am, I like to express my emotions and I make sure the client knows that look, not only am I looking at this from a solicitor's point of view [...] but it's more sort of [...] you want that success for the client and that's the way I've always approached my cases. (Toby, Solicitor, 6 years PQE, Contentious Trusts and Probate)

The same sense of both personal and commercial motivations which appeared to underlie the role of emotions in the solicitor-client relationship generally was evident in participants' discussion of feedback. Several referring to a sense of personal validation from it, of 'job satisfaction' and of it being a 'nice' experience. However, there was also reference to its importance in terms of developing and preserving your professional reputation and attracting more clients.

7. Interactions with colleagues, employers and third parties

Several participants referred to their colleagues as having an emotional impact upon their day-to-day working life.

> I think it's mainly got to do with colleagues in the workplace. They are the people that need to learn to be more empathetic to, and understanding of how their behaviour affects people who work with them… (Wendy, Solicitor, 1 year PQE, Civil Litigation)

> So even if I'm kind in the workplace, or I've been really sympathetic to a colleague, it's often been thrown back in my face or it's often been, it's not been reciprocated at all. (Laila, Trainee Solicitor, Various)

It is notable that these issues with civility were particularly emphasised by more junior participants, as a specific issue raised by several participants was that of the managerial or leadership style of more senior staff (commonly partners) within law firms. This was highlighted from the perspective of a junior staff member:

> A lot of the time they're just totally clueless. I've worked with quite a few corporate psychopaths in my time and people that the law firms generally keep […] on because they bring lots of money through the door. They don't care how they treat other people, you know. (Wendy, Solicitor, 1 year PQE, Civil Litigation)

However, it was also raised from the perspective of more senior staff, who acknowledged the part that managing the wellbeing of others should, or could, play within their busy role, but who did not appear to have been equipped or supported to undertake this aspect of their work:

> I think one of the difficult things in law is that, in terms of management, management kind of comes with seniority rather than with skill […] it is assumed that you become better as you get more senior, but it's also assumed that you take on more of a management sort of role, but you don't necessarily have those skills… (Rosie, Senior Solicitor, 8 years PQE)

> So we don't know how to manage people, so a lot of things just get ignored because people don't know how to deal with them. (Imran, Solicitor, 4 years PQE, Residential Property)

This reflects the fact that managers and leaders within the legal profession are commonly drawn from within its ranks. Whilst such senior personnel are likely to have significant experience in legal practice, it does not necessarily follow that they will have received

training and support in managing or leading others. The Solicitors Regulation Authority ('SRA'), the regulatory body for solicitors in England and Wales, removed the previous requirement for solicitors to undertake a Management Course Stage 1 in 2015. There remains a requirement for continuing professional development in the form of an annual declaration, but the focus now is on solicitors being able to 'reflect on their practice and undertake regular learning and development', leaving the type of training undertaken to the individual solicitor's discretion (SRA 2020).

A couple of participants referred more generally to the importance of emotional competencies within management and dealing with people, with one partner referring to empathy as a 'key tool' to gain the co-operation of staff. A couple of participants also emphasised the importance of modelling appropriate behaviour when working with others. One partner, Donald (23 years PQE, Insurance Litigation), discussing communication skills, commented:

> I have had and have now junior people who will pick up these skills and will learn these skills from me as I learned them from people who were far more senior than I was when I was in my 20s and 30s.

However, a more junior solicitor (David, Solicitor, 1 year PQE, Commercial Litigation) also raised this as a potential issue, suggesting that colleagues were learning their approach to practice by observing partners who had not been taught (and therefore could not model) appropriate behaviour and skills.

The generally perceived lack of support for developing such emotional competencies was attributed by one participant to the commercial orientation of law firms:

> Lawyers work in numbers, and their profit, they are a profit making organisation, of course they are, and so a lot of them if they can't put a value on it they may not see the worth of it. (Ali, Solicitor, 2 years PQE, Commercial Contracts)

This suggests there is an argument for making such emotional competencies more explicit within the competency frameworks which are commonly applied to entry into, and continued legal practice within, the legal profession in England, such as the SRA's 'Statement of Solicitor Competence' (2019). This could potentially encourage more value and importance to be placed on such competencies, which are currently often implicit within such frameworks (Jones, 2018).

Levels of engagement with third parties varied amongst participants, but some were involved in networking events with contacts or had longstanding relationships with individuals. However, several also recounted encounters with opposing solicitors where the participant had

found the other solicitor to be 'unreasonable', 'unethical' (prolonging an issue for to obtain greater costs) and 'a nightmare'. A number of participants contrasted the high level of emotions involved in client care with the shared expectations and understanding 'of what's involved' they had with other professionals. Examples included counsel and expert witnesses, where it was possible to speak 'off-the-record' and there was a mutual 'professional touch' involved with 'less volatile' emotions. This discussion of interactions with other professionals once again emphasised the sense of professionalism (this time as displayed by others) being equated with an approach to work where emotions were either perceived as absent or were highly regulated and controlled.

Participants seemed unsure whether such third parties would have any emotional involvement with their cases, but overall seemed to feel there may be some emotional connection, and a sense of wanting the best outcome for the client, but that there would not be the same level of emotional involvement as a solicitor. As one participant expressed it (discussing the role of counsel):

> They will just dip in and out of a case, they don't have the constant contact that you have as a solicitor, and [...] they wouldn't build up a rapport in the same way and get that kind of closeness with a client that you would get. (Sami, Senior Solicitor, 6 years PQE, Personal Injury)

This echoes some of the discussion of emotions within client care above and hints at a genuine emotional connection or involvement in the solicitor-client relationship

8. The emotional wellbeing of solicitors

Studies globally have indicated that legal professionals may experience higher levels of stress, anxiety and depression than the general population (Krieger & Sheldon 2015; Kelk et al 2009). Therefore, it is perhaps unsurprising that a significant number of challenges to emotional wellbeing were discussed by participants in this study, including the feelings of self-doubt referred to previously. Echoing the discussion of the commercial orientation of private practice in relation to client care, financial pressures were raised as a particular source of worry, ranging from the cost of training to be a solicitor to the pressures experienced specifically by smaller firms. The mergers and consolidations of such firms were referred to, demonstrating the impact of wider market pressures. This form of pressure also appeared to exacerbate the stress felt by those participants in managerial and leadership roles.

Perhaps unsurprisingly, given participants' emphasis on the presence of client emotions, having to deal with heightened emotions displayed by clients' (for example, grief when dealing with wills and probate) was referred to as having an impact on solicitors' emotional wellbeing. High levels of client expectations also seemed to be implicated in wellbeing issues. This appeared to be a result of a combination of factors, including the frequent use of email requiring (or assuming) 'instantaneous' responses, a lack of clients' understanding around the complexity of issues they perceived as 'straightforward', frustration with legal 'processes', unhappiness with the cost involved and clients' emotional investment in their legal issue:

> So, what they really want is you to wave a magic wand (Jerry, Partner, 7 years PQE, Civil Litigation)

> [S]ome people get very demanding when they're emotionally charged and that can be hard work. (Rebecca, Partner, 17 years PQE, Family)

The need to meet such expectations to generate positive feedback and repeat instructions and build an individual's professional reputation was referred to in relation to the discussion of client care above. At the same time, it can be surmised that the financial pressures participants' identified also reinforce the pressure to meet client demands.

There was also a sense from some participants of their emotional wellbeing being closely linked to their workplace performance, in particular with the outcomes of client issues:

> If it all goes well then it's good for your wellbeing and if it goes badly then it can be rather less good. (Donald, Partner, 23 years PQE, Insurance Litigation)

This may in part relate to the need to meet client expectations, possibly stemming from a notion of professionalism within legal practice which, it has been suggested, 'prizes unquestioned pursuit of client interest' (Kuhn, 2009, p.685). It may also reflect a desire to ameliorate the sense of self-doubt some participants referred to in relation to solicitors' characteristics.

Several participants also discussed time pressures and the 'intensity' of the role, referring to the need to work over weekends and feeling as if they were on 'a bit of a treadmill' (although one participant indicated they enjoyed working under pressure). The difficulties of having to deal with unexpected issues or issues which participants had no control over was also raised, for example, not being able to obtain a court order because the court was closed for the weekend. There was also the pressure generated by individuals' desire to progress within their career:

> There's quite a lot of people trying to be very stoic and just getting on with things and, you know, you don't want to be one of the people that can't cope and keep up with what's going on. (David, Solicitor, 1 year PQE, Commercial Litigation)

This gives a sense of solicitors' needing to project a strong and controlledpersona, not only for clients, but also to succeed in the legal workplace more generally.

Outside of these workplace-focused issues, a number of participants also referred to the difficulties generated when personal issues collided with work issues and referring to the problems of maintaining a 'work-life balance'. Several participants referred to the need to separate work and family life, and the difficulties of doing so:

> If I've had a bad morning with the kids and, like, it's taken me ages to get them in the car and get them to nursery and then I get to work and I've got a client shouting at me, it really annoys me. (Solicitor, 4 years PQE, 3)

This implies the presence and influence within the legal workplace of 'incidental' emotions. In other words, emotions generated by issues unrelated to work which may then impact upon individuals' emotions reactions and responses within the workplace (Bachkirov, 2015, p.862). As such, it adds another layer of complexity to the emotional labour solicitors undertake in dealing with and regulating emotions.

A number of participants characterised the impact of the above factors on their emotional wellbeing in terms of the levels of stress involved

> I think stress is [...] a problem that's just endemic across the entire profession. (David, Solicitor, 1 year PQE, Commercial Litigation)

> Doing law generally is quite stressful, because I think you are worried about getting it wrong the whole time. (Partner, 27 years PQE, 11)

The same Partner characterised this stress as 'part of being a professional', linking it to the weight of their professional responsibilities. Several participants also talked about the difficulties they experienced in stepping away from work, indicating a potentially unhealthy level of rumination.

Some participants referred to coping mechanisms used to deal with the levels of stress involved. For one participant, concerned about the outcomes for individuals involved in litigation, this was about rationalisation:

> You have to realise, I think, that there's a reason for all of this and there's safety nets for people and you rationalise all of the time… Rationalise, rationalise otherwise I think you'd go mad, wouldn't you? (Angus, Partner, 9 years PQE, Private and Commercial Litigation)

Another talked about the need to detach and compartmentalise – 'you just have to put a lid on it at some point frankly' (Jerry, Partner, 7 years PQE, Civil Litigation), whilst a third spoke about the importance of undertaking regular exercise and several emphasised the importance of provision within the workplace to support emotional wellbeing.

Applying forms of dissociation such as rationalising and compartmentalising issues may have some benefits in terms of dealing with distressing emotional states, including potentially preventing incidental emotions from intruding in work settings (Bowins, 2012). They certainly appear congruent with the notion of legal professionalism as requiring a neutral detached persona and highly regulated and controlled emotional approach. However, an over-reliance on these coping mechanisms could also be unhealthy if the effect was perpetuate notions of professionalism and forms of legal thinking which suppress emotions and prevent reflection upon, and learning from, emotional responses that have occurred (Swan & Bailey, 2004; James, 2005).

9. Training needs and gaps

Within this final theme, the key focus was on the gaps in existing training, in particular the lack of emphasis on emotional competencies within legal education and training. In this context, a couple of participants referred to client care training on the Professional Skills Course (undertaken by trainee solicitors during their period of work prior to qualification), but a significant number of participants indicated that training in emotional competencies was not usually provided:

> Not in relation to the emotional side… Which is a major shortfall in maybe law school, and probably the Law Society and the firm I trained at because it's an enormous part of the client interface. (Ali, Solicitor, 2 years PQE, Commercial Contracts)

One participant suggested that the absence of such training could result in a 'steep learning curve' for trainee solicitors, with a sense of them simply being 'let loose' on clients. Although that participant was referring to the necessity of using emotional competencies to build a rapport with clients, a further participant viewed training as necessary to teach solicitors to '[t]o take away the emotion and look at the

commercial elements of it' (Angus, Partner, 9 years PQE, Private and Commercial Litigation). This reflects the distinction referred to above between those participants who explicitly acknowledged the role of emotional competencies within their work and those who emphasised the perceived need to remove emotions, to preserve detachment and neutrality.

10. Discussion

An analysis of the themes found in this study highlights several key points. First, it reiterates the findings of previous studies that legal practice is inherently emotive (Silver, 2004; Westaby, 2010; Graffin, 2019; Bergman Blix and Wettergren, 2019). It also further develops these findings by indicating that this is the case across practice areas, including those considered to be 'corporate' or 'commercial' in nature. This finding suggests that there is a need for further exploration into the role, and impacts, of emotions within a wider range of practice areas than those that have to date been the focus of most research and discussion. The role of emotions was most clearly identified across participants within discussions of client care. Discussions emphasised the strong emotions which clients experience in relation to legal issues. They also highlighted the solicitor's role as a form of 'shock absorber', buffer or bulwark as they seek to manage their clients' emotions, regulate their own responses and portray a professional demeanour or mask. Interactions with colleagues were also identified as an area where emotions could arise, with workplace incivility and poor management practices both referred to as problematic. The role of emotions also manifested itself within discussions of emotional wellbeing. Participants in this study highlighted a wide range of challenges to their wellbeing, including (amongst others) financial and time pressures, client expectations, the sense of a lack of control of some aspects of their work and the influence of wider life events. A sense of self-doubt was also referred to by some. The impacts of these challenges were commonly characterised as forms of stress and seemed almost to be accepted as an inescapable 'part of being a professional'. All of these aspects suggest important avenues for future research and dialogue.

Second, this study indicates that there is a significant incongruence or disjuncture between the presence of emotions within everyday legal practice and the ways in which emotions are conceptualised and acknowledged by solicitors. The participants' sense of emotional intelligence as being a form of individual trait characterises it as fixed and innate. The notion of it as something that can only be developed through time and experience is perhaps more fluid, but still eschews the

notion of working with and using emotions as teachable competencies that can be developed through self-awareness and reflection. Given that both conceptualisations situate emotional intelligence outside the individuals' locus of control, it is perhaps understandable that there was a tendency amongst some participants to view emotions as irrational and potentially threatening to individuals' sense of professionalism and neutrality. The tendency to shift discussion of emotional competencies towards the forms of cognitive skills generally prized amongst legal practitioners also suggests that emotional competencies were perceived as less valuable than cognitive skills for most participants. It was clear that participants did experience, and respond to, emotions within the legal workplace. However, only a relatively small number explicitly acknowledged the emotional regulation and management involved within their work. The focus on the cognitive also appeared to be reflected in the greater acknowledgement and acceptance by participants of empathy (rather than emotion) as a 'key tool' within their practice. While for some it appeared more instinctive, for others it was clearly being used as a deliberate strategy, positioning it as a cognitive skill to be employed within client care. Similarly, the coping strategies discussed by individuals when exploring challenges to emotional wellbeing focused largely on the cognitive – rationalisation and compartmentalisation – rather than explicitly acknowledging or exploring emotional aspects of wellbeing. These findings suggest that there is a need to increase the emotional vocabulary of legal professionals and develop an evidence-based understanding of the role and impacts of emotions and empathy. This could be begun by adopting the term 'emotional competencies' as opposed to 'emotional intelligence', to highlight the ways in which relevant legal skills can be developed and trained. Greater emphasis on such emotional competencies within legal education and training and within the workplace setting, including the modelling of appropriate behaviours by more senior staff, could also assist in challenging the current focus on a particular form of heavily cognitive skill set (Jones, 2018).

Third, this study indicates the problematic intersections between the use of emotions within everyday legal practice and solicitors' notions of professionalism. In particular, the perceived clash between emotions and particularly highly prized professional values such as neutrality and detachment. For example, comparisons with the medical profession emphasised the detachment required (alongside the requisite appropriate 'bedside' manner). Similarly, when participants referred to dealing with rude or aggressive clients being able to respond in an emotionless professional manner was highlighted as key. A number of participants explicitly sought to diminish or deny the role of emotions within legal practice as antithetical to professionalism, despite then going on to identify a range of ways in which their presence manifested

itself. A smaller number of participants explicitly acknowledged their presence and suggested a range of ways in which the use and display of emotions and empathy, particularly in client care, were a valuable tool within their practice. The discussion of the common form of balancing act solicitors perform, between building rapport with clients and over-empathising with them, illustrates the emotional labour solicitors commonly experience as they seek to apply (what is perceived as) emotionless and objective legal reasoning whilst having to regulate and manage their own and their client's emotions. There was also a potentially gendered element to this, with one participant implying that the more emotional female practitioner could be transgressing professional norms and therefore fail to progress in her career. Whether this notion of professionalism results from the above conceptualisation of emotions, or whether that conceptualisation is the driving force for the problematic relationship between emotions and professionalism is unclear. However, as indicated in the Introduction, law and emotions scholars have previously identified the tendency of law to prize what it perceives as reason and rationality and ignore or dismiss emotions as irrational and potentially misleading or dangerous (Maroney, 2006; Grossi, 2015). These findings suggest that, on a practical level, legal professionals require need detailed and relatable examples of how they can be compassionate and responsive to emotions whilst remaining professional, detached and neutral. At a theoretical level, it also indicates that the role and impacts of emotions should be included as part of wider discussions around the core values involved in practising law and how these relate to everyday practice (for one example, see, Rand & Crowley Jack, 1989, pp.144-149).

Fourth, the commercial orientation of private practice appears to influence the lack of acknowledgment of, and emphasis upon, emotional competencies within everyday legal practice. Participants' discussions highlighted a lack of support for staff in developing emotional competencies, because where it may not be possible to 'put a value' on such training, leading to it being ignored. This was particularly problematic in relation to managerial practices where those in senior positions may not receive the training and support required to model good practice in terms of such competencies and interpersonal skills. This emphasis on the commercial also manifested itself within participants' perception of the need to build rapport with their clients and their appreciation of positive feedback. In both situations there appeared to be at least in part a genuine emotional response, but at the same time this was informed by an awareness of the commercial and reputational advantages involved. Some individual participants made reference to the use of emotions and empathy to effectively protect their firm, as well as their own reputation. However, there was little to suggest that employers' recognised upskilling individuals to raise their

awareness of the role of emotions and the importance of emotional competencies could have wider economic benefits, as well as assisting the solicitors in question (Reich, forthcoming). This finding suggests that there is need for increased awareness of these benefits on the part of employers (and possibly regulators), to emphasise that training in emotional competencies can help legal professionals effectively 'protect' their firm and maintain the right level of professionalism.

Overall, the key implication for everyday legal practice is the need for a greater awareness and understanding of the complex emotional balancing acts which solicitors are performing within their working lives. This is particularly the case in relation to client care, where solicitors are actively managing the emotions of their clients and regulating their own emotional responses. However, it appears that the need to combine such emotion work with the projection of a particular form of professional persona is not solely confined to this. Instead, it seems to pervade the legal workplace more generally, influencing interactions with colleagues and managerial practices. The high levels of emotional labour involved and the potential impacts upon emotional wellbeing therefore require further exploration and discussion.

Such an exploration is likely to entail further targeted empirical research into the specific emotional dynamics involved in different practice areas and environments and amongst different demographics of solicitors. However, it will also entail shifts within the legal profession itself. Ways in which to facilitate such awareness and discussions are likely to include the inclusion of appropriate emotional competencies within legal education and training, both within Law Schools and as a part of the Continuing Professional Development undertaken by solicitors (potentially differentiating between different practice areas). The potential to explicitly incorporate emotional competencies into the competency framework for solicitors should also be explored with the SRA and other key legal stakeholders. Such suggestions imply a challenge to existing notions of professionalism, repositioning emotions as an integral and important part of everyday legal practice in a way which can potentially be incorporated within a redefined or refocused idea of what it means to be a legal professional. This form of challenge is unlikely to be fast, or easy, but there is an urgent need to begin a nuanced and evidence-based dialogue in this area.

11. Conclusion

This study provides a unique insight into the role of emotions in the everyday legal practice of solicitors. In doing so it exposes the presence of emotions in those areas of law often perceived as un-emotive as nature

and reveals the challenging and delicate emotional balancing acts which solicitors habitually perform, most notably within client care and interactions with colleagues. In doing so, it highlights the disjunctures between the everyday realities of practice and the ways in which both emotions and professionalism are conceptualised by individuals. It suggests a shift is required towards explicitly acknowledging emotional competencies, and providing appropriate training and support in these, to facilitate further awareness and understanding of the nuanced interplay of emotions with all aspects of professional life.

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"Eleven Old Boys Crying Out for Revenge". Emotional Dynamics in Care-Leavers' Efforts to Seek Justice: Case Study of the Palhoniemi Reform School 1945–1946

Antti Malinen*

1. Introduction

In February 1945, a housekeeper working at the Palhoniemi reform school in Finland received a threatening letter, signed by "eleven old boys crying out for revenge". The housekeeper, who in the letter was described as a human beast for keeping boys in a state of hunger, was called upon to leave their post immediately. The boys claimed to have

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joined the recently established Finnish People's Democratic League (FPDL) and to know people capable of forcing her to leave (Page 55, Hb:1.3 Palhoniemi Investigations). The arrival of the threatening letter posed an unheard of challenge to the staff of Palhoniemi and also its authority. Reform schools were intended for children and young people deemed by the authorities to be anti-social and uncontrollable, with discipline and its strict enforcement an essential component of the reform school routine (Hoikkala 2020, 21-33; Malinen et al. 2019, 4). Children were expected to conform to institutional rules and order, to respect authority and not challenge it, or even worse, threaten it.

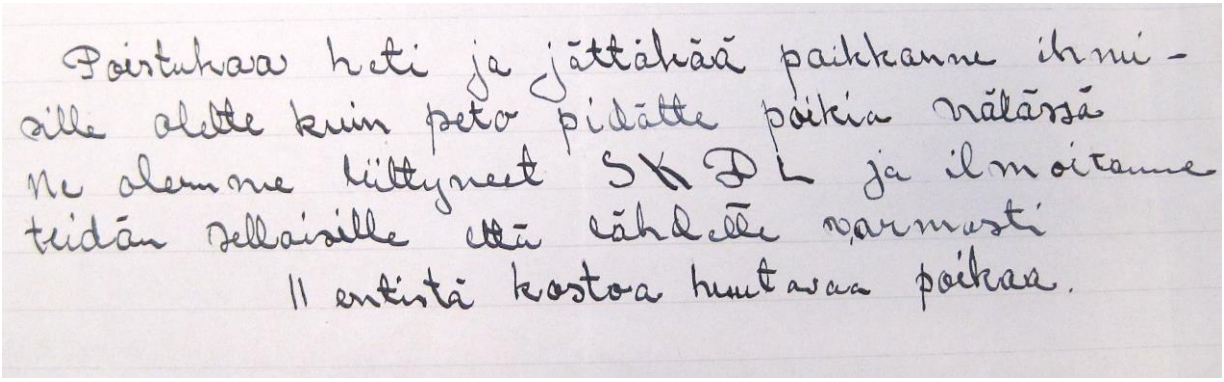

Poistukaa heti ja jättäkää paikkanne ihmi-
sille alette kuin peto pidätte poikia nälässä
Ne olemme liittyneet SKDL ja ilmoitamme
teidän sellaisille että vähelle varmasti
11 entistä kostoa huutavaa poikaa.

Figure 1. The letter received by the housekeeper in February 1945, signed by "eleven old boys crying out for revenge".

In the following weeks and months, life at Palhoniemi became more restless than usual, raising concerns among the staff. When a personnel meeting was held at the end of April 1945, the director of Palhoniemi, A. L.[1], warned the staff that they were now witnessing a battle over the 'souls of youth'. He urged members of the staff to be alert and to try their best with the boys, to educate them back to becoming proper citizens (2§, Personnel meeting 31.4.1945, G:17). What the director could not know or probably even imagine, was that he was now a part of the chain of events which in a couple of months would culminate in the initiation of a formal investigation carried out by the Ministry of Social Affairs and Health of Finland, and finally result in a decision to relieve the director of his duties in May 1946.

Together with other recent studies on the failings of Finnish child welfare, the Finnish inquiry into neglect, abuse and violence against children in institutions and foster homes in 1937–1983 (hereafter the

[1] To protect privacy of those involved in the Palhoniemi reform school investigation (current inmates, care-leavers and members of the staff), initials are used throughout the text. Names of politicians, government officials and local child welfare authorities have not been anonymized. The archival material contains sensitive information, for example accusations related to health and descriptions of violence.

Inquiry) has revealed that not only children in care, but also their close relatives and other concerned citizens often experienced difficulties in seeking justice (Hytönen et al. 2016; Laitala & Puuronen 2016). This was also the case with Palhoniemi. Yet eventually the complaints issued by care-leavers were taken seriously, leading to the initiation of a formal investigation. A number of different emotions were at play during the investigation and the events preceding it. Some emotions such as hope, anger and even hate resulting from their experiences of injustice, mobilized care-leavers into action and gave them resources to pursue their interests. But other more immobilizing emotions such as fear and shame were constantly present.

This article examines what role certain emotions such as anger and feelings of injustice play in care-leavers efforts to seek justice, and especially in the formation of a protest group and in its activities. Furthermore, it considers how members of the protest group dealt with, shared and negotiated their feelings. By using contemporary sources such as interviews, letters and written accounts, I analyze how emotions and feelings were experienced both individually and collectively at a group level, and to what effect. Theoretically, I take the view that individuals and groups operate within structured contexts that constrain and facilitate their actions, including their emotional lives (Sewell 1992). The investigation of the Palhoniemi reform school took place in a specific historical context, and the societal changes that followed the end of World War Two had a major impact on how contemporaries felt about the future, and their possibilities of bringing change.

When the threatening letter was delivered in February 1945, Finnish society was experiencing a time of social unrest and political turmoil. Hostilities with the Soviet Union had ended in September 1944 when the Moscow Armistice was signed. The conditions of the Armistice required Finland to ban organizations deemed to be fascist and paramilitary, and to rehabilitate the Communist Party (645/44; Meinander 2012, 87). The Communist Party of Finland re-entered political life, and the far left was organized as the FPDL.

Most of the Finnish army was demobilized by the end of 1944, but the war still continued in Lapland, as the terms of the armistice compelled Finland to expel German troops from its territories. After the Moscow Armistice, especially veterans, together with evacuees, struggled to find adequate housing where they could return to a sense of peace and some sort of normalcy (Malinen 2017).

A considerable number of Finns felt a need to come to terms not only with their war-related experiences and losses, but also to express their feelings of frustration, tiredness and anger, for example due to the continuing scarcity and on-going rationing of food, goods and housing. State actors were worried whether these negative feelings and worries would make Finnish society unstable, and promoted a culture of

resilience and self-restraint in which citizens were encouraged to focus on the future and put aside their past and present personal burdens (Kivimäki & Hytönen 2015; Malinen & Tamminen 2017). William Reddy has defined these kind of feeling systems and emotional prescriptions as 'emotional regimes', in order to describe dominant modes of emotional expression and thought, often aligning with political regimes (Reddy 2001). However, in the aftermath of the Moscow Armistice, the far left began to promote competing emotional prescriptions, encouraging people to vent their feelings, both positive and negative.

In post-conflict situations, certain practices such as war tribunals, reparations and purges frequently take place, and Finland was not an exception, at least to some extent (Elster 2004, 1; Tallgren 2014). One of the major goals of the FPDL was to push for the democratization of bureaucracy, and the idea of purges and radical political change offered new narratives and concepts which other societal actors were able to use for their own interests and agendas. This case study allows an analysis of how individuals and groups in changing societal situations, and especially in the field of child welfare, tried to come to terms not only with war and its social effects, but also with other more deeply rooted grievances and injustices related to social class and positions, and how their efforts at seeking justice were perceived by those who were criticized and accused of wrongdoing.

Following the parliamentary elections of April 1945 and the landslide victory of leftist parties, feelings of injustice, but also of hope , worked as a catalyst and helped to propel care-leavers into action, despite them being in a disadvantaged position. However, care-leavers experienced considerable resistance and difficulties in pursuing their matters in public and administrative spheres. Local child welfare authorities were not willing to recognize care-leavers as credible sources of knowledge, and instead tried to discredit their accounts of harm and wrongdoing at reform school. Accordingly, this analysis sheds new light on how the care-leavers and inmates of Palhoniemi experienced the Finnish justice system, and more specifically, epistemic injustices (Fricker 2007, 2012) due to prejudices stemming from their social identity, institutional care histories, and even their age.

A general overview of the Finnish child welfare system and the role of reform schools is given in the next section 2, and the methodological framework of the study and the historical sources used are discussed in section 3. In sections 4 and 5, I apply concepts from the history of emotions framework to highlight and contextualize the role of emotions in justice-related processes.

2. The Finnish Child Welfare System and the role of reform schools

At the turn of the twentieth century and during its first half, childhood took shape as a special period in a person's life, and children were described as having distinctive features and enjoying special rights (Sandin 2014, 67). Various legislative bodies defined the child and childhood, and determined what children could expect of their childhood, such as access to education, regulation of child labor, and protection against physical violence and maltreatment. Moreover, new ideas of preventive criminal and penal laws perceived children and minors more clearly and as distinct from adults (Harrikari 2011; Therborn 1996, 29–30). In Finland, the emergence of the acts on Compulsory Education (101/1921), Child Welfare (52/1936) and Child Guidance (75/1950) all highlighted how children came to be viewed by society as politically important objects of welfare. But at the same time, children were still mainly on the receiving end in terms of provision of services and protection, and not seen as participants. Children themselves had no say in matters affecting their wellbeing, as they were not recognized as having any capacity to make decisions or to act on their own behalf. Instead, they were embedded within a system in which parents, guardians, adult caregivers or child welfare officials were entrusted to act on their behalf and in their interests.

In the time period of 1945–1960, approximately 15,000 –17,000 children a year were living in out-of-home care, either in foster families or in residential institutions such as children's homes, reform schools, or reception centers. The forms of out-of-home care are presented in Table 1.

Table 1. Types of foster homes and residential institutions in Finland.

Foster homes	
Foster homes for children taken into care	Private homes where children were placed as foster children; written agreements concluded between the authorities and foster parents
Foster homes for children placed there by their own parent(s)	Private homes, often relatives; no officially signed agreements; supervised by local authorities
Residential institutions	
Children's homes	Run by local authorities, associations, churches and private individuals, housing orphans, needy children, and children taken into care
Reception centres	Institutions in which children were assessed before long-term placement
Reform schools	For children and young people deemed by the authorities to be anti-social and uncontrollable

Source: Malinen et al. 2019, 4.

According to the Law on State Reformatories (Laki valtion kasvatuslaitoksista, 125/1924) and the Child Welfare Act (52/1936), under-aged offenders were to be separated from adults and placed in re-education institutions. Children viewed as delinquent or anti-social could also be placed in reform schools. Reformatories were gendered, and typically girls were admitted to reformatories based on their deemed delinquent and morally reprehensible behavior. Boys were mostly admitted to reformatories based on their antisocial behavior and offences which were leading them towards a criminal lifestyle (Vehkalahti 2009, xiii-xiv). In 1945, municipal, private and state-owned reform schools had places for nearly 1,300 children (Pulma 1987, 227).

The main aim of reform schools was to educate children and young people into a regular way of life and to make them decent members of society. The everyday life at the school was dominated by studies and practical training, mostly agricultural (Hoikkala 2020; Haikari 2009, 20–21). In the case reported here, the middle-sized Palhoniemi reform school was one of ten municipal reform schools in Finland. During the time period studied, it housed an average of 46 boys every month.

When children entered reform school, both they and their parents had to submit to the rules set by the director, to whom parental rights were transferred (Vehkalahti 2009, 57). From then on, contact between the children and their family was discouraged, with letters censored and sometimes withheld. Furthermore, reform schools like Palhoniemi were often situated in remote rural locations (Hoikkala 2020, 29). Palhoniemi was located outside a village called Kuru, some 45 kilometers from the

center of the nearest city Tampere, and it could only be reached mainly by a ferry which plied the lake between Tampere and Kuru. Such topographical factors further served to diminish the inmates' ability to connect with their families and other people (Hytönen et al. 2016, 42).

Reform schools shared the basic characteristics of a 'total institution', which Goffman (1961, xiii) defined as 'a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.' However, reform schools were not totally isolated from the surrounding society. In Finland, the Municipal Boards for Child Protection were locally responsible for the inspection of residential care, and this was also the case with Palhoniemi (see Directive for Palhoniemi Reform School 8 January 1932). Nationally, the Child Welfare Office (CWO) at the Ministry of Social Affairs and Health was the highest authority.

Residential institutions could be also inspected by the parliamentary Ombudsman of Finland (Eduskunnan oikeusasiamies in Finnish). The ombudsman had a special duty to make regular inspections of "closed institutions", including reform schools and other residential institutions such as children's homes. In theory, any individual could lodge an administrative complaint to the supervising authorities or an ombudsman (Mäenpää & Fenger 2019, 176–177). However, internationally it was only during the 1970s that the voices of children and care-leavers came to be taken more seriously. This reflects historical changes and developments in the ways in which childhood in general has come to be been seen and valued in society (Murray 2015; Daly 2014; Wright 2016, 17; Davis 2005), yet not all experiences of abuse went unacknowledged, even at the time they were perpetrated, as this case study will show.

3. Studying justice and feelings of injustice

The search for justice and feelings of injustice are among the very first human life experiences. Justice matters to people, and people often talk about how they are treated in their social interactions and how goods and services are distributed in society, often in the frame of justice versus injustice (Cremer & Bos 2007, 1–2). During the last couple of decades, researchers of justice have devoted much attention to distinguishing between different "types" of justice. Cremer and Bos have pointed out how 'justice involves issues of distribution, treatment, formal and informal decision-making procedures, and so forth. This variety of justice instances has been reflected in the scientific use of

concepts such as distributive, procedural, and interactional justice.' (Cremer & Bos 2007, 1–2). Recent inquiries and historical studies on the failings of child welfare have shed new light on how these different types of injustices have been experienced and felt emotionally (Daly 2014; Sköld 2013; Hayner 2011). Also, law and emotions scholarship has investigated how the law can affect, shape and script emotions (Grossi 2015, 57).

In addition to unjust treatment, victims of abuse and neglect have often experienced procedural injustice in the form of inadequate institutional responses. Miranda Fricker (2007) has coined a concept of 'epistemic injustice' which according to Kidd et al. (2001, 1) refers to 'those forms of unfair treatment that relate to issues of knowledge, understanding and participation in communicative practices'. Fricker herself focused especially on two kinds of epistemic injustices, testimonial and hermeneutical, and the latter, testimonial injustice, is especially relevant for highlighting the troubles which marginalized groups often face when seeking justice.

The Finnish Inquiry, among others, has revealed how especially local supervising authorities enabled the continuance of the neglect and abuse by ignoring complaints and pleas (Hytönen et al. 2016; cf. Ericsson 2015, 52). As a result of this kind of 'dual neglect', some of the care-leavers lost faith in authorities and became bitter and distrustful of welfare institutions and people in positions of authority (Malinen et al. 2019, 9). In general, both children living with their families as well as those in out-of-home care have historically experienced difficulties in voicing their opinions and grievances. In the Finnish post-WWII culture, adult authority was emphasized, and children were not supposed to challenge the decisions or behavior of their parents or educators. Consequently, children had to suppress their feelings of injustice even when they felt they were being treated wrongly (Malinen & Tamminen 2017).

Despite their vulnerable position, children in care often perpetrated acts and displayed behavior that can be defined as 'forms of everyday resistance'. James C. Scott has pointed out how subordinate groups in society seldom have resources that allow them to influence or gain access to those in power. Historically, subordinate groups have often also feared reprisals if injustices have been openly and publicly protested against. These structures gave impetus to control anger and aggression, and develop more subtle and veiled ways of resistance (Scott 1990, 40). Children in care developed practices which they used to subvert the power of adults in foster homes, children's homes and reform schools, such as stealing small items, acting slowly, or giving derisive nicknames to caregivers and superintendents (*katsastaja* in Finnish) (Laitala 2019). Kathleen Daly has pointed out how absconding or running away from institutions was often a form of resistance against abusive and oppressive conditions (Daly 2014, 90). Some of these absconders tried

to alert child welfare officials and other authorities to events and conditions, but often to no avail. Furthermore, children's strategies could prove counterproductive and runaways typically received harsh treatment and punishment upon their return (Hytönen et al. 2016; Daly 2014, 90).

Currently there are few studies on how children in care or care-leavers have tried to seek change and justice by using more conventional administrative procedures such as complaints. On a more general level we know that complaints against the social welfare system and bureaucracy were increasing in the aftermath of World War Two. The chief of staff at the Ministry of Social Affairs and Health, Aarne Tarasti, interpreted in November 1945 that the proliferation of complaints reflected both a dissatisfaction with the distribution of services, and also changes in how both political actors and ordinary people related to social welfare officials and services (Minutes 13-14.11.1945, Ca:3, HMA).

In her historical research on restrictive and disciplinary practices in Finnish residential care, Susanna Hoikkala has pointed out that already during the early 1950s, national authorities asked local actors to inform children in care of their rights and possibilities to complain. But unfortunately, the data used by Hoikkala did not allow her to draw any conclusions as to whether local authorities had informed the children or not (Hoikkala 2020, 84). Other previous studies dealing with the history of child welfare suggest that especially the FPDL criticized the conditions in residential care institutions in the immediate post-war years, and its members 'made waves' at least with regard to the reform schools at Palhoniemi, Muhos and Lauste (Laitala & Puuronen 2016, 118; Juntunen 2007, 179; Jalonen 1999).

This case study is the first to take care-leavers activities into closer scrutiny. By using materials produced during the investigation, my aim is to attempt to do justice to the complexities of the past and its contingency (cf. Kennedy 2001, 118). The investigator appointed by the Minister of Social Affairs and Health collected documentary evidence, including inmates' essays, letters to parents, minutes of staff meetings and documents filed in response to complaints, and also conducted interviews with care-leavers, current inmates, and staff members. These primary sources present a unique opportunity to examine how children in care and young care-leavers tried to make sense of the harm inflicted on them, how they described events and actions deemed unjust, and how they reacted to these experiences not only by seeking justice, but also by trying to come to terms with their past.

When describing their recent experiences, children and care-leavers were able to give often vivid and detailed accounts of events and their related emotional reactions. As I will elaborate further in my analysis,

they expressed their reminiscences and testimonies within a moral frame and vocabulary. Both the informal meetings organized by care-

leavers and the formal investigations conducted by investigators formed arenas in which children and young care-leavers were able to articulate their feelings and feel that they were listened to and acknowledged. However, these pathways resulted in very different emotional experiences.

Vallgårda, Alexander and Olsen (2015, 21) have used the concept of 'emotional formation' to describe how a variety of factors shape emotional experiences, such as cultural and social understandings of what is appropriate behavior in certain situations. The use of language in the care-leavers' meetings was more passionate, aggressive and political than the dispassionate tone adopted in the interviews conducted by the formal investigator, reflecting their different power positions, and also the emotional prescriptions involved and prevailing local rules and norms (cf. Olsen 2017; Boddice 2018, 75, 193). In chapters 4 and 5, I will further emphasize the connectedness of emotions and spatial settings. By the help of interaction rituals such as the sharing of experiences, care-leavers' meeting rooms and venues became emotionally heightened spaces (Gammerl 2012, 165) in which feelings of injustice were felt collectively and turned care-leavers into an emotional community, ready to act (cf. Rosenwein 2006).

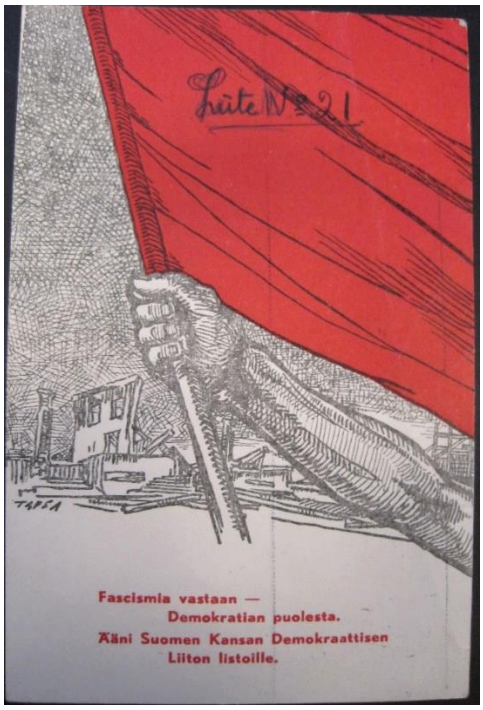
Cultural historians of medicine have also proposed that there is an ever-changing "symptom pool" that composes of the legitimate contemporary idioms of distress and appropriate ways to express psychological distress (Shorter 1998). In the case of the Palhoniemi children, they could not, for example, frame their experiences as traumatic, as the research concept of trauma was not yet established in Finnish society. However, contemporary political discussions provided narratives of change, of an unjust society, and a need to make society more democratic. Thus, care-leavers could use these ideas to make sense of their experiences and mobilize their feelings into a vehicle of social action.

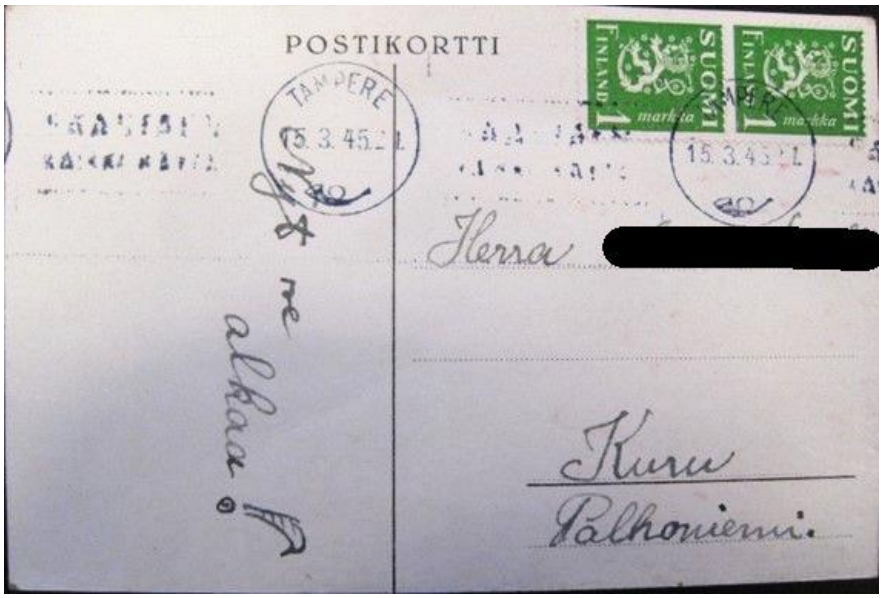
Although contemporary accounts afford interesting insights into past experiences, we have no way of accessing any "immediate" or "authentic" experiences that may have been present at the time, and we only know the experiences through their representation. When sharing their experiences, children had to transform actual events and impressions into discursive and textual forms (Abrams 2016). I concede that contemporary experiences are socially constructed, and formed in specific cultural and institutional contexts (Scott 1986). When the Palhoniemi care-leavers shared their experiences in their informal meetings, the environment for discussion was radically different from that of the interviews conducted during the investigation. Current inmates were interviewed during the formal investigation and asked questions for specific purposes, in order to ascertain whether infringements were actually perpetrated (cf. Vehkalahti 2016, 438). A

timeline, mapping the different phases of the investigation and other major events is attached as Appendix 1.

4. 'Now it Begins' – feelings of injustice as a resource for action

A new attack on the Palhoniemi authorities followed in March 1945, when the director of the Palhoniemi Reform School (A. L.) received an anonymous postcard bearing the message 'Now it begins!' (see Figures 2 and 3). The postcard was dated 15 March 1945 and was sent two days before the Finnish parliamentary elections. Finland was the first European country to hold parliamentary elections after the outbreak of WWII (Meinander 2012, 88). The postcard itself was a campaign postcard for the left-wing Finnish People's Democratic League (*Suomen Kansan Demokraattisen Liitto* in Finnish). On the front of the postcard was the slogan "Against Fascism – For Democracy" (*Fascismia vastaan – Demokratian puolesta* in Finnish). Because of the timing, the phrase 'Now it begins!' could refer to the elections and the anticipated victory of the left, which was indeed the outcome of the elections. The far left received 23.5 percent of all the votes cast, becoming the second biggest parliamentary group after the Social Democratic Party of Finland (SDP) (Holmila & Mikkonen 2015, 141). The phrase "Now it begins" may also refer to the activities of a group making preparations for lodging complaints against Director A. L. and the Palhoniemi Reform School.





Figures 2 and 3. In March 1945 Director A. L. received an anonymous postcard on which was written 'Now it begins!'. The name is covered by author.

On 15 April 1945, nearly 40 people gathered in the *Eine* restaurant in Tampere to discuss the conditions in the Palhoniemi Municipal Reform School. The convenor of the meeting was a 19-year-old care-leaver of Palhoniemi, Mr. H. S., who had spent eight years at Palhoniemi from 1937 to early 1945. The participants consisting of Palhoniemi care-leavers and parents of current inmates, were invited to the meeting to discuss grievances about the institution, past and present. A few of the participants were also active members of the Finnish People's Democratic League (FPDL).

Preparations for the meeting had started two weeks earlier, when H. S. visited Palhoniemi on Good Friday, 30 March, and collected the names and addresses of current inmates and information on how they were treated (Anonymous letter, 30.12.1945, Palhoniemi Reform School, G: 17). It is probable that H. S. himself was inspired to act by other current events. In early March, a Finnish left-wing newspaper *Vapaa Sana* published an article dealing with 'horrendous brutality inside a reform school' (Vapaa Sana 2.31.1945). A young care-leaver who remained anonymous, shared his experiences of violent treatment in a reform school, which was only referred to as being 'the biggest in the Nordic countries'. By voicing his experiences, he set an example for others in a similar position.

Less than a week later, a new focus was put on reform schools when the government set up a committee to investigate conditions in reform schools and workhouses, and to correct possible shortcomings (KM 1946:1). The establishment of an official investigative committee gave new confidence to those who were already contemplating airing their grievances on a local level. It seems that the political turmoil following

World War Two and a rhetoric of radical change opened up a 'window of opportunity' (Kingdon 1995) to air grievances in a more open manner and in new political arenas, at least for several months. Especially in the field of child welfare, negligent or abusive treatment in institutional care could be articulated in a new way.[2] When participants entered the *Eine* restaurant they were feeling confident, but by the end of the meeting the room had become an emotionally charged space (Anderson & Smith 2001) - full of excitement, and hope of getting both retribution and also a change in the practices of Palhoniemi.

Margit Pernau has discussed the role of spatial settings in the formation of emotional experiences. She has argued that spaces are not naturally given, but 'constituted through endowment with social meaning and constantly re-created through human practices' (Pernau 2014, 542). The participants of the meeting knew beforehand that the *Eine* restaurant was regularly used to hold meetings of the FPDL, and this knowledge sensitized participants to certain emotions even before they entered it. Other factors such as the social sharing of experiences and the spatial setting, also influenced how the atmosphere of the meeting developed. At the beginning of the meeting, the participants were simply a group of people aware of the general agenda and who came from a similar background. But as the meeting progressed, the group (at least temporarily) began to transform into an emotional community (cf. Rosenwein 2006).

The minutes of the meeting give us some clues about the factors shaping the emotional experience. First, a participant who was referred to as '*comrad*' read aloud newspaper articles dealing with shortcomings in other reform schools, and in this way focused the attention of the other participants on the matter at hand. This was followed by an introductory speech by H. S. Starting from the day he entered Palhoniemi at age 11, H. S. described how he had personally experienced everyday life at Palhoniemi, the treatment in general, the punishments, and the social conditions. H. S. also noted how memories and time spent in reform school never left him, and he felt that the stigma of being 'a Palhoniemi boy' followed him and made it difficult to enter working life, as a second-class citizen. This highly emotional speech was received with enthusiasm, at least according to the minutes, and inspired others to share their experiences and feelings in the moment.

Researchers of collective emotions have pointed out how interaction rituals such as chants or songs, or the disclosure of experiences as seen at the meeting at *Eine*, can intensify emotions and produce emotional energy – including enthusiasm and confidence - for the participants (Scheve & Salmela 2014). By sharing and thereby validating their

[2] On the concept of 'tellability', see Rose 1999.

experiences, the participants did not only build a sense of community, but they also reduced the presence of stigma.

To render comprehensible the experiences of care-leavers and current inmates at Palhoniemi and their feelings of injustice and stigma, I will describe in some detail how participants in the meeting perceived and understood the nature of the care they received. In general, the main problems with the institution were identified as involving too harsh discipline, poor and inadequate food and clothing, too little freedom, excessive workload, and a lack of vocational training. A particular shortcoming was felt by the inmates to be that punishments did not adhere to the order prescribed in the rules.

In order to bring maladjusted children and young offenders back into line, a system of punishments of increasing severity was created (see Table 2). In principle, the outcomes of education were supported in institutions by means of sanctions and incentives (stick and carrot). If an inmate broke the rules, these same rules required that initially a public warning was to be administered. If the warning did not have the desired effect, it was possible to withdraw partly or in whole certain rewards and privileges earned, and to reduce the quality of food provided for no more than one day at a time. Corporal punishment was also permitted, however, the basic principle was that such punishment may not impair the health of the inmate (Laitala & Puuronen 2016, 164; cf. Sargent 2014).

The inmates' accounts stressed that instead of issuing warnings, punishments frequently became physical. Typical punishments were due to offences perpetrated by the boys (such as petty theft and stealing), refusing to work, or defying instructions given by the personnel - all practices which can be labelled as everyday resistance. Many of the Palhoniemi inmates appear to have deemed the punishments meted out as routine, reasonable or just if there was some reason for them. In the post-war years, corporal punishment was fairly common in Finnish families, although in the 1940s and 1950s, Finnish psychologists argued against it as they believed it eroded trust between the child and caregiver.

Table 2. Forms of punishment allowed and infringements involving exceeding the limits

Permitted punishment	**Accusations of exceeding the limits**
Solitary confinement:	
Under 14 years old, max 2 nights	
14–16 years old, max 4 nights	e.g. 15-year old boy, 12 nights
Over 17, max 6 nights	
Birching on the decision of the director together with the guardians administered by the director in the presence of another employee	
Proper tool: birch	Instrument used: tarred rope, leather strap, pitchfork shaft
Maximum number of strokes 10	Number exceeded, 11–30
No punishments other than those mentioned above were to be administered.	
Especially forbidden were: Boxing the ears, prodding, and other hands-on actions	Punching with fists, kicks, hitting with a stick, throttling

Possibly the greatest anger and feelings of hatred arose in those situations in which the inmates felt that they had been punished or mistreated without just cause. In the Palhoniemi institution, several workers (inspectors/superintendents) were believed to act unpredictably and to be subject to fits of anger. To give an example, one boy born in 1930 was punched straight in the face in a situation in which the boy had refused to address a worker in a certain manner. Boys might even be punished for accidents that occurred. When one boy engaged in farm work accidentally uprooted a carrot plant while working with a hoe, the gardener immediately beat him with a stick (L. L., born 1932, Interview, Palhoniemi investigation). When another boy was driving a horse and inadvertently broke a shaft, the superintendent (K. P.) struck him several times on the back, wrists and knees with a stick 2.5 cm in diameter (R. M., born 1930, Interview, Palhoniemi investigation).

Similar punishments deemed excessive were also meted out for the slightest of breaches of etiquette. When an informant born in 1930 had been fighting with another boy about his place in the line, an inspector called J. V. knocked their heads together.

Another punishment deemed unjust was the use of unreasonable force and the inflicting of excessive physical or mental pain. For example, the inmates considered blows from fists or throttling as unreasonable, as well as heavy blows from a stick or strap that caused injury, bleeding, bruising or swelling that troubled them for a long time. After harsh punishments and violent treatment, the inmates wept, ran off, and some absconded from the institution. The violent treatment received is also likely to have caused the children to suffer from mental and physical symptoms, for example bedwetting. However, there were

differences in how feelings were expressed, and while some tried to hold back their tears, some wept openly, especially the younger ones.

Punishments deemed unreasonable frequently coincided with the days of being sequestered on recapture after absconding (cf. Daly 2014, 90). After attempting to escape, a youth might be sequestered in a cell for as many as 12 to14 days (J. L., born 1930; H. S., born 1926, Interviews, Palhoniemi investigation). Long periods in the cell were considered a terrifying experience, especially if the inmate's rights to be allowed out of the cell were also curtailed. After attempting to escape, boys were regularly birched.

Both the statements and previously gathered testimonies read out during the meeting at the *Eine* restaurant help us to understand the emotional states of the participants and their eagerness to call wrongdoers to account. When H. S. gave his concluding speech, he argued that now was finally the right time to demand changes and to "fight against the terrorism" which they had experienced, but with a warning that success demanded a joint effort:

> 'Now we, both the former boys and parents of Palhoniemi inmates, must have a complete mutual understanding in order to stand united. We know that there will be troubles ahead and forces who will resist us, but with common sense and a clear mind, we must prevail and beat our opponents.' (Minutes, Palhoniemi investigation, Hb:1 Investigations).

The participants agreed with H. S.'s call for action and according to the minutes, expressed their enthusiasm by cheering, shouting supportively, and giving standing ovations. It seems that the discussions and sharing of experiences provided participants with a sense of belonging and empowerment. By entering into an alliance with the local representatives of the FPDL, the care-leavers were even more hopeful of getting their voices heard, and accessing the political system and justice. It seems that the care-leavers tried to make use of the previously described 'window of opportunity' (Kingdon 1995) which opened up in the months immediately following the end of the war, allowing them to become "policy entrepreneurs" and promoting changes in the management and organization of care.

Although the discussion revolved around negative and even traumatic experiences, especially towards the end, the atmosphere of the meeting turned positive and future-oriented, and even exuberant. According to Judith Herman, an opportunity to share a traumatic experience in detail with the accompanying feelings can provide relief and reduce symptoms related to that experience (Herman 1997, 273–274). As the participants were trying to come to terms with their experiences, the meeting allowed them to feel that they were being listened to without being judged or doubted.

The participants also made demands of a retributive nature. First of all, the participants agreed to call for Palhoniemi Director A. L. to be relieved of his duties, and for all staff members of Palhoniemi to be called to account for their unlawful conduct. Accusations were also made against the Municipal Board for Child Protection. Some of the parents claimed that their children had been sent to Palhoniemi without written parental permission, and that some of the boys placed in Palhoniemi were too unfit and anti-social to be placed there.

When discussing concrete means of seeking justice, the use of complaint procedures was raised. Even before the meeting, the convenors had gathered quite extensive material in the form of written testimonies to substantiate their claims. The right to make a complaint ("gå till kungs", actio popularis) has been a part of the Finnish administrative and judicial system for a very long time, and as already pointed out, any individual could file an administrative complaint to the supervising authorities (Mäenpää & Fenger 2019, 176–177). When it was time to make a decision, the empowered attendees voted with an overwhelming majority to demand the initiation of an official "investigative commission".

5. The role of emotions in the process of handling a complaint

In June 1945, the attendees of the Palhoniemi meeting sent an official request to the Child Welfare Office (CWO) at the Ministry of Social Affairs and Health, in which they demanded the initiation of an official 'investigative commission' (*tutkimuskomitea* in Finnish). The CWO was the highest authority in Finland responsible for inspecting child protection, and was legally obligated to address the complaint. Locally, the Tampere Municipal Board for Child Protection was responsible for the inspection of children in out-of-home care. On receipt of the complaint, the CWO initially requested a statement on the issue from the Tampere Board for Child Protection. The Board and its director Alpo Lumme were the supreme authorities overseeing the reform school and the body in charge (L1936, 35§). The Board in turn requested a statement from the director of the reform school. In his statement, Director A. L. first gave a general overview of how the situation at Palhoniemi had developed during the spring, and how certain individuals such as H. S. had begun to cause unrest among the inmates. As the following excerpt shows, the Director fairly quickly started to paint a picture of H. S. as a troublemaker and a deviant individual, who was also a possible psychopath:

> ‘Some sort of diagnosis of H.’s personality might help to explain his antics. If a psychopath is understood to be a person who reacts violently in different situations, then H. can be considered to be mentally disturbed’. (Statement by A. L. 21.6.1945, Hb:1.3)

Katariina Parhi has argued that in Finland in the 1940s, psychiatrists used a diagnosis of psychopathy as a marker of problematic behavior (Parhi 2019, 1). By chance, roughly at the same time as A. L. responded to the accusations, the authorities initiated an inquiry to directors of reform schools to estimate the number of psychopaths in their facilities, and according to subjective evaluations, roughly 21–24% of boys met the criteria (KM 1946:1, 12). It is therefore not surprising that director H. L. used H. S.’s emotionality and the volatility of his emotions as an indicator of his pathological condition and possible psychopathy. To make his argument more convincing, A. L. attached a number of records to his statement, in which other professionals such as teachers had made evaluations of H. S. and his inability to adjust to his environment. Anne Koskela and Kaisa Vehkalahti have pointed out how professional devices such as teacher’s statement forms produced a picture of normality and deviance (Koskela & Vehkalahti 2016). In H. S.’s case, these records highlighted the pathological nature of his behavior and also the hereditary factors behind it.

In the statement of 21 June 1945, as a rejoinder to the complaint, the Board proposed that there was no need for an investigation, claiming repeatedly that the inmates’ accounts could not be relied upon. The rejoinder set the character of the inmates in a decidedly dubious light, and in a similar fashion to A. L.’s statement, most of the boys were reportedly mentally disturbed, with their imaginations vacillating between fact and fiction. At the end of its rejoinder, the Board regretted ‘that such flagrantly dishonest and malicious accusations should have been made by H. S. and his associates, which is what the accusations against the Palhoniemi Reform School are’ (Minutes, Palhoniemi investigation, Hb:1.3).

As Harry Ferguson and Carol Brennan have pointed out, in general, children in care have had trouble presenting themselves as credible witnesses (Ferguson 2007, 127; Brennan 2015). This also becomes apparent in the Palhoniemi case. The actions taken by Director Alpo Lumme of the Child Welfare Board and the Palhoniemi Director A. L. build a picture in which they appear to act in a coordinated manner to brush aside the care-leavers’ accusations as false and misleading. Furthermore, both Director Lumme and Director A. L. also made efforts to publicly defend the reputation of Palhoniemi. When the care-leavers’ meeting was held in the *Eine* restaurant on 15 April 1945, an advert was published the same day calling former boys of Palhoniemi to join a ‘brotherhood meeting’ to be held on 6 May 1945 (Newspaper *Aamulehti* 15.4.1945). The meeting was organized by Director A. L., and in a

peculiar way followed the same formula as the meeting organized by H. S. In his introductory speech, Director A. L. presented an idea to establish a society for former boys, as it was important both for the development of current work, and also for boys in care, to listen and learn from the experiences of care-leavers. During the 'brotherhood meeting', former boys shared their experiences one by one, but neither the newspaper article nor the transcript of the meeting reveals the number of attendees. Director Lumme of the Child Welfare Board was also present in the meeting, and in his speech he publicly rejected the accusations made regarding the Palhoniemi reform school, and especially any criticism of its results as re-educative facility (*Aamulehti* 7.5.1945).

Despite this heavy resistance, the care-leavers did not back down from their demands for an inquiry, although the Board for Child Protection insisted that there was no need for it. On 20 August 1945, those who had attended the earlier meeting at the *Eine* restaurant set up a committee in whose name a demand was made to the city government on 30 August 1945 for an inquiry to be held. A painter by the name of E. N. was elected to chair the committee, and he was a member of the FPDL. In their complaint, the complainants reiterated their accusations, the main shortcoming still perceived to be that the punishments meted out in the institution contravened the rules of the reform school (40§ and 41§). In evidence of this, the committee presented information collected from inmates, parents and medical practitioners.

In spite of the negative attitude on the part of the Board for Child Protection, the city government required the inquiry proposed by the complainants to be implemented, and encouraged the Board to enlist the help of the Ministry of Social Affairs. The document requiring the inquiry was signed by Mr. Aarre Ranta, deputy mayor of Tampere and a member of the Social Democratic Party (SDP), into whose purview social matters fell. The material at my disposal does not reveal the extent to which the FPDL members of the city government may have exerted influence in the processing of the complaint. But it would nevertheless appear that the complainants knew that they could also rely on support from local left-wing politicians. In October 1945, Director A. L. was sent a letter describing him as a predator and calling for his immediate resignation. The same letter informed him that the signatories of the letter were 'eleven old boys crying out for revenge' and that they had joined the FPDL. Robert C. Solomon (1999, 126) has pointed out how a desire for vengeance seems to be 'an integral aspect of our recognition and reaction to wrong and being wronged', and this desire was explicitly expressed in the letter.

At the request of the city government, the Board for Child Protection called for assistance from the Ministry of Social Affairs in the implementation of the inquiry, and this was met with a positive

response. On 29 October 1945, Minister Eino Kilpi (SDP) ordered 'a full and thorough investigation of the issue'. The framing of this instruction suggests that the official appointed needed to be familiar with the genuine background of the matter, namely the aspects and conditions which it would rely upon to resolve the issue. 'Full and thorough' meant that officialdom should obtain all the information that was deemed to be of significance in resolving the issue. A lawyer and departmental secretary by the name of Leo Lähdevuori was involved in this process.

It was very rare, but not unprecedented, for the Ministry and its officials to conduct an inquiry. District inspectors of social care used to be sent to investigate various complaints and revelations. Complaints about the care of the poor were especially common, but less so within the field of child welfare. However, the Ministry might also conduct inquiries of their own accord, for example as a result of items or accusations appearing in the press.

The inquiry began on 6 November 1945. Lähdevuori conducted four separate interrogations on 6 November (at the Board for Child Protection), on 7 November (at Palhoniemi, with current inmates), on 14 November (at the Board for Child Protection, in the presence of former Palhoniemi personnel), on 17 December (at the Board for Child Protection, with Director A. L.), and the upshot of these inquiries was a 61-page transcript which Lähdevuori completed on 17 January 1946. With its appendices, it amounted to a total of 103 pages. The interrogations were conducted in the form of a police interrogation, with those present in addition to Lähdevuori being two witnesses to the interrogation, Mr. Eetu Reinilä, a grammar school teacher and member of the Tampere Board for Child Protection, and Ms. Liisa Uotila of Tampere city youth work, who also took notes.

The purpose of the interviews was to gather information about the alleged events, and the investigator's task was to estimate the evidential value of the witnesses and the value of the information gleaned in the interviews, especially from the perspective of the issue to be investigated. In practice, the investigator had to weigh up what attitude to take in the interviews held with the boys and personnel. It would appear that the investigator endeavored to ascertain what had really happened, and to what extent the actions exceeded the limitations on punishments and penalties laid down in the rules of the institution. The degree of detail assumed importance in the investigation. When the inmates recounted how they were punished and how they were treated, the precise number of blows was entered into the record, the specific object with which they were struck, and what the consequences of such beatings had been.

The personnel interviewed made great efforts to discredit the boys' accounts. The director of the institution, in particular, attempted to claim that the boys were unreliable witnesses, and as in the earlier

statement by the Board for Child Protection, called them mentally disturbed and described them as psychopaths. However, there was a high possibility that the claims of the young people and personnel might have been given little weight in investigations led by the Ministry. In another case concerning alleged sexual misconduct on the part of a pastor who was part of the management of an orphanage, the district inspector of social care conducted a fairly thorough investigation. Although a female worker at the orphanage was of the opinion that the pastor's conduct with the older girls was inappropriate, the inspector attached greater importance to the directress' statement that she had observed no inappropriate conduct on the part of the pastor.

However, in the investigation conducted by the Ministry of Social Affairs, the boys were given a hearing and it would appear that their testimonies were taken seriously. In a statement to the Board for Child Protection on 14 February 1946, the Ministry expressed the opinion that an atmosphere had evolved in the Palhoniemi Reform School which was decidedly detrimental to successful upbringing, and that this atmosphere was attributable to Director A. L.. The statement went on to note that punishments had been inflicted in the institution which ran contrary to its own rules, and that a superintendent by the name of K. P. was particularly implicated in these. The report also noted other shortcomings which the Board was exhorted to take urgent measures to correct.

After the publication of the report, the board of governors of the institution decided that Director A. L. should be removed from his post. At a meeting held on 6 May 1946, the dismissal of A. L. was proposed, and after lengthy consideration, the Board for Child Protection concurred with the proposal and decided to relieve A. L. of his duties with effect from 1 August 1946, and to issue a severe reprimand to superintendent K. P.

The document drawn up by the Board for Child Protection accompanying the decision on dismissal does not, however, mention the unreasonable and violent treatment of inmates, which was expressed as the main problem. Rather, the problem highlighted is that Director A. L. no longer enjoyed the confidence of the inmates' parents and his own personnel, and that the reform school had been too open to external visitors. The Board for Child Protection was moreover of the opinion that punishments had been meted out 'as would appear' contrary to the rules, and that Director A. L. had not sufficiently monitored the infringements of his subordinates.

The major interest surrounding the complaint and the ensuing investigation focused primarily on the offences committed where the limits of punishment allowed in law were exceeded. The focus of the interviews was not on how the inmates felt about this, but nevertheless,

the inmates described the feelings which the punishments and conditions of care had caused.

6. Conclusions

In this article I have scrutinized a somewhat uncharacteristic investigation conducted by the Finnish Ministry of Social Affairs into accusations made against a municipal reform school in the vicinity of the Finnish city of Tampere during the period 1945-1946. What makes the case unusual is that the investigation got under way only gradually, at the instigation of young men who had been released from the institution. The former inmates of the reform school, together with parents of current inmates, drew up a complaint demanding not only changes in the conditions prevailing in the reform school, but also calling the perpetrators of the misconduct to account. In the testimonies collected for the complaint, the former inmates of the reform school also recounted at length what it felt like to be there. The study data and analysis is significant in terms of understanding how children and care-leavers made sense of their situations and expressed their moral views.

The chain of events was rendered possible through the situation prevailing in society and the mood in Finland after the war, and conditions to which inmates were subjected were widely criticized. In the postwar political situation, abuse and neglect in institutional care became tellable in a special way, and although the complaint was quite exceptional, especially due to the young age of the complainants, a critical movement against reform schools was also discernible in other Finnish municipalities.

The article argues that not only feelings of injustice, anger and hatred, but also of hope, became an import resource for collective action. By seeking justice, the care-leavers were able, at least momentarily, to come to terms with their past and heal some of the wounds inflicted on them. When the group was organized, it formed, at least temporarily, an emotional community (cf. Rosenwein 2006) in which its members were bound together by their experiences of being in care and the feelings of injustice they experienced. Being part of this emotional community opened up opportunities for empowerment through sharing and the validation of experiences.

Since the 1990s, there has been a growing public interest in the human consequences of experiencing human disasters, including failures in education, upbringing and care (Abrams 2016, ix, 175–176). Recent inquiries into the failures of child welfare have in particular become a global phenomenon, documenting and acknowledging the

experiences of children who are allegedly being 'looked after' (Gibney 2008; Olick 2007). The Finnish Inquiry revealed that when lodging complaints about inappropriate and abusive care, care-leavers felt that they were not being listened to, sometimes disrespected, and labelled as untrustworthy and even mentally disturbed. The combination of the social attitudes towards children and their parents, and the indifference of local authorities towards inspection created environments in which abuse and neglect has continued (Malinen et al. 2019, 9). Specifically in regard to failing complaint mechanisms, instead of giving hope to children that their problems would be dealt with, they have continued to cause structural violence, and feelings of being neglected by a new group of adults and authorities (cf. Abrams & Keren 2007).

The Palhoniemi investigation and its different phases provided an interesting historical case study on how 'truth' and 'knowledge' were socially constructed by the parties involved, and how parties had differing capacities to produce knowledge that could be considered as trustworthy. Local authorities and representatives of the reform school clearly had a more advantaged position, as they were representing the state, and offered expertise based on professional and scientific knowledge. However, due to the unstable political situation and changing political constellations, both governmental and local authorities became more carefully attuned to voiced grievances (as experiential knowledge), and also to the emotional states of citizens and their feelings.

Appendix 1.

Timeline depicting main events of Palhoniemi investigation and events preceding it

19.9.1944: Signing of the Moscow Armistice between Finland and the Soviet Union, ending the so-called Continuation War.

February 1945: A housekeeper working at the Palhoniemi Reform School receives a threatening letter, signed by "eleven old boys crying out for revenge".

2.3.1945: Finnish left-wing newspaper Vapaa Sana 2.3.1945 publishes an article: "Terrible brutalities inside the walls of reform schools".

8.3.1945: Finnish government sets up a committee to investigate conditions in reform schools and workhouses and correct possible shortcomings.

15.3.1945: Director of Palhoniemi receives an anonymous postcard bearing the message "Now it begins!"

17.-18.3.1945: Parliamentary elections in Finland result in a victory for leftist parties (SDP 25.08 %, FPDL 23.47 %).

30.3.1945: Care-leaver H. S. visits Palhoniemi to gather information from current inmates.

15.4.1945: Palhoniemi care-leavers and parents of current inmates meet at the Eine restaurant.

15.4.1945: An advert is published in the newspaper Aamulehti, calling for Palhoniemi care-leavers to join a 'brotherhood meeting', to be held 6 May 1945.

27.4.1945: Last Germans leave Lapland, ending the Lapland War with Germany.

31.4.1945: Personnel meeting at Palhoniemi, in which the recent activities of care-leavers, including the meeting at the Eine restaurant are discussed; director presents his plans for a 'brotherhood meeting', also intended for care-leavers.

6.5.1945: 'Brotherhood meeting' organized by the director of Palhoniemi is held at the Emmaus hotel.

8.5.1945: Recently established committee presents its first statement and urges the Finnish government to establish a specific residential institution for children considered to be psychopaths (Suomen Sosialidemokraatti 8.5.1945).

28.5.1945: Personnel meeting at Palhoniemi. On the request of the director, disciplinary practices are discussed and personnel are asked to refrain from the use of corporal punishment, especially of an arbitrary nature.

21.6.1945: The Tampere Board for Child Protection issues a statement to the Ministry of Social Affairs and Health, disclaiming the validity of complaints made by care-leavers; a statement by the director of Palhoniemi is attached as an appendix.

5.8.1945: The Tampere Board for Child Protection visits Palhoniemi and conducts a short inspection.

20.8.1945: A meeting organized by parents of Palhoniemi inmates is held, and a working group for the preparation of a new complaint is selected.

30.8.1945: The working group selected on 20.8.1945 issues a request to the city government to initiate a formal investigation at the Palhoniemi Reform School.

15.9.1945: Some members of the working group and parents of current inmates visit Palhoniemi after being given permission by director A. L.

4.10.1945: City government of Tampere issues a request to the Child Welfare Board to initiate a formal investigation of the Palhoniemi Reform School, with the help of the Ministry of Social Affairs and Health.

30.10.1945: Child Welfare Board informs the committee appointed by care-leavers of the initiation of a formal investigation and dates for forthcoming interviews.

6.11.1945: Investigator Leo Lähdevuori is appointed by the Ministry of Social Affairs and Health, and conducts the first interviews at the office of the Child Welfare Board, starting with care-leavers.

7.11.1945: Investigator continues conducting interviews at Palhoniemi with current inmates and members of staff.

14.11.1945: Investigator conducts a second round of interviews with care-leavers and current inmates.

16.-17.11.1945: Two accountants conduct an audit of Palhoniemi Reform School.

17.12.1945: Investigator interviews director A. L. of Palhoniemi Reform School.

30.12.1945: Director of Palhoniemi provides Concluding Statement.

17.1.1946: Investigator Leo Lähdevuori publishes his final record of investigation.

7.2.1946: Left-wing newspaper Työkansan Sanomat publishes an article on the Palhoniemi Reform School, focusing on the alleged brutal treatment of inmates.

14.2.1946: Ministry of Social Affairs and Health issues a statement with a final record of the investigation as an attachment to the Tampere Child Welfare Board.

18.2.1946: Child Welfare Board receives the statement issued by the Ministry of Social Affairs and Health.

11.3.1946: Final record of the investigation is delivered to concerned parties for scrutiny.

21.3.1946: Director A. L. of Palhoniemi reform school provides additional information to his concluding statement.

28.3.1946: Child Welfare Board makes a decision to visit four different residential care institutions, in order to compare current practices of residential care, and to prepare a decision regarding the Palhoniemi Reform School.

4.4.1946-6.5.1946: Three members of the Child Welfare Board conduct a tour of four different Finnish residential care institutions.

6.5.1946: Board of Palhoniemi Reform School makes a proposition to remove director A. L. and issue a severe reprimand to superintendent K. P.

16.5.1946: After a long meeting, the Child Welfare Board removes the director of Palhoniemi Reform School, with effect from 1 August 1946.

31.5.1946: The city government of Tampere agrees with the decision of the Child Welfare Board to remove director A. L.

12.6.1946: Child Welfare Board issues a severe reprimand to superintendent K. P.

19.9.1946: Child Welfare Board examines a statement made by psychiatrist Ilmari Kalpa, on the role and meaning of corporal punishment in the education of children. The Board makes a decision to forward statement to all members of the Child Welfare Board and institutions which are supervised by the Child Welfare Board. In the statement, Kalpa argues against the use of corporal punishment.

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The Disputed Identity of the Victim of Mass Atrocity and the Strategic Use of International Legal Concepts in Colombia

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1. Introduction

Victims of mass atrocities have become an important constituency in Colombia. The country has endured an internal armed conflict that has lasted for over 50 years, in which three main armed actors have battled against each other — namely the Colombian state, the insurgent guerrillas, and the paramilitary groups. But the group that has been most affected by the clashes between these armed actors is the civilian population. The proportion of victimisation is enormous. For each combatant killed, four civilians have died. (GMH 2013.) And, as of January 2020, the Unified Registry of Victims counts almost nine million victims (Unidad Victimas). With a population of around 48 million, this represents more than 20% of Colombia's total population.

While the victims of the conflict have in fact been accumulating for a while, the category of the victim of mass atrocities, brought in by

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international law,[1] has had a fairly recent and sinuous trajectory in Colombia.[2] In this trajectory, the framework of transitional justice[3] has been particularly important for victims of mass atrocities, providing a language that has allowed them to articulate their demands in terms of rights.[4] It was only in the period between 2003 and 2005, with the peace negotiations between the Colombian government and a nation-wide coalition of paramilitary groups, that the framework of transitional justice was introduced, discussed and, to a certain extent, adopted in the text of the Justice and Peace Law. (Aranguren Romero 2012.)[5]

In this paper, I would like to show how the category of 'victims of mass atrocity' produces a disputed identity. In this dispute, the different ways in which victims relate to the category are important as they move in different directions, producing and reproducing conflicting notions of victimhood. Often the actions of victims who seek relief to their situation by applying to governmental benefits for victims of mass atrocities can, unwillingly, end up by supporting a stereotype of a disempowered and defenceless victim. Other times, instead, the ways in which victims relate with the category of victim are profoundly empowering as they do not limit to only invoking the category of victim but they fill it with specific and strategic contents.[6]

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[1] The references to international law in this paper, encompass those disciplines that deal with victims of mass atrocities, namely human rights law, international humanitarian law, and international criminal law. Moreover, these are all considered in the emerging practice of transitional justice, commonly understood as the 'conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes.' Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69. Thus, although transitional justice is an area of practices that includes domestic as well as international norms, with regards to its conception of victim, it is heavily influenced by human rights norms. Moreover, in this paper, I confine my reflections to the victims of mass atrocities, that is, those direct and indirect victims of the crimes normally included in the major international criminal tribunals, namely crimes against humanity, genocide, and war crimes.

[2] Colombian civil society has utilised the language of human rights and international law for a long time, victims' groups actions strategically using this language, though connected, are more recent. See: Winifred Tate, *Counting the Dead* (University of California Press, 2007).

[3] On the definition of Transitional Justice, see footnote n 2.

[4] The rights of the victims to truth, justice, reparations and guarantees of non-recurrence have been particularly important in this role. See for instance: UN Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 27 August 2014, A/HRC/27/56.

[5] This process of discussion is analysed in: Gómez Sánchez, Gabriel: *Justicia transicional en disputa*. Universidad de Antioquia, Medellín 2014; and Fundación Social, *Trámite de la Ley de Justicia y Paz: Elementos para el control ciudadano al ejercicio del poder político*. Fundación Social, Bogotá 2006.

[6] It should be noted here the victims are not a homogenous group. A consequence of this is that contestation does not necessarily go in one direction from the victims as a homogenous group against the state. The identity of the victim can be infused with meanings that may undermine the very status of other victims. In Colombia, because of the existence of different armed groups (state, guerrilla and paramilitary groups) this is actually the case. While there are few that would challenge the status of guerrilla victims, the struggle of some groups of victims was a struggle for recognition of their status as victims in a context that did not

In turn, the ways in which the government reacts to the pressures of civil society and grassroots groups is also important in shaping the disputed identity of the victim. Indeed, a series of successive legal responses have attempted to tackle the problems of the growing victimised population, from 2005 onwards, explicitly using the category of the victim.[7] But, as any legal category, victimhood produces spaces of inclusion and exclusion. These spaces are crucial when incorporating the category of victim to the domestic context where the abstract and general language of human rights and international law is adapted to the specificities of the country. Thus, in actively creating these spaces of exclusion, while at the same time responding to the pressures to incorporate international law standards into domestic legislation, the state acts in a strategic way. Moreover, the way in which the government implements the international standards also affects the way in which the victim's identity is developed: When offering redress but failing to comply, the state is actively contributing to maintain victims in a vulnerable position.

There is a growing amount of literature focusing on the political effects of the category of victim in the context of Colombia's internal armed conflict. Some of these works reflect on the category of victim as one with an emancipatory potential, while others focus on its limitations. (Delgado Barón 2011; Fuentes-Becerra & Atehortúa-Arredondo 2016, 65, 67; Acebedo Pérez 2016; Gómez Sánchez 2014; Jimeno et. al. 2015; Gomez Correal 2015.) For instance, for Jimeno, Varela and Castillo, the category of victim grants a language to express personal pain and allows to create 'emotional communities' that place victims of a particular violent event together with wider audiences, exceeding ethnical and regional limits, situating them in a global political longing. At the same time it is a language that allows them to

recognised the existence of state crimes. Moreover, some groups of victims are also suspected — sometimes by other victims — of belonging to or sympathising with the guerrilla, which would undermine their status as victims. Other group who has recently resorted to the category of victim is the Colombian army, with regards to its members injured or killed during the conflict. See: Nathalie Pabón Ayala et al, Memoria y Víctimas en las Fuerzas Militares (Editorial Universidad del Rosario, 2018). This may be a way to clean the army's image in the wake of cases such as the so called 'false positives'. The name 'false positives' refers to a widespread practice in which random people — often of poor background - were kidnapped, killed, and dressed as *guerrilleros* by security forces in order to respond to the pressures of the institution to increase their body counts of guerrilla members killed. See, Rojas Bolaños, Omar Eduardo and Benavides Silva, Fabián Leonardo: *Ejecuciones Extrajudiciales en Colombia 2002-2010*. Ediciones USTA, Bogotá, 2017.

[7] Before the Justice and Peace Law, a 'pre-victim' legislation from 1997 already regulated the situation of internally displaced persons, the major form of victimisation in Colombia (Law 287/1997). Following the Justice and Peace Law, in 2008, a decree established a programme of administrative reparations that would complement the framework of the Justice and Peace Law, in order to access reparations outside the context of criminal processes. But it is in 2009, with the so called 'Victims Law' that the transitional justice framework was more decidedly adopted.

communicate and negotiate with public institutions. (Jimeno, Varela & Castillo 2015, 295—298.) Moreover, Jaramillo (2014, 228) observes that the fact that 'victim' is a familiar category, widely used by social movements, has contributed to its effectiveness as a tool for governing that can be used to articulate gender and ethnic-racial hierarchies by attributing specific forms of agency to subaltern groups.
He observes how in Colombia, the category of victim has become a place defined by vulnerability, where gender and ethnic features intersect. Agency is thus acknowledged, but limited to the claim for humanitarian assistance (cf. Jaramillo 2014, 227). This work contributes to this discussion by showing how these two effects of the category of victim coexist, as all the actors that resort to this category are contributing to the formation of a disputed abstract identity. The category of victim is neither emancipatory nor limiting, but each actor can - willingly or unwillingly - effect in the construction of an identity associated with such category. And the effects of this construction are mixed.

In previous works I have reflected on how victims of mass atrocities' organisations at times act — using the vocabulary of international law — in ways that contrast with its prevailing representation of victims as subjects essentially defenceless, passive and docile (Tapia Navarro 2018, 2019, and 2020). In this paper, I seek to follow the sinuous trajectory of the category of victim and explore the different ways in which victims of mass atrocities relate to it by identifying with it or challenging it as well as its effects. By contrasting the different legal frameworks with which the government addresses the question of the victims of the conflict, on the one hand, and on the other, the different ways in which victims relate to these legal concepts, I suggest that these frameworks and actions produce and reproduce conflicting notions of victimhood. An identity emerges from that interrelation, a conflicting identity that is never fully realised.

In what follows, I begin by unpacking some of the conceptual underpinnings of this paper. More specifically, I develop three concepts that will allow the reader to better understand the argument I present: identity, interlegality and indeterminacy (Section 2). Then, I situate the reader in the Colombian context by briefly referring the context of the internal armed conflict, and then, examining the different legal responses towards the situation victims in the context of Colombia (Section 3). Next, I turn to examine the ways in which victims identify with the norm (Section 4). I argue that, when victims of mass atrocities identify with the category produced in the law, they seek recognition and redress, but in this process they also contribute to reaffirm the state's legitimacy. Moreover, in offering redress but failing to comply, the state contributes to create an identity of a victim essentially helpless and vulnerable. I then go on to examine some examples of dis-identification (Section 5). Dis-identification entails a challenge to the category of

victim, and it may take different forms. It may seek legal reform, in which case it challenges the contents while at the same time reaffirming the power of the state. It may challenge deeper political aspects such as, gender equality, social justice, economic regime, and neoliberalism.

I conclude that, the strategic use of the international law has mixed effects. On the one hand, victims gain the opportunity to push for legal change and through this, they are also able to challenge deeper political questions. As a response however, the government can strategically use the norm to comply with international law and, at the same time, ignore the deeper claims of victims. In this back and forth movement, a dynamic identity is shaped, always in dispute. The fact that victims use the norm strategically allows for some of their claims to enter in this dispute but not to prevail.

2. Identities, interlegality and indeterminacy

Several works in the area of human rights, transitional justice, and international criminal law have underscored that victims are usually portrayed as defenceless and passive.[8] In this context, one may affirm that the prevailing abstract identity of the victim of mass atrocities is that of a subject who has suffered a great a violation of their rights, and that finds herself in a vulnerable position in need for the assistance of others. This is, of course, a stereotype. But a stereotype that is relevant as it prevails in the discussions around victimhood and that inspires the interpretations of the rights that international law grants to victims.[9]

However, there are different stories of victims using the language of the law and the category of victim in ways that are far from merely vulnerable, and that highlight different aspects of victimhood.[10] An interesting conclusion that comes from observing these stories is that victims do not limit themselves to simply 'wield' the category of victim, but instead, they infuse it with contents that align to their own struggles (Tapia Navarro 2019). In this sense, they may use the category

[8] There are several works reflecting on the stereotype of the victim as passive and defenceless in international law, human rights law, international criminal law and transitional justice. I review these different works thoroughly in: Tapia Navarro 2020.

[9] See for instance, in relation with general human rights law: Mutua 2001; Wilson 2009; Kennedy 2002; Urueña, 2012, 93. In relation with the practice of transitional justice: Madlingozi 2010. In relation to international criminal law: Kendall & Nouwen 2014; Fletcher 2015; Branch 2011; Clarke 2009; Schwöbel-Patel 2016.

[10] I have developed two such cases in separate works, see: Tapia Navarro 2018 and 2019.

strategically,[11] with the intention of achieving purposes that cannot be reduced to the mere application of the legal standards.

In this paper, I resort to the idea of identity in order to make sense of the diversity of ways to relate to the category of victim. Following Hall (1996, 3), I do not adopt an essentialist concept of identity, but rather, a strategic and positional one. Identities, then, do not 'signal that stable core of the self' but instead, they signal to the 'process of becoming', which means that identities are not constituted outside the process of representation but within it (Hall 1996, 4). In this sense, identification 'is always a process of articulation (…) an over-determination or a lack, but never a proper fit' (Hall 1996, 3). And it is precisely in this over-determination or lack, where there is room for strategy in the use of these concepts because it is in that over-determination or lack where the victim itself may dispute the formation of the abstract identity of the victim.

As will be seen later in this article, the different ways in which victims themselves relate to the concept of victim with different and sometimes adverse effects. In strategically using the 'label' of victim, for instance, grassroots victims' groups may access sources of financing that allow them to continue their work. (Sandvik & Lemaitre 2015, 251—271.) But at the same time, it may also inscribe them as vulnerable beings, and its agency becomes thus defined in the expression of a claim for humanitarian assistance (e.g. Jaramillo 2014, 227). A similar thing happens with the single victim that, in applying for victims' redress, gives the state the power to decide which stories are to be told, and how to tell them, and finally finds as herself waiting for a long time for redress.

At the same time, in strategically resorting to international law in their actions, victims groups have succeeded in introducing different nuances to the category of victim. I have grouped these actions under the level of 'dis-identification', which is nothing more than a form of identification in which the subject invokes the category of victim and at the same time disputes it by introducing separate claims. In this paper, I show four such examples, in which victims introduce questions of gender, land distribution, the state as a perpetrator of violence, and the idea that victims' lives, their political motivations and dreams should be highlighted and upheld (instead of only focusing on the harm they suffered).

Because the category of victim has been adopted in Colombia as a result of the incorporation of the language of human rights, and more recently, transitional justice, victims that invoke it are also often referring to victims' rights under international law. When victims are

[11] I use the word strategy here in a colloquial way, that is, strategy is understood as a plan that intended to achieve a particular purpose. See, Oxford Lerner's Dictionaries 2020. In this case the 'particular purposes' are the specific struggles of each group.

able to frame their claims as demands that have the international law's support, they are making a powerful statement, putting their 'grievances as claims of universal entitlement, at the same level as claims made by other members of the community' (Koskenniemi 2003, 106; see also Koskenniemi 2009, 103). In this sense, the use of international law concepts is an important tool for victims of mass atrocities that want to uphold different causes.

There are two important factors that contribute to the use of international law concepts: interlegality and indeterminacy. On the one hand, domestic law and international law represent 'different legal spaces operating simultaneously on different scales' and, because of this 'interlegality,' (Santos 2002, 427) victims can, at the same time, resort to the category of victimhood in international law, and challenge the category produced domestically. On the other hand, the fact that human rights norms are formulated in universal, abstract terms to reflect 'different, and at times conflicting, purposes — interests and values — of the drafters, as well as the reciprocal assumptions that the drafter had about the world (…),' (Petman 2012, 147) makes them especially susceptible to being appropriated for different purposes. This indeterminate character of human rights means that 'there is nothing in the right itself that would decide them (sic): the right receives meaning only when it is viewed by reference to some context or purpose' (Koskenniemi 2009, 143).[12] While indeterminacy is usually conceived with regards to adjudicative or legislative functions, a different corollary to this quality of the norm is that not only the legislator or the adjudicator can formulate opposite legal claims on the basis of the same norm, but also other — and perhaps powerless — groups can use the language of international law. And they can do this, because international law gives them an enhanced legitimacy and visibility to produce these claims.

3. The context

3.1. The conflict and its victims

During the 1960s, what is commonly understood as the Colombian internal armed conflict began with the establishment of the first

[12] As Petman (2012, 126) has thoroughly explained, indeterminacy does not necessarily lead to arbitrariness, instead there are patterns in decision making that can be explained by institutional culture. 'The claim of indetereminacy is quite simply that none of these patterns and regularities are necessary consequences of rules.' On the idea of indeterminacy in international law see: Koskenniemi, 2009.

guerrillas.[13]As part of the efforts to confront these insurgent groups, different private armies began to be formed which were, at times, authorised by the law.[14] Both these groups evolved over time, the drug trafficking being a catalyser factor for their growth and evolution. (GMH 2013, 134-135; Reyes Posadas 2016, 124—125. Paramilitary groups evolved into armed mafias with important allies, such as, entrepreneurs and politicians, singlehandedly organising different legal and illegal businesses (Reyes Posadas 2016, 27).[15] Between 2002 and 2010, during the presidency of Alvaro Uribe, a strong military offensive diminished the power of the guerrillas. During this time, the whole existence of an internal armed conflict was denied in the official discourse, and guerrillas were no longer considered as revolutionary insurgent groups, instead they were simply considered as terrorists. (GMH, 2013, 179 et seq.)[16] During Santos' administration (2010-2018), the official discourse changed again, acknowledging once more the existence of an internal armed conflict while decidedly adopting the language of human rights and transitional justice.[17]

The Historical Memory Group contends that all armed groups, including the public forces, attacked the civilian population as a part of their strategies, though the types of crimes and the target population vary. The public forces' violence included arbitrary detentions, torture, selective killings and forced disappearances; the guerrillas' violence included kidnappings, selective killings, pillage, terrorist attacks, and illegal recruitment, among others; and the paramilitary crimes include

[13] There is no agreement on the commencement of the internal armed conflict. For instance, the Historical Memory Group considers from 1958 onwards, others consider the initiation of the conflict with the assassination of Jorge Eliécer Gaitan in 1948.

[14] Already in the 1960s, a national law allowed the army to hand weapons and support civilian groups of self-defence against insurgency, while in 1994, a law created special private security services to operate in combat areas, also known as 'Convivir' Decreto 3398 de 1965 y Ley 48 de 1968. In 1989 the Colombian government suspended the application of this legislation, see: Guzmán, Sanchez & Uprimny Yepes 2010, 97.

[15] In 2006 a former paramilitary commander revealed the ties that these groups had with politicians, entrepreneurs, and elites in Colombia. This scandal was known as 'para-politica'.

[16] The shift on the discourse can partly be explained as a result of the failed peace negotiations between the guerrillas and the previous government of President Pastrana, but also the international political environment following the 9/11 attacks which allowed the conflict to be interpreted under the prism of the fight against terrorism. See: Vargas Velásquez 2012, 179 et seq; Reyes Posadas 2016.

[17] Although initially Santos presented himself as a continuation of Uribe's government, soon after his arrival to power, he distanced himself from him and eventually Uribe became one of his major opponents. According to some commentators, while both Santos and Uribe represent right wing interests, Santos would be much more influence by a "Third Way" political philosophy, which would explain his more tempered political style which reflects also in other topics, such as his foreign policy towards countries such as Cuba and Venezuela. Generally on the differences between Santos and Uribe see: Rodríguez 2014, 254; Orjuela, 2015, 52 . On Santos' change of discourse regarding victims and the conflict, see: For instance, in 2011 a special Transitional Justice Direction (Dirección de Justicia Transicional) was created (by Decree 2897 de 2011) within the Ministry of Justice.

selective killings, massacres, forced displacement, blockades, and sexual violence. GMH, 2013, 35.) The victims of internal displacement tend to be poor peasants from the Colombian countryside, often belonging to afro-descendant or indigenous communities. The victims of kidnappings tend to be wealthier and more powerful. Today, several sources confirm that the actions of paramilitary groups were at times tolerated and at other times even supported by the army, which saw them as an ally who could do the 'dirty work' it was not allowed to do. (Guzmán et. al. 2010, 99—100; GMH, 2013, 140.)

3.2. Inclusion and exclusion through the definition of victimhood

The framework of transitional justice and its definition of victim began to be incorporated into Colombia's norms in 2005.[18] Even though a 'pre-victim' legislation can be found already in 1997 with Law 387 regulating the situation of internally displaced persons (IDPs), (Pérez 2016, 219)[19] the introduction of the concept of the victim of mass atrocities was the result of the peace negotiations between the government and paramilitary groups. The outrage sparked by these negotiations — perceived as a negotiation between allies that would grant impunity to an actor that had severely affected the lives of massive amounts of civilians — inspired different forms of mobilisation that used the language of international law to call for measures of accountability and reparations. In its final text, the law that would regulate the process of demobilisation (law 975 of 2005, henceforth, the 'Justice and Peace Law') departed from previous demobilisation processes in that it included, for the first time, provisions on the rights of victims, including reparations.

Article 5 of the Justice and Peace Law defined victims as 'the person who individually or collectively suffered direct harms (…).' In this, it followed closely the ideas of the main documents of international law, such as, the "UN Basic Principles and Guidelines on the Right to a

[18] Similarly, Sánchez 2014, 93.

[19] As internal displacement reached major proportions in Colombian during the nineties, Law 387 of 1997 defined the conditions under which the state should provide a series of benefits for internally displaced persons (IDPs or *desplazados*). Even though the condition of *desplazado* allowed to access assistance for a period of three months, the reality of forced displacement in Colombia was that, once displaced, IDPs normally do not return, and stay displaced for life, potentially for many generations. As IDP numbers in Colombia grew every year, the numbers of applications for the benefits provided by Law 387 overflowed the system. As a result, victims began to submit complaints before the Constitutional Court. In 2004, the Court issued its landmark decision T-025 where it declared an 'unconstitutional state of affairs' (*estado de cosas inconstitucional)*, giving specific orders to state institutions, and remained seized of the matter in order to monitor its compliance. See: Duica Amaya, 2016, 124; Hampton 2002, 87; Vidal López 2007; Shultz et. al.2014, 15.

Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (henceforth, the Principles) (UN General Assembly 2006). However, by the end of the article it clarified that 'the harms must have been a consequence of actions that breached criminal law, by armed groups organised outside the law.'[20]

This last part of the article is important because it reflects the political choice of the government at the time. Indeed, during the process of discussion of the law, all direct or indirect references to the internal armed conflict or to the international humanitarian law were eliminated (Fundación Social 2006, 174). Thus, as Castillejo observes, the law crystallises a conceptual shift from what an armed conflict with insurgent groups entails, to what 'armed groups organised outside the law' englobe (Castillejo 2014, 53.) To refer to guerrillas as 'armed groups organised outside the law' puts them in the same category with paramilitary groups, concealing the political motivations of the guerrillas that aimed at deep social change. But at the same time, the focus on 'groups organised outside the law', excludes the possibility that state agents may have also produced harms that can be repaired under this legal framework, thus making some harms, invisible (Castillejo 2014, 53). This result was certainly the product of a heated political debate, where the initial legal project was withdrawn and then replaced by seven different proposals with different degrees of inclusion of international standards.[21] However, in these discussions, the question of the responsibility of the state did not play a major role as efforts were concentrated on including a framework for the recognition of victims' rights and to avoid the impunity of demobilised groups.[22] In this sense, the Justice and Peace Law can be understood as the expression of a strategic choice by the government: to incorporate the idea of transitional justice into the process of the demobilisation of an armed group, while maintaining its policy towards the internal armed conflict.[23]

In 2008, Governmental Decree 1290 introduced a program for administrative reparations to complement judicial administrations of

[20] Unofficial translation of the author. The article goes on to include family members of direct victims as well as members of state forces who have suffered harms by groups organised outside the law.

[21] On this debate see: Gómez Sánchez 2014; Fundación Social 2006.

[22] A summary of the different projects can be found in: Fundación Social 2006, 105—115.

[23] Understanding how this was possible is out of the scope of this paper. However, a couple of elements that the reader should bear in mind are, first, two years after the passing of the Justice and Peace Law, a corruption scandal burst unveiling the links between several members of the congress and the paramilitary forces; second, the presence of left wing parties in the Colombian congress is small as several left wing politicians have been killed, a famous case being the case of the Patriotic Union, were it is said that around 1500 members were killed. See: Murillo Delgadillo 2008, 141; Verdad Abierta, 2016.

the Justice and Peace Law. This norm improved the conditions of the victims, who could now access reparations without having to wait for a judicial decision. But it did not modify the definition of victimhood and, instead, maintained the ideas of the Justice and Peace Law. Accordingly, administrative individual reparations would only cover those acts attributable to 'armed groups organised outside the law'. The idea that the State had no connection with these groups is highlighted by the explicit notion that reparations are based on the principle of solidarity, as opposed to the principle of responsibility. Though the decree explicitly states that the principle of solidarity on which reparations are based is 'without prejudice to the responsibility of the perpetrators and the subsidiary or residual responsibility of the State', the context in which this decree was issued gave very little meaning to this reservation.[24]

After the failure of the 'Victims' Statute' during Uribe's administration, the Victims Law — and the adoption of transitional justice, more generally — became one of the main elements in Santos' campaign. In 2011, Law 1448 (henceforth, the Victims' Law) was passed. It fully embraced the framework of transitional justice,[25] establishing different judicial, administrative, social and economic — both individual and collective — measures for the benefit of victims of the conflict.[26] Article 3 of the Victims Law of 2011 defined victims in more general terms, without explicit reference to the perpetrators, and incorporating an explicit recognition of the international armed conflict.[27] Thus, the law now implicitly extends to victims of state crimes.

[24] Indeed, the decree was issued during Uribe's administration and in the middle of the legislative discussions of a 'Victims' Statute' that would not come to a successful end mainly because of government pressures arguing a lack of funds to implement the law.. Fundación Social, *La Agenda de las Victimas…* p. 52; the main reason officially argued by the government was the lack of money to finance the programmes included in the law. See: Eusse Guerra 2009.

[25] See for instance, article 8 which defines 'transitional justice' as 'different judicial and extrajudicial processes and mechanisms associated with the society's attempts to guarantee that those responsible for the violations contained in article 3 of the present law, are held accountable for their actions, the rights of victims to justice, truth and integral reparation are satisfied, institutional reforms are undertaken to achieve non-repetition, and the illegal armed structures are dismantled, all with the ultimate goal to achieve national reconciliation and sustainable and lasting peace'. (Unofficial translation of the author).

[26] See articles 1 and 3, Law 1448/2011.

[27] Victims are defined as 'those persons that individually or collectively have suffered harm by facts occurred from the 1st of January of 1985, as a consequence of breaches to International Humanitarian Law or gross violations of international norms of human rights, with the occasion of the internal armed conflict.' (Unofficial translation of the author) The original article reads: ARTÍCULO 3°. VÍCTIMAS. Se consideran víctimas, para los efectos de esta ley, aquellas personas que individual o colectivamente hayan sufrido un daño por hechos ocurridos a partir del 1º de enero de 1985, como consecuencia de infracciones al Derecho Internacional Humanitario o de violaciones graves y manifiestas a las normas internacionales de Derechos Humanos, ocurridas con ocasión del conflicto armado interno.

4. Identification

For every legal framework that the Colombian government has created to provide redress for victims, thousands and even millions of individuals have flooded into governmental offices in order to register, be thus acknowledged, and ultimately, receive different forms of benefits. Law 387/1997 established humanitarian measures for IDPs;[28] the Justice and Peace Law allowed for victims' participation and reparations in the context of criminal trials;[29] the Governmental Decree 1290 incorporated an administrative reparations programme; and the Victims Law unified these different reparation programmes while establishing a special programme for land restitution. Today there are almost nine million victims registered in the Unified Registry of Victims (*Registro Unico de Víctimas*).

These many overlapping mechanisms, as Sandvik and Lemaitre show, created both opportunities and challenges for grassroots victims' groups influencing the way grassroots groups of women identify themselves (Sandvik & Lemaitre 2015, 251—271, 262—263.) On the one hand, victims would take some strategic — and at times, cosmetic — choices, such as changing the name of the organisation by adding the word 'victim,' or including demands for reparation as part of their purposes. But, on the other hand, by putting IDPs and other victims under the same designation, an emerging political mobilisation — of poor forcibly displaced peasants claiming for social justice — was being concealed, as well as the specific circumstances that surround victimisation, which vary depending on the crime. (Sandvik & Lemaitre 2015, 263.) Instead, reparations, as a part of the transitional justice framework, are based on past harms and on the need of redressing them, regardless of the social condition of the victim. Thus, claims are no longer based on demands for social change, but only on the proof of the damage. (Sandvik & Lemaitre 2015, 263.)

But even in those cases where the victims resort to the label of 'victim' in a strategic way. This process of identification contributes to the shaping of an identity, where victims appear as subjects in need and the

[28] The measures established in this law, and the inability of the different governmental offices to provide them, were source of a large mobilisation of victims that, instead of identifying with the category of victim, considered themselves as internally displaced persons. This mobilisation eventually brought the issue to the Constitutional Court of Colombia which, after different decisions covering individual cases, decided to issue one of its most iconic decisions declaring that the situation of IDPs entailed an 'Unconstitutional State of Affairs' [*Estado de Cosas Inconstitucional*]). About this situation, see: Rodríguez Garavito & Rodríguez Franco 2015.

[29] The Justice and Peace Law also created a special commission for historical memory. Thought this measure can be considered as a form of symbolic reparation to victims, because of the more general effects that this kind of measure has towards the society as a whole, I have decided not to include it in my analysis.

state is legitimised as the one to provide redress. Moreover, the fact that the state offers redress but fails to deliver it also affects in the formation of this identity. Certainly, the exorbitant amount of victims puts any governmental efforts under enormous pressure and, in Colombia, where most of the victims are in dire need of immediate alleviation, there are important consequences to offering redress and not delivering it.

I would like to show here that, even with the improvements that aim at acknowledging a greater degree of agency for the victims, there seems to be a strong tendency in which, many of the setbacks of these different legal frameworks end by extending the — now officially acknowledged — condition of vulnerability of its beneficiaries, while at the same time, reaffirming state legitimacy. These effects are partly the result of applying and continuously waiting for reparations. Indeed, with only ten percent of the applicants having actually received reparations, waiting for reparations becomes the norm, putting the applicant victims in a helpless position where vulnerability is coupled with suspense. In addition, when victims submit their stories to be assessed by the state bureaucracy, they acknowledge the state's legitimacy to decide, not only which kinds of violence are recognised, but more importantly, which kinds of stories can be told and how to tell them. Thus, with the implicit agreement that the state is the one that administers the victims' relief, coupled with the willingness of the victims to wait for it, the state's legitimacy and sovereignty are reaffirmed. (Jaramillo 2012, 42; Mora-Gámez 2016, 75.) In what follows, I present different examples of this.

4.1. The Justice and Peace Law

Under the Justice and Peace Law's proceedings, victims were allowed to participate in the proceedings and seek for reparations. Participation could be done in two stages, during the so-called 'free version' hearings (*versiones libres*) before the prosecutors' office and, once they were officially recognised as victims, they could seek for reparations within those criminal trials. In practice, during the 'free version' hearings, demobilised combatants appeared in person before the prosecutor. The fact that the versions are 'free' means that the former combatant decided how to tell the story of the crimes they participated in and sometimes even justified the crimes as part of a service to their country. (Aranguren Romero 2012, 46 et seq.) Conversely, victims were given the chance to participate but from, a separate, 'victims' room,' equipped with a screen that showed the confession in real time (Castillejo-Cuellar 2013, 3, 22-23). Participation thus was in practice reduced to observing the confession through the screen and, sometimes, question the accused. Questioning, however, was also heavily mediated. It was done through a

written format passed to the prosecutor, who would then read the question to the accused, or sometimes, through an assistant from the prosecutor's office, who talked with the victim, and 'translated' it using a microphone connected with the hearing room (Castillejo-Cuellar 2013, 32). In addition to all this, participation faced other important practical obstacles that hindered the attendance of, often poor, victims living in the countryside, such as, the length of the hearings;[30] the distance of the hearings from rural areas;[31] and the risks inherent to attendance and participation as victims were still subject to threats from non-demobilised groups.[32] Because of all these reasons, this way of participating, was highly criticised.[33]

It was only with regards to reparations that victims could finally appear openly face to face with their perpetrators.[34] But these too, faced major obstacles. First, only officially recognised victims could submit their requests for reparation and discuss it in a public hearing especially devised for this purpose (*incidente de reparación integral*).[35] Official recognition depended on the fact that the harms suffered by those victims were part of the prosecutor's case against the perpetrator and thus, the harms discussed in this incident represented a small fraction of the crimes he actually participated in. (CMH 2012, 75—76.) Second, this was one of the final stages of the process and, due to the length of the procedures, after five years of initiated procedures by the Justice and Peace Law, only two of these hearings had taken place (CMH 2012, 75 et seq.) Finally, actual reparations awarded by these courts were also limited. Even though the Justice and Peace Law provided a wide range of reparations for victims, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, both symbolic or material and individual or collective,[36] the Supreme Court

[30] Hearings could last for several weeks. Castillejo-Cuellar 2013, 23—28.

[31] The proceedings were only carried out in few major cities. Aranguren Romero 2012, footnote 13.

[32] For instance, Aranguren tells the case of a victim who was subjected to threats in attending the free versions and was eventually killed. Aranguren Romero 2012, 125—129.

[33] While seemingly based on a recognition of the victim as an active political subject, the procedure in fact, relegated victims to a marginal corner of the process, reducing them, as Castillejo (2013 ,32) puts it, to a spectre that appears in the form of a voice but never as a bodily presence, unlike the perpetrator who is able to decide how to tell story of the crimes committed. Also on the difference between the place of the victim and the accused in the context of the Justice and Peace Law: Aranguren Romero 2012.

[34] Indeed, the possibility of seeing the victims and the perpetrators facing each other prompted the interest of the media that covered the first hearings. CMH 2012, 75 et seq and 584 et seq.

[35] Artícle 23 Justice and Peace Law.

[36] Article 8 Justice and Peace Law. In 2007, a pilot programme of administrative collective reparations was initiated by the National Commission on Reparations and Reconciliation (Comisión Nacional de Reparación y Reconciliación, CNRR). Though the recognition of communities as collective victims is positive in the sense that it entails the recognition of harms that affected the social fabric of communities, Firchow suggests that they can also lead to re-victimisation especially because many of these communities lacks basic social services.

stated that the orders could not include duties by other public institutions. Even though the first decision of the Justice and Peace Law included a wide range of order of reparations, the Supreme Court stated later that this first reparation order had exceeded the authority of the chamber and infringed on the principle of separation of powers in granting wide reparations which included orders to public institutions. From then onwards, the Justice and Peace Chambers began a practice of exhorting administrative offices to take certain measures to redress the victims.[37] However, these exhortations have unclear legal effects and the victims have no means to demand their implementation.

Due to its many flaws, the Justice and Peace procedures entered into a legitimacy crisis, visible as early as 2008-2009 (CMH 2012, 544). Different factors contributed to it, many of which were reviewed above. For instance, the limited consideration given to victims in the 'free versions' soon materialised in a decrease on the victims' assistance (CMH 2012). Moreover, by 2010, only two sentences, which included two reparations orders, had been pronounced. In general, the system was overflowed. As a reaction, public institutions directed their efforts to put victims at the centre of the coverage regarding the Justice and Peace Law but, in the assessment of the Centre for Historical Memory, they were not able to achieve a re-legitimisation of the process (CMH 2012, 546).[38]

In 2008, a governmental decree introduced the possibility to seek administrative reparations outside the context of the judicial proceedings. This decree would simplify the procedure of receiving reparations, so that victims should no longer have to wait for a sentence against an individual. In this sense, the decree entailed an improvement to the situation of those victims already acknowledged by the Justice and Peace Law, but for the victims of state crimes the situation still was that, if they wanted to seek for reparations, they had to initiate complex civil procedures.

4.2. The Victims' Law

In 2011, the Victims' Law took a different approach establishing a comprehensive administrative process that included reparations as well

The state includes these basic services as a part of its community reparation programme, but this blurs the reparative effect as basic development programmes are considered as reparation. Firchow 2013, 59—60.

[37] Cf. González de Lemos 2011, 39—40.

[38] In 2012, further modifications were introduced to the Justice and Peace Law aimed at reducing the amount of cases in the system by imputing patterns of macro-criminality (patrones de macrocriminalidad) instead of focusing on individual responsibility. Fiscalía General de la Nación 2014, 43—44.

as land restitution and that would unify the preceding systems. In order to apply for reparations, victims have to be included in a unified registry. In practice, victims apply through an interview, in which, a civil servant fills out a complex form with a recount of the events, attaching to it, any proof material that the victim may have. (Mora-Gámez 2016, 79—81). After the interview, victims receive certain emergency benefits, such as vouchers for food, and a guaranteed stay of 15 days in a Red Cross shelter (Mora-Gámez 2016, 82).[39] But there is a waiting time of about 90 days, in which the applicants, in order to ensure the provision of the social benefits for their condition as victims, cannot obtain a permanent job that includes such benefits (Mora-Gámez 2016, 82.) The process eventually results in the inclusion of some individuals and the exclusion of those applicants whose stories do not qualify as part of the violence officially recognised (about 20 percent of the applications are rejected) (Mora-Gámez 2016, 88). Once an individual is acknowledged as a victim by the state, they are entitled to receive certain humanitarian assistance, but actual reparations take much longer. Indeed, of the total universe of 8 million victims, only 10 percent (8 hundred thousand) have received individual reparation (Santos 2019).

This process of application serves to shape an identity of the victim through the administration of a bureaucracy that decides the kinds of violence that are relevant, the stories can be told and how to tell them. As suggested by Mora-Gámez (2016, 95), when individuals offer their narratives to be represented and translated by the state, they are also granting the state a new legitimised status. In this new legitimised status, the legal adoption of human rights standards plays a significant role. Furthermore, in the identity that comes out as a result of these procedures, waiting for reparations — and not reparations themselves — becomes the normal state. Because of this, Jaramillo (2012, 41, 55) suggests that reparations for victims do not only entail the definition of the identity of the victim, but also, the possibility to keep them waiting. While the recognition of debt sets a certain hierarchy between the creditor — in this case, the victim — and the debtor — in this case, the state — the fact that the latter can keep victims waiting inverts this relation. Thus, when reparations fail to materialise, as observed by Counter in his study on victims of land mines, the Victims' Law actually produces victimising effects (Counter 2018, 124).[40]

[39] This is not a new way of administering this sort of benefits, for instance, with Law 387/1997, victims of forced internal displacement had to submit a testimony before the authority in order to receive the benefits. While this information was processed, they were entitled to receive assistance during a period of 15 days. Once the information was confirmed to be truthful, the system granted them assistance for a period of three months, which could be extended exceptionally for an additional period of three months. See: Aparicio 2012, 134;Decree 173/1998.

[40] Similar things can be said about land restitution, which is administer to a separate set of procedures and offices. While the law establishes the possibility of forcibly displaced peasants

Thus, despite the fact that the Colombian state is interested in adopting the latest standards in transitional justice, the effects of this adoption continue to be mixed. Another example of this is the article in the Victims' Law aimed at allowing victims to participate 'in the design, implementation, execution and monitoring of the compliance of the law and the plans, projects and programmes that are created with its occasion.'[41] The idea of this mechanism is to provide a space for the population affected by the conflict to interact with the state (Unidad para la Atención y Reparación Integral a las Víctimas 2014, 13). Such mechanism follows the idea that victims should be considered as right holders and have their human dignity respected so that they recover trust in public institutions (Unidad para la Atención y Reparación Integral a las Víctimas 2014, preamble). However, in a study of the first instances of participation, Lemaitre (2013) shows how there was an open discouragement of victims debating or criticising the system imposed by the Victims' Law.[42] Instead, for this author, the process was designed so as to legitimise the government and its newly embraced system of transitional justice. As a result, the victims' voices were actually silenced. Thus, the implementation of this mechanism is, to an important the degree, both influenced by, as well as perpetuating of, an identity of a victim who is essentially vulnerable.

Moreover, the mechanism of participation included in the Victims' Law does not allocate any new resources to the municipalities which are in charge of implementing them (Vargas Reina 2012, 192—195).[43] As a result, the mechanism is insufficient and uncoordinated.[44] In failing to provide sufficient means, the state actually debilitates the victims' mobilisation as victims' organisations that invest time and effort in following the officially organised participation, while neglecting other kinds of mobilisation (Vargas Reina 2012, 203). Once again, victims had to seek external channels to participate, rendering ineffective those channels provided by the state. Indeed, in 2017, 70,000 victims from departmental tables jointly submitted a complaint before the Constitutional Court denouncing several failures of the system (Columbia Plural 2017).

In this section, I have sought to show how, in identifying with the category proposed by the government, victims legitimise the state as the one who decides which kinds of violence are recognised, and the way in

to recover their lands, it has been argued that it does not allocate sufficient funding or capacities to face the attacks from newly created 'anti-restitution armies. Montoya & Vallejo 2016, 90; see also Martínez Cortez 2013.

[41] Article 192 Law 1448/2011.

[42] Victims were often asked to abstain from referring to their particular situations and limit their comments to only 'concrete proposals. Lemaitre Ripoll 2013, 13-14, 22-25.

[43] Other problems are the lack of coordination and capacitation from the municipality to the Victims' Table, see: Cerón Arboleda 2017, 101.

[44] Lack of coordination is often cited as a problem. See: Martín Berrío, 2013, 5.

which victims' stories are to be told. At the same time, in continuously failing to deliver the benefits promised to victims, their vulnerability — while now officially acknowledged — is extended through time. A victim's identity is shaped in these different moves, its main characteristic being the victims' vulnerability. In the following section, I show how victims seek to challenge the government in using the very concept of victimhood. In doing so, they dis-identify from the category proposed and challenge it.

5. Dis-Identification

Victims' groups included in this section use the categories of international law to highlight the incompleteness of the domestic categories. But in this, international law is an instrument for another, substantive purpose that varies depending on the case. In what follows, I briefly examine some cases of grassroots groups and the way they relate to international law concepts, specifically the concept of 'victim'. I contend that these actions are important to understand what I have described as sinuous trajectory of the category of victim of mass atrocity in Colombia as they represent challenges that are later responded to by the government in different ways. Because of this they are only partly successful. They are successful to the extent that, in invoking the international, law grassroots groups are heard and the category of victim is later incorporated and modified to respond to these challenges. But, just as this represents a strategic use of international law, the government can also find ways to respond to these challenges without addressing the substantive concerns of the victims.

Already before the incorporation of the transitional justice framework the identity of the victim in the context of the discussions regarding the internal armed conflict was already subject to challenges. An example of this is the Pacific Route of Women (*Ruta Pacífica de las Mujeres)* which, in 1996, began to problematise how the internal armed conflict affected women in a different way that men.[45] As the movement evolved through the years, they adopted more decidedly the language of human rights and, once the framework of transitional justice began to be discussed in Colombia, their actions repertoire also increased.

[45] They defined themselves as a feminist movement that supports a negotiated solution to the armed conflict in Colombia, working to make visible the impact of war in the women's life and demand the rights to truth, justice, reparation and reconstruction of individual and collective historical memory to ensure non-repetition. Ruta Pacífica de las Mujeres, *Colombian Women's Truth and Memory Commission*; about this group also see: Samudio Reyes 2015, 81 et seq and 108 et seq.

In 2013, the report of the "Colombian Women's Truth and Memory Commission" was published. This is one of their most visible actions, an unofficial truth commission aimed at identifying, monitoring and documenting violations against women in the context of the internal armed conflict (Ruta Pacífica de las Mujeres 2013). The report features testimonies of women, including one thousand individual violations, as well as collective cases. It highlights how women suffer specific forms of harm in the context of war, which are embedded in the patriarchy as the conflict creates new forms of control over the lives of women, reinforcing male domination (Ruta Pacífica de las Mujeres 2013, 22 et sec.). Here the concept of victimhood is central, but they have connected it with the idea that as female victims recover, they become 'survivors' (Ruta Pacífica de las Mujeres 2013, 26 et sec.) The dichotomy of the victim/survivor is taken from the work of feminist approaches that have sought to reverse the notion of the victim as a notion associated with silence and helplessness.[46] Instead, survivors are constructed as more agentic and, in this agency, the act of breaking silence by making abuse visible is central. The very choice of a Truth Commission, as a mechanism focused on collecting and systematising women's testimonies of the harms suffered during war, is deeply influenced by these ideas. Moreover, unlike other truth commissions focusing on documenting harms, this one is also focused on collecting stories of recovery, precisely to highlight the passing from victimhood to survivorship.

The shift in the way gender is considered as part of the identity of the victim shows its disputed nature as well as the importance of the processes of dis-identification that use international law concepts. As a result of the sustained work of the *Ruta Pacífica* and other feminist groups today it is widely recognised that a large proportion of victims are female, and that the way the conflict affects them is different than the way it affects men. For this reason, a gender focus has been incorporated into all discussions regarding victims of mass atrocities, the latest example being the Final Peace Agreement between the FARC-EP and the Colombian government, which included a gender approach in each of the different topics covered.[47]

Another example of early dis-identification that incorporated the language of international law is the case of the Peace Community of San José de Apartadó (henceforth, simply 'the Community').[48] Created in 1997, the Community was as a way to seek protection in the wake of a violent paramilitary offensive that forcibly displace thousands of

[46] This was done first in the context of child and sexual abuse. Orgad 2009, 142.

[47] Here, a gender subcommittee (*Subcomisión de Género*) was created with the task of including a gender approach to the different topics covered by the Final Agreement's text, an unprecedented measure in peace processes of this nature. Colombia 2020.

[48] I have analyzed this group in depth in: Tapia Navarro, 2018.

peasants in Urabá, an important geo-strategic area of Colombia (Bejarano 1988; Botero 1990, 25). Instead of leaving the area, about 500 people decided to stay and declared themselves as a 'Peace Community' that would maintain a neutral status in the conflict. To maintain their neutral status, they established a set of rules to clearly separate them from armed actors directly invoking international law in these unofficial rules.

As a mechanism for protection, the project of the Community is deeply connected with the identity of the victim and international law, but together with this defensive aspect, a community life project has emerged in the struggles of war. This community life project is deeply influenced by left wing ideas critical to capitalism and neoliberalism,[49] and entails a re-enactment of traditional peasants' way of life — a lifestyle deeply threatened by paramilitary violence seeking to displace peasant communities.[50] This attitude, critical to the neoliberal economical system that the Colombian state has imposed, has turned this group into very special victims. While they uphold the category of victim and resort to international law — for instance, at the Inter-American Court of Human Rights or before the Constitutional Court of Colombia — they have refused to interact with the state and to receive the benefits it provides to victims. Indeed, after the Colombian government begun to incorporate the discourse of transitional justice and the possibility to seek for reparations, the Community modified its rules so as to include the refusal of individual reparations as an additional duty of their members. As a consequence, if a Community member chooses to receive individual reparations, they must resign from the Community. Thus, the identity of victim of the Community, while allowing them to seek for international support and even bring forward notions of historical exclusion and the struggles of peasant communities, it does not fully coincide with the identity proposed by the government.

The results of this kind of dis-identification are less obvious than in the case of the Pacific Route. A crucial difference of these two is that, while both resort to international law in a strategic way, the first aims at both a cultural and normative change, and the second uses international law to frame their project, search for allies and seek protection. In doing so they invoke international law in their own unofficial rules. But they also put in the table political questions such as the historical exclusion

[49] In this sense, one of the Community leaders said in 2013: "Communitary works and all that the Community of Peace represents, is a reality, we are living it. But the capitalist system is against all that, because it goes against all its interests that instil to the human being that a paper is what matters. A human being is worth nothing. This generates a degradation of humanity because it generates a society around a concept of money instead of life. The struggle of the Community of Peace is for life, in all its senses." PBI Colombia 2013).

[50] A thorough analysis of this logic can be found in: Reyes Posada 2016.

of peasant communities. Today these questions have been acknowledged in the recent peace agreement between the FARC-EP and the government, where an integral land reform occupied a central place.

Moreover, both of these two forms of dis-identification also propose a different identity of the victim. While the victim as a result of the process of identification appears as vulnerable and helpless, here the victim appears different, empowered by its recovery and turned into a survivor. Or, empowered by its unwillingness to receive reparations in the form the state proposes. These features are part of the disputed identity of the victim and invoking international law gives them visibility as well as a certain degree of legitimacy that allows them to seek for funds to support their project, and have international allies.

The adoption of the transitional justice framework in 2005, gave way to unexpected consequences as a number of social agents, including victims' organisations, used the language of transitional justice to challenge the normative purpose of the Justice and Peace Law (Vera Lugo 2016). Another consequence of the adoption of this law, was the creation of the Movement of Victims of State Crimes (MOVICE, according to its initials in Spanish, henceforth 'Movice').[51] This group embraces the identity of the victim and the discourse of transitional justice and uses them to problematise the domestic category. To name themselves as victims of state crimes already implies to introduce a proposition absent from the Justice and Peace Law. In doing this, they introduce an alternative reading of the violence of the conflict in which the state is a third perpetrator in the conflict and their actions are deeply connected with paramilitary groups. But the violence suffered by the victims of state crimes cannot fully be understood within the logics of the internal armed conflict. Instead, it is part of a long existing practice of suppression of political opposition through violent means. These violent means exceed the violence that is necessary to suppress the internal conflict adversary. These are all powerful and controversial assertions that were introduced and given visibility in the political conjuncture of the passing of the Justice and Peace Law and later in other opportunities.[52] Claiming the status of victim and invoking international law gave them legitimacy to make these assertions.

Similar to Movice, the movement Sons and Daughters for Memory and against Impunity (*Hijos e Hijas por la Memoria y contra la Impunidad*, henceforth, simply 'Hijos e Hijas') was created in 2006, after the passing of the controversial Justice and Peace Law (GMH 2009, 198—199). The group gathers sons and daughters of people killed or disappeared because of their political affiliations which, in Colombia,

[51] I have analyzed this group in depth in: Tapia Navarro, 2019.

[52] One such opportunity was the massive rally organised against guerrilla violence in 2008 which had great visibility around the world. Movice responded by organising a rally against victims of paramilitarism, which counted with massive adhesion (Tapia Navarro 2019).

means former union leaders and militants from left wing parties, human rights defendants and others (GMH 2009, 195). But, unlike Movice, they have an explicit critical stance on the adoption of the identity of the victim (GMH 2009, 200). For *Hijos e Hijas*, victimised subjects should speak from a position that boosts them as subjects and political interlocutors, instead of a place that diminishes them, like the identity of the victim (GMH 2009, 202). Similar to the Pacific Route, the movement puts emphasis on memorialisation but, in this case, as a way of upholding of the political views and projects proposed by their parents in their lives. For them, it is necessary to show victims as persons with projects, perspectives, and dreams, and thus, their role is to uphold their memory beyond their victimisation (GMH 2009, 201). On the one hand, *Hijos e Hijas* reclaim their parents' political projects and proposals, mostly left wing ideas critical to capitalism and neoliberalism. (Gomez et. al. 2007.) On the other, in upholding those projects they stress the very existence of state violence, which at the time of their creation, was not acknowledged.[53]

The strategic use of victimhood in these two groups can also be seen in the relationship between of Movice and *Hijos e Hijas*. While these are two different organisations, a number of the members of *Hijos e Hijas* are also members of Movice despite the different approach the two organisations have towards the category of victim.[54] Thus, while they are truly critical of the use of the category of victim, they understand that it is important to speak in these terms because in doing so, they are able to speak to power.

Moreover, while these two groups were created in the wake of the controversial Justice and Peace Law, this norm was eventually succeeded by the Victims' Law, which does not distinguish between perpetrators as long as violations have been committed in the context of the internal armed conflict, implicitly including victims of state crimes. However, the deeper contentions of these organisations remain unanswered. They seek for the state to acknowledge its responsibility for the crimes committed by its agents and its ties with paramilitary groups, and they seek for the acknowledgement that a number of these crimes are part of a practice to repress political opposition through violent means, and thus exceed the logics of the internal armed conflict.

Thus, though in the adoption of international law language and the category of victim, these groups speak to power in ways that may be

[53] *To find other people that had lived stories similar to ours allowed us to, first, acknowledge similar trajectories in the other, that is, to build relations based in the same silenced story, in an effort to rediscover our lives. Second, to understand that it was necessary to take the issue to another level, that it was not us who kept in silence, but that the society as a whole had been co-participant in this omission*. Gomez et. al. 2007.

[54] For instance, at least three of Movice's recent spokespersons are also part of *Hijos e Hijas,* namely, Alejandra Gaviria, Erik Arellana and Diana Gomez-Correal.

influential, the relative success of these groups comes in mixed results. While the fight for the legal adoption of international standards has been successful, another question is how these legal standards actually respond to the victims' deeper concerns, on the one hand, and how these standards are actually satisfied in practice, on the other. While the enlarged category of victim now allows victims of different perpetrators to come forward and demand reparation, all these harms still have to be perpetrated in the context of the internal conflict, disguising the existence of political persecution.

Finally, the acceptance of the category of victim in the context of mass atrocities as part of the vocabulary of political discussions now brings a varied array of actors claiming this identity, such as army members and former *guerrilleros*.[55] The law's indeterminacy is both a strength and a weakness for these groups of victims as their deeper claims for acknowledgment of responsibility, remorse, and most importantly, a change in the way political disagreement is managed, remain unanswered.

6. Conclusions

The legitimacy of international law is crucial in countries like Colombia, where the state does not hold the monopoly of violence, and thus, as Sandvik and Lemaitre (2015, 268) contend, the incorporation of international standards provides renewed legitimacy to the state. In this context, international law becomes an important asset for victims of mass atrocities that strategically use it to push for the introduction of international standards, but also to introduce other, deeper, concerns. The fact that international law is a legal space that exists in parallel to the domestic legal space allows for victims to continue to resort to it once the category of victim is introduced domestically. In turn, the generality of the norms allows them to appropriate them, to translate them into the domestic context in a strategic fashion. However, precisely because the norm's indeterminacy, that can support different conclusions, the state is finally able to respond to their legal demands without necessarily addressing their deeper claims.

Thus, a sinuous trajectory of the category of victim is drawn in this back and forth movement, where groups of victims of mass atrocity challenge the government, the government responds, the groups further challenge the response, and the government, once again, decides to adjust its legislation. But this is not all. At the same time, while some victims' groups are challenging the norm, other thousands of victims in

[55] On the contended identity of victim in the context of the latest negotiations between the government and the Farc, see: Sáenz Cabezas 2017.

dire need of alleviation pour into governmental offices seeking for redress. There, they find a bureaucracy ready to tell them how to tell their stories, classify the harms, define which harms are to be considered, and which harms are to be excluded. In this identification, they reaffirm the state as the legitimate actor to deal with their suffering. In turn, the state has, in different ways, failed to deliver redress. To be sure, I am not suggesting that failing to comply is part of the state's strategy, instead, without really assessing the causes of this failure, I am thinking about its effects.[56] The effect of promising redress for victims of mass atrocities that are often also in an extremely vulnerable situation before the violation and failing to deliver it, is that waiting for reparations — instead of reparations themselves — becomes the normal state. Unlike other relations of creditor and debtor that set a hierarchy between the two, the fact that the state can make — and actually makes — victims wait for reparations, has the effect of reaffirming its own power, while perpetuating the victims' vulnerability. (Jaramillo 2012, 41, 51.)

In this sinuous trajectory an identity is being shaped. One that is always in dispute and never fully achieved. In this landscape, perhaps the most empowering attitude for victims is dis-identification, and it is because of this that victims' groups are today considered as important emerging political actors in Colombia (Rettberg 2013; Vera Lugo 2016). However, the effects of this kind of mobilisation limited. For victims, the strategic use of international law allows them to insert certain claims into the political discussions, but not to define their outcome. For the state, the strategic adoption of international law allows it to respond to the challenge without necessarily addressing the victims' deeper claims.

[56] As Eva Ottendoerfer (2018) has argued: "not only the specific design of a reparations program but also the way it is ultimately implemented are decisive for how victims perceive of reparations and which effects they are able to trigger."

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Book Review

Susan M. Sterett and Lee Demetrius Walker (eds): Research Handbook on Law and Courts, Edward Elgar Publishing, 2019

Jukka Viljanen*

Threats against courts in the time of growing populism and nationalism

In a recent speech on the topic of Rule of Law and the European Court of Human Rights: the independence of the judiciary, President of the ECtHR *Linos-Alexandre Sicilianos* spoke on the emerging threats faced by courts and the judiciary. He mentioned several developments that are a cause of concern in European countries and their court systems. The rule of law is under attack as a result the growth of populism and

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nationalism. This is also in the background of *Research Handbook on Law and Courts*.

President Sicilianos mentions several attacks against the rule of law such as the dismissal, replacement and demotion of judges; the use of disciplinary proceedings against judges and prosecutors for political reasons; the use of threats. The ECtHR has issued important judgments in relation to the impartiality of judges. The Grand Chamber judgment of Baka v. Hungary (2016) in particular has been a key-case on developing the criteria under which the actions taken against the judiciary can have a chilling effect on judges' willingness to participate in the public debate on legislative reforms. In the other European Court, the European Union Court of Justice (CJEU) a judgment was passed on Poland (19.11.2019). The CJEU considered that the Polish court reform was not in accordance with Article 47 of the EU Charter of Fundamental Rights. The CJEU focused on the separation of powers required independence in relation to the legislature and the executive.

In addition to that, the new surge of cases has drawn attention to the relevance of Article 18 of the Convention during the last ten years. The Court has now completed multiple reviews in particular of the ultimate reasons behind different kinds of deprivation of liberty for politically motivated cases. This is not related to one single state in its political power struggle, but can be seen more like a trend with the focus on politically motivated actions against opposition forces or human rights defenders. Recently Article 18 has been annexed in addition to Article 5 (Right to liberty and security) cases, also to measures that can be examined under Articles 8 (Right to respect for private and family life) (Aliyev v. Azerbaijan, 18.9.2018) and 11 (Freedom of Assembly and Association) (Navalnyy v. Russia, 15.11.2018). The Court has introduced a criterion of whether the ulterior purpose, as compared to the Convention-compliant one, was predominant.

In the Navalnyy case, the applicant was arrested on seven occasions for taking a part in a peaceful assembly, and the Court found "it established beyond reasonable doubt that the restrictions imposed on the applicant in the fifth and the sixth episodes pursued an ulterior purpose within the meaning of Article 18 of the Convention, namely to suppress that political pluralism which forms part of 'effective political democracy' governed by 'the rule of law', both being concepts to which the Preamble to the Convention refers."

The Research Handbook on Law and Courts approaches these trends from a global perspective. The examples come from Europe, Africa, India, Australia, Latin America, Canada and the USA. In the introduction *Susan M. Sterett and Lee Demetrius Walker* point out that there is a change in the story that has been told about the courts. Previously the courts were the ones to hold central governments accountable. Now the story is much more diverse, and questions raised

about the role of the courts has been noticeable, especially in issues like the fight against terror, asylum seekers, emergencies. Political trends and resurgent authoritarianism have made the courts' work difficult. The courts also reflect the problems in society as a whole. The discussion on diversity by gender is one the obvious talking points. In addition, digitalization has a profound influence on the court system. It means that case-law is spreading globally. But it also means that digital traces are spreading, and at the same time digitalization creates massive databases also giving rise to new problems.

The Research Handbook on Law and Courts can serve as a source of inspiration not just for researchers but also for those who work in the court system. The book is divided into six parts, each of which presents a variety of themes, and of course it depends on a person's own interest on which parts a reader would like to focus.

The book starts with the part that focuses on the **courts and political accountability**. The role of international tribunals in this discussion has been active and *James Meernik*'s chapter discusses especially the development related to the International Criminal Court (ICC), Yugoslavia (ICTY) and Ruanda Tribunals (ICTR). He makes a prediction on the upcoming challenges and especially on the situation in which states do not co-operate with the court. He concludes that if the ICC cannot provide justice when this is in conflict with national interests, it will be a tool of the states, not of the law. More research into developments and their implications for international justice is critical in helping to understand whether independent and impartial justice is indeed possible. In same part the USA and Latin American systems are also studied in light of the judicial-executive relations by *Gbemende Johnson*. One of the critical issues in her chapter is judicial deference. The discussion on judicial appointees seems to become more and more central in political discussion. The reference to Chief Justice Roberts' opinion on the independence of the judiciary in contrast to the discussion of who is appointed by which president is reminiscent of the studies that show according to the author that judicial appointees show increased deference to the party/faction of the executive responsible for their appointments.

Chris Hilson approaches in his chapter the theme law, courts and populism. He combines populism with climate change litigation. He makes links to anti-elite and anti-expertise populist rhetoric. His examples are taken from the Brexit campaign and Trump's drain the Washington swamp phrases and withdrawal from the Paris Agreement. The chapter discusses the consequences of the narrative methods used about science and law. His argument is that any short-term advantages may end up chipping away at the currency of the expert discourses of science and law in the longer term. Is it a good thing to rely on populist

cues in strategic litigation? Hilson also points out that the game type of litigation can have its dangers.

The judicial process part of the book is the most challenging for a reader. This second part includes a variety of themes introducing numerous and sometimes unrelated subjects which makes it difficult to follow and link chapters to the main storyline. The editors note that in this part the focus shifts from accountability to horizontal relationships and internal processes. *Julio Rios-Figueros* examines internal judicial independence. There seems to be no consensus on what is the optimal or correct design to ensure internal independence. For instance, the results on the role of the judicial council are inconsistent. In some countries these can ensure professionalism and protect internal independence, while in others it has not eradicated undue interference. It is easier to show what designs are bad. These include temporary appointments made unilaterally by the executive; promotions and appointments where the Supreme Court exercises undue influence; biased examination conducted by a politicized or non-transparent judicial council. *Jessica A. Schoenherr and Ryan C. Black* provide their account on the use of precedents in the US Supreme Court litigation. The analysis is based on linguistic patterns. The authors suggest supervised machine learning and their focus on the successes and failures of merits, briefs and the Supreme Court's opinions is interesting, but it also acknowledges that empirical research should be expanded to their legal content. Next *Lydia Brashear Tiede and Susan Achury* report a comprehensive study on Latin American amparo driven actions or inactions. The amparo system dating from 1857 allows both review of constitutionality and review of administrative actions and judicial decisions, as well as specific rights claims. Amparos can be found everywhere except in Cuba. The interesting feature of the Latin American amparos is their connection to rights not only mentioned in the national constitutions but also in the Inter-American Human Rights Convention. It is an important legal tool, but there are features that do not guarantee that courts and judges will agree with those bringing rights claims. The problems related to enforcement and the capacity and resources of the state are ultimately issues decisive for the real success of amparos.

The third part of the book tackles diversity, focusing on appointing women to international courts and high courts. These chapters include not just the US system, but also glance at Africa and Germany. Although the courts are more diverse than ever, this does not mean that racial and gender diversity will automatically mean different lawmaking outcomes, argue *Taneisha N. Means, Andrew Eslich and Kaitlin Prado*. However, they present a convincing argument on the benefits of people with different backgrounds. Judicial diversity or lack thereof can profoundly influence lawmaking when cases having broad

and far reaching implications come before the courts. The authors do a close reading of important cases like Utah v. Strieff (2016), also important in view of social movements like BlackLivesMatter, focusing on policing practices and misconduct. References to the US Supreme Court and Justice Sonia Sotomayor's dissenting opinion are well analysed in this chapter and are possibly even more relevant in the aftermath of the killing of George Floyd on 25 May 2020, which gave rise to demonstrations and protests not just in the USA but also worldwide.

The fourth part discusses subnational courts. As the authors point out, the focus is often on the federal supreme courts, as in the case of Brazil. *Luciano Da Ros and Matthew C. Ingram* go to the state level and follow the variety of capacity and expertise that is relevant in analysing state level courts. They discuss judicial empowerment and this is especially interesting to read in relation to the fight against corruption, which is endemic in Brazil's legal system. The model enabling havingan effective trial against city mayors has required expertise and the pioneering example of the Supreme Court of Rio Grande du Sol has been pointed out. The results also seem to demonstrate the importance of the four dimensions of their review: empowerment, activation, behaviour and impact. One of the patterns in legal research is looking at the influence from higher courts to lower courts. However, *Jennifer Bowie and Elisha Carol Savchak* do this in the opposite direction and consider how lower courts' opinions influence the higher courts. The idea is that it is as relevant to understand bottom-up influence in order to have a more thorough understanding of judicial politics. The authors claim that writing clearly matters in order for lower court judges to influence on the state supreme court justices. *Benjamin J. Kaslow* discusses precedents and their diffusion from the state high courts. The ongoing debate on why certain precedents are more discussed than others is in the background here. What causes a precedent to be cited by a state high court and what causes state high court precedents to diffuse outward to other states? One of the bold arguments put forward by Kassow is the near absolute freedom of state high courts to use US Supreme Court precedents. If they want to follow they can, but they can also frequently ignore such a precedent. Kassow sees many possible directions for the development, but one of the potential directions that needs scrutiny is political polarization. He suggests that there may be more room for the state courts to act ideologically. *Luz Munõz and David Moya* also provide an interesting perspective on NGO involvement, especially in environmental cases. They analyse different litigation strategies used by NGOs in the subnational courts. The strategy is to use European legislation to enforce a higher standard of environmental protection and thus put pressure on governments. The differences in NGOs' strategies for legal mobilization are related to their organizational attributes and support structures. An interesting finding is the paradox that local NGOs

with easy access to the policymaking process tend to be more active and successful litigants while international NGOs tend to be less active in litigation.

Part five discusses courts, inclusion and belonging. This part also discusses different identities including indigenous and minority identities. *Kati Nieminen* reviews how courts draw boundaries of identity and belonging in minority populations and among indigenous peoples. Her approach to belonging and identity combines the Islamic headscarf discussion before the ECtHR and the Finnish discussion on the Sami people, which includes the Supreme Administrative Court in addition to several international supervisory mechanisms like CERD (Committee on Elimination of Racial Discrimination) and the UN Human Rights Committee (supervising International CP-Covenant). The role of courts can sometimes be surprising and implicit. It is an interesting claim that while the ECtHR weighs and balances personal freedoms, according to Nieminen, it also implicitly and indirectly participates in the debate over the French citizen subject. The Finnish approaches the discussion from a different perspective. The Sami people are opposed to losing their indigenous identity by assimilation. The Finnish Supreme Administrative Court has an explicit role regarding belonging because it decides on who has rights e.g. to vote in the election of the Sami Parliament. The indigenous question is also addressed in *Rebecca A Reid and Todd A. Curry*'s chapter focusing on the USA and common law countries like Canada and Australia. This chapter makes the worrying finding that the courts and the executive are in an interactive dialogue. However, the legislative branch often reacts to court decisions protecting indigenous rights by restricting these rights. The contrast in the basic meaning behind the rule of law providing guarantees against arbitrary actions is not delivered in the context of Indigenous peoples.

Finally, the sixth part of the book provides interesting views on the future and discusses the **digitalization of law and courts research.** *Elisabeth Chrun and Rachel Cichowski* discuss the ECtHR database. This is one of the initiatives to use data visualization and make accessibility one of the key features in data projects. For a traditional ECtHR scholar it is always interesting to see how new methods of analysing case-law and rather interesting how earlier research very heavily based on the names of cases providing established case-law and a doctrinal approach to judgments can be combined with the elements developed in the ECHRdb. At the moment the most important results seem to be reached as a teaching tool rather than a tool for researchers. As the chapter explains, a course developed pedagogical tools for the ECHRdb website that will help European human rights come alive in the classroom. *Justin Wedeking* focuses in his chapter on the text as data in law and courts. The chapter discusses the challenges related to computer

text analysis, but despite tensions Wedeking also has an ultimately very positive message about combining computer text analysis with human text analysis. It is precisely the limits of human reading that necessitate engaging with the massive an amount of information available.

Overall, *The Research Handbook on Law and Courts* can be recommended to those seeking new approaches to research on law and courts. The book provides numerous interesting innovative approaches that enrich the picture of doing research on these topics. In this review I have only been able to provide some indications of the book that raised my own interest as a scholar focusing on doctrinal research on European institutions and how their influence through case-law is diffused to the national courts' practice and legislation. For a scholar it was important that the chapters in this research handbook often referred to issues that needed further and more comprehensive research. The authors also left questions open and did not have all the answers on the table. The main part of doing research is to understand the context where the law and courts operate in the contemporary globalized world. The past, present and future are obviously interlinked. The courts do not operate in a vacuum and political reality impacts what happens in courts. It was refreshing to have a look at issues that are not so familiar in one's own legal culture but which can provide a lesson also valid outside of the context in which it was situated. How courts are equipped to avoid attacks that explicitly question the interlinkage of democracy, human rights and the rule of law remains one of the key questions. The polarization of judicial politics needs counterforces and strong voices like Chief Justice Roberts stating that "we do not have Obama judges or Trump judges, Bush judges or Clinton judges". The worst-case scenario is that we let populist discourse manipulate research and focus on populist and polarized views. Rather than trying to find simple answers, we need to contribute to a comprehensive picture of the law and the courts, expanding to areas that are not yet properly explored. This means focusing not only on well-known courts that are already under scholarly scrutiny but also understanding to look into issues from another and different perspective, focusing on those whose role has not so far been emphasized in research.