Contents

Welcome to the annual SLSA Conference 2007

Welcome from the Chair of the SLSA

On behalf of the SLSA I am very pleased to welcome you to the 2007 conference hosted by Kent Law School. The Law School at Kent prides itself on being both lively and innovative and the organising committee has worked hard to ensure that our conference in Canterbury lives up to that reputation. We have two plenary sessions presented by eminent socio-legal scholars, papers have been organised either by keywords or by streams providing what should be a good mix of the familiar and the provocative, and there is a variety of social events ensuring that even the most demanding delegate is kept fully occupied. Please make the most of the opportunities provided by the conference and enjoy yourselves. The organisers have asked me to thank on their behalf:

- the stream leaders who have been asked to do things differently this year and have responded with good grace,
- the sponsors without whom we would not have a conference and who have been particularly generous this year,
- and, for the magnificent support they have received, the fantastic administrative team of Katrin Steinack, Sarah Slowe, Liz Cable and Frances Pritchard.

Professor Sally Wheeler
Chair of the Socio-Legal Studies Association

Vice Chancellor's Welcome

On behalf of the University of Kent and on behalf of Kent Law School I am very pleased to welcome you to our Canterbury campus. It seems particularly appropriate that the Law School is hosting such a prestigious and dynamic conference in 2007 in the Law School's 40th year. It was founded with a mission to provide something distinct and valuable in legal education. It has always prided itself on its lively and innovative approach to the law and on combining an international reputation with regionally strong identity. It has carved out an important international role at the forefront of critical, socio-legal and feminist legal studies. We are proud of many of the law school's achievements, perhaps most notably the AHRC centre for law gender and sexuality (and our links with our partner institutions of Westminster and Keele) and our Law Clinic led by John Fitzpatrick whose services to legal education have been recognised in his award of an OBE. However we are even more proud that our law graduates tell us time and time again how much they enjoyed their time at Kent and how their legal education here has enriched their lives. I have no doubt that you too will enjoy your time here and take away good memories, new ideas and new friendships. Thank you very much for coming and I wish you all the best for a successful conference.

Professor David Melville
Vice-Chancellor
University of Kent

Sponsorship

Kent Law School and the SLSA are delighted to thank the following organisations for their generous donations to the SLSA Conference 2007:

The Department for Constitutional Affairs for their donation towards the conference dinner, in celebration of the 10th anniversary of the DCA Research Unit

Feminist Legal Studies for sponsoring the evening quiz on 3rd April

The Journal of Law and Society for sponsorship of the Plenary Session on 'Homelessness and the delusions of property'

The Journal of Law and Society for their generous donation to cover the costs of the Dinner Entertainment,

Routledge, Taylor & Francis Group for sponsoring the Pre-Dinner Drinks on 4th April

The University of Kent for sponsoring the Wine Reception on 3rd April

We additionally would like to thank the **Blackwell Bookshop on Campus** which has agreed to give a 10% discount on all books bought in store throughout the duration of the conference when presenting the delegate's badge.

Exhibitors

We are delighted to welcome the following exhibitors to the SLSA Conference. The exhibition stands will be in the Keynes College Atrium.

The Authors' Licensing & Collecting Society

Blackwell Publishing

Cambridge University Press

Hart Publishing

Oxford University Press

Pearson Longman

Socio Legal Studies Association

Taylor & Francis

UK Centre for Legal Education

Westlaw UK

Registration & General Information

Included in your registration pack is a guide to Canterbury which contains a map, a list of attractions in and around Canterbury and a list of shops in the city centre.

If at any point during the conference you require any information that is not supplied below or in the guide book, please do not hesitate to contact the Conference Desk.

Registration

Registration will take place at the Conference Desk on Tuesday 3rd April from 08:45-17:00. For all delegates that are arriving on the 2nd April, the delegate packs will be placed in your room – please come to the Conference Desk to sign in on the morning of the 3rd April. Late registration will be available at the Conference Desk throughout the duration of the Conference.

Apart from this conference booklet with schedule and abstracts your registration pack includes:

- University of Kent Guide
- Canterbury Guide – The guides are in English, although we do have a limited amount available in other languages. If you would like a guide in French, German or Dutch, please contact the Conference Desk.
- Accommodation details, if booked
- Further details of the activities, if booked
- Promotional material from publishers

The Conference Desk also holds details of local hotels and visitor attractions as well as further details of the pre- and post- conference activities if there are spaces available on these.

Accommodation and Session Venues

The exact location of all buildings on campus is given in your University of Kent Guide. All seminar rooms, including the lecture theatre are located in Keynes College around the Atrium Foyer – please consult the floor plan below.

Booked accommodation for delegates is provided in either Becket Court (next to Eliot College) or Keynes College. Postgraduate accommodation can be found in Eliot College. For directions please see the detailed maps below, or contact a student volunteer. Please note that your room needs to be cleared by 10:00 on the morning of departure. If you need a secure storage place for your luggage, please see the Conference Desk.

Please note: As the University is closed for the Easter weekend we regret that we cannot offer accommodation for the night of the 5th April. Please contact the Conference Desk if you have not yet organised a hotel for this night and would like us to do so.

Meals/Breaks

Tea and Coffee will be served mid-morning and mid-afternoon at the breaks each day in the Keynes College - Keynes teaching Foyer

A Buffet-lunch will be served in the Dolche Vita restaurant adjoining the Keynes Atrium. Please refer to the programme for times of all refreshment breaks.

Both dinners take place in Eliot Dining Hall; the drink receptions prior to the dinners will be held in Mungos Bar, next to the Dining Hall. Please leave the Keynes Atrium through its front door from where on both venues are clearly sign-posted. Please note that if you are a non-resident participant and would like to attend the Conference Dinner, this can be booked separately at the Conference Desk.

There is packed lunch provided for all delegates at the end of the conference. Please pick up your lunch bag at the Conference Desk.

Access to Internet and Newspapers

Delegates are provided with a temporary user ID and password for email and internet access as part of the registration process. You can use the login in any public computer room on campus. There is a terminal room upstairs in Keynes College which is the closest to the conference rooms. Please contact the Conference Desk or a student volunteer for directions if required.

Kent is also part of the Eduroam scheme – if you come from a participating institution, you can connect to the wireless internet which available in Dolche Vita and Keynes Atrium.

For those interested in keeping up to date with things happening outside of campus a range of national newspapers is available to be read in the Senior Common Rooms of both Eliot and Keynes College. Additionally, the campus shop sells a range of magazines as well as national and international newspapers.

Enquiries & Emergency Contact

The Conference Desk will be staffed from 08:45-17:00 on Tuesday 3rd April and Wednesday 4th April and from 08:45-13:30 on Thursday 5th April. Additionally, a number of student volunteers will be available throughout the conference to assist with directions to the venues.

If there is an emergency please dial **3333** from any internal phone. For Campus Watch, please dial 3300 or visit any of the college receptions.

If you have lost/found some property, please either bring this to the Conference Desk, or take it to Campus Watch (building J4 in the Campus guide).

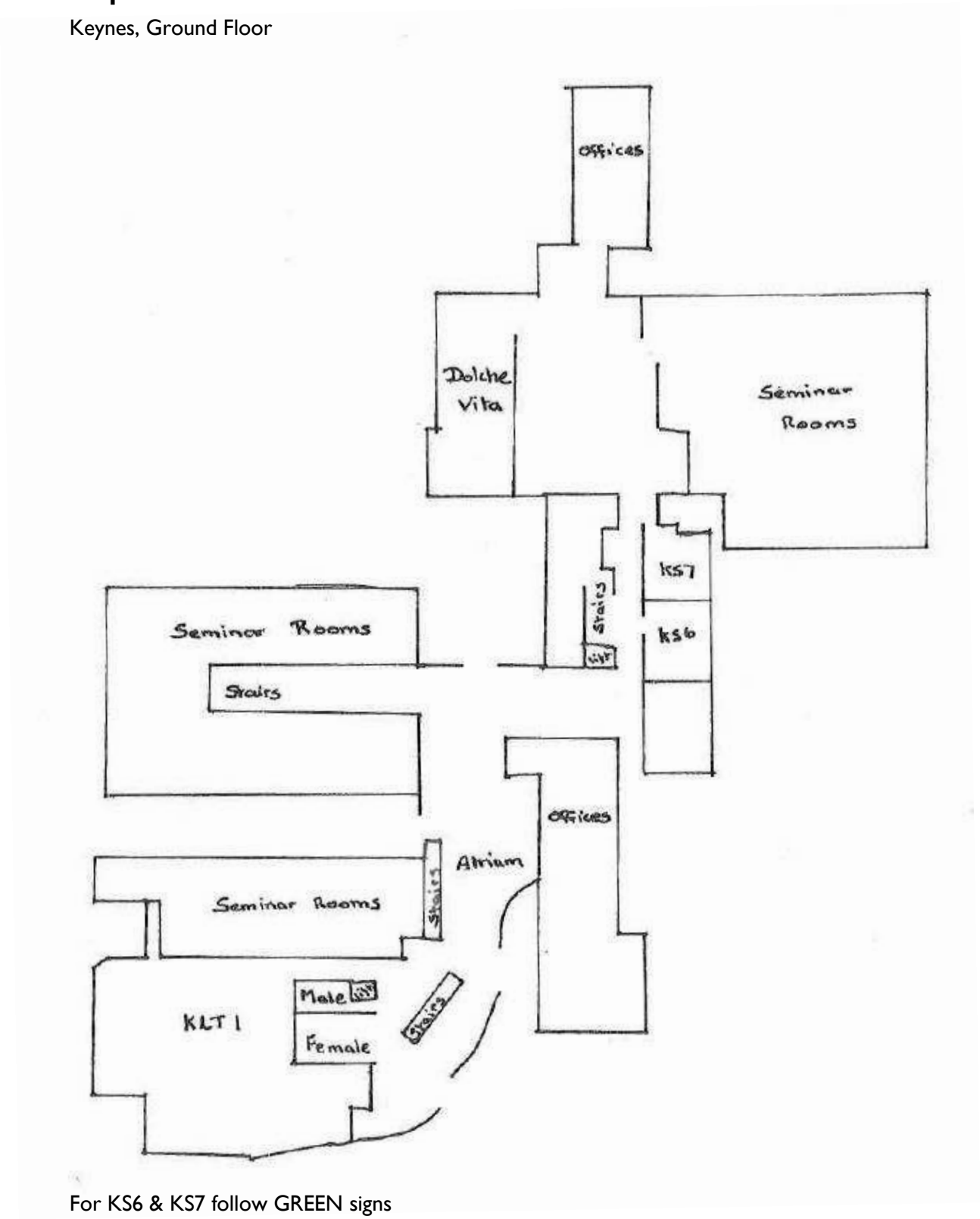
Medical Centre/ Emergency Medical Care

The University Medical Centre is located on Giles Lane on campus. The website is www.kent.ac.uk/medical/index1.htm and the medical centre can be contacted on extensions 3583 or from an external phone on 01227 823583. When the practice is closed the out of hours emergency cover is provided by Stour Care (based in Herne Bay) – to contact them please ring 0844 800 1234.

There is a pharmacy next to the medical centre which is open on weekdays between 9:00-17:00. Alternatively the campus shop sells basic over the counter remedies.

Map/Floor Plan

Keynes, Ground Floor



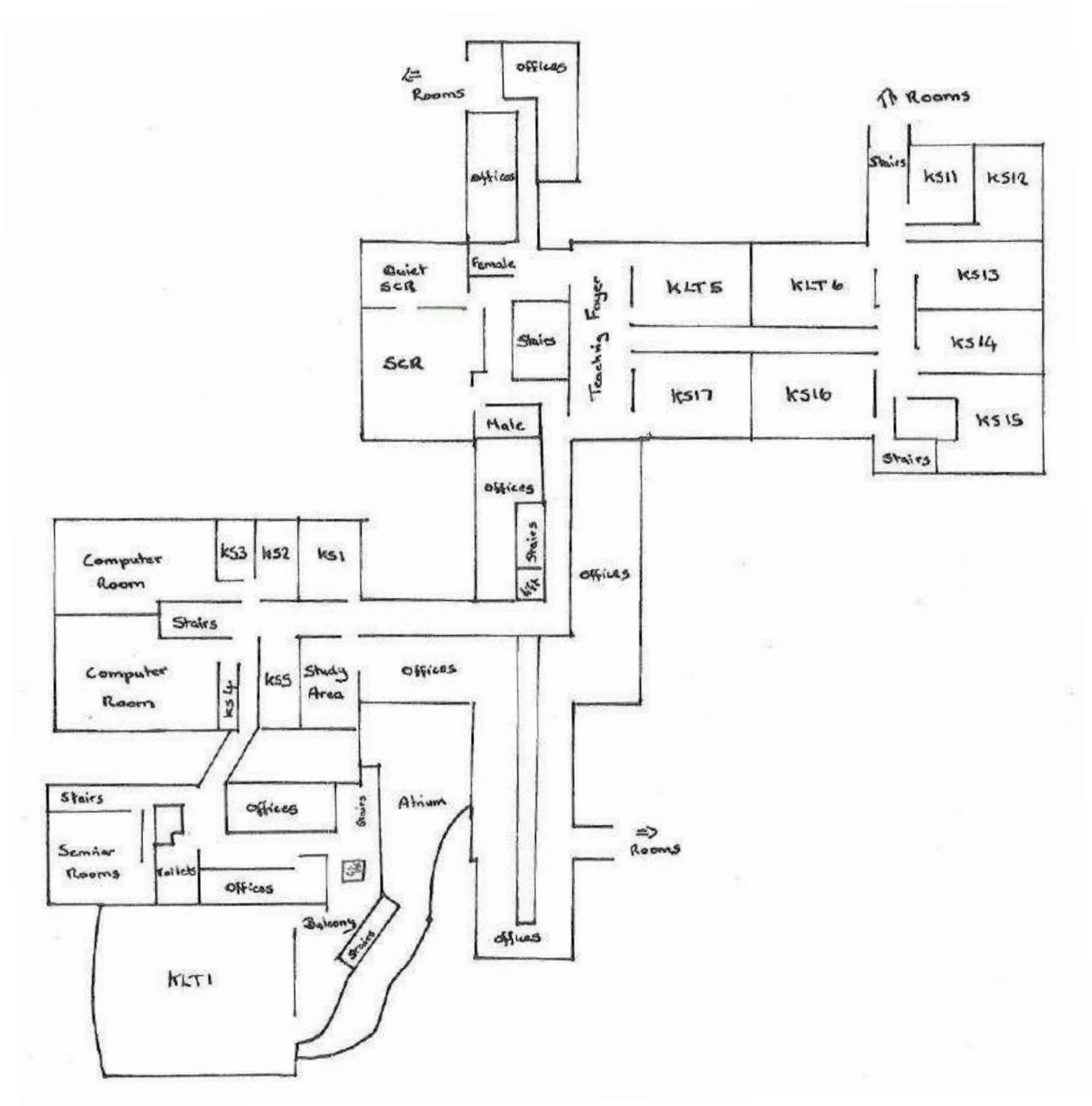
For KS6 & KS7 follow GREEN signs

For Keynes Atrium, KLT 1 & Dolche Vita, follow YELLOW Signs

For KS11 – KS17 follow BLUE signs

For KS1 – KS5 follow RED signs

Keynes, 1st Floor



For KS6 & KS7 follow GREEN signs

For Keynes Atrium, KLT 1 & Dolche Vita, follow YELLOW Signs

For KS11 – KS17 follow BLUE signs

For KS1 – KS5 follow RED signs

Transport

Local Bus Service

The Unibus Service runs from Keynes bus stop to the town centre (marked Unibus or 6/6A) approximately every 15 minutes. It stops close to both train stations and terminates at the bus station. A return ticket is £2, a single is £1.30. Additionally, there is a bus to Whitstable and Herne Bay every 30 minutes (4/4A/4B). A full bus timetable will be available at the Conference Desk.

Local Taxi Services

Taxi ranks are located both outside Keynes College and near the Venue roundabout. Both Canterbury East and Canterbury West train stations have taxi ranks and usually there is a taxi available. If you would prefer to prearrange a taxi, please find below a list of local taxi companies. Please note that the dialling code for Canterbury is 01227.

Canterbury Taxi Companies

Always Taxis	731010	Dad's Taxis	456888
Andycabs Taxi	767111	Laser Taxis	464422
Aristocars	456905	Longport Cabs	458885
BJC Taxis	710055	Lynx taxi	464232
Cab Co	455455	Phoenix Taxis	788888
City Cars	454445	Z Cars	789100

Parking

For those requesting a parking permit as part of their registration process this should have been sent out prior to the conference. For all other visitors there is a visitors' car park on Giles Lane which operates as a 'Pay and Display' car park. Parking elsewhere is very restricted and for permit holders only.

Sports/Leisure Activities

Sports Centre

The university has a well equipped sports centre with a full gym, including a specialist cardio vascular suite. There are some scheduled classes available. If you wish to make use of the sports centre whilst you are at the University, please contact the conference desk for details regarding prices.

Swimming Pool

Kingsmead Swimming pool is approximately five minutes drive or fifteen minutes walk from the University. For directions please contact the Conference Desk.

Blean Woods

Blean Woods, which are a 10 minutes jog or a 2 minutes drive away from University are Kent's largest, covering over 3000 hectares. This woodland is very old and almost half the area is considered so special for wildlife that it is designated as Site of Special Scientific Interest. There are several circular walks of different lengths. For directions please contact the Conference Desk.

Crab & Winkle Way

Adjoining to campus the 'Crab and Winkle Way' takes its name from the railway line which ran between the towns of Canterbury and Whitstable and used to be the first regular steam passenger railway in the world. Today the old rail track is a mostly traffic free bike and footpath which after approximate 5 miles through woods and fields takes you to Whitstable. There is also a bus back if required!

Restaurants off Campus

Canterbury's many cafés, pubs and restaurants make it easy to find something to suit both your individual taste as well as your purse. Instead of listing them all, here is an overview of some of the places where we like to eat in particular:

Apeksha

(24 St. Peters Street, Canterbury, 01227 780 079) – Indian Cuisine

Bistro Vietnam
(The Linen Store, White Horse Lane, Canterbury 01227 760022) – Close to the High Street the restaurant serves inexpensive, good quality Vietnamese food.

Café Des Amis
(93-95 St. Dunstans, Canterbury – near the Westgate Tower, 01227 464390) – provides Mexican food and drinks.

Cafe Mauresque
(8 Butchery Lane, Canterbury, CT1 8JR, Tel: 01227 464300(offers tasty North African/Spanish cuisine.

The Goods Shed
(Station Road West, Canterbury, 01227 459153) - By majority vote the best place to eat in Canterbury. The old railway shed next to Canterbury West Station hosts both a daily farmers market and a restaurant with a clear focus on modern British kitchen based on local ingredients.

The Old Weavers House
(1-3 St. Peter's Street, Canterbury, Phone: 01227 464660) – Situated in a 16th century restaurant by the edge of the River Stour it serves some good old-fashioned British food such as great sirloin steaks and stodgy puddings.

Acknowledgements

The Conference Organisers would like to thank all of the many people who have helped in the organisation of this Conference. In particular we would like to thank Donald McGillivray, Helen Carr and Rosemary Hunter for their valuable contribution and liaison between Kent Law School and the SLSA. We are also indebted to the stream organisers who have contributed to a lively and interesting program.

For an outstanding personal contribution we would particularly like to thank the following individuals:

Liz Cable and John Wightman for their continued support throughout the organisational process.

Nick Jackson and Jose Casal-Gimenez without whom the website would not have been possible.

Frances Pritchard for her continued help with all the financial arrangements.

Sarah Slowe for managing all delegate registrations, the arrangements with exhibitors and sponsors and her continued support in many other practical arrangements.

Katrin Steinack for the co-ordination of the practical arrangements and the collation of the abstracts.

Finally, last but not least a big thank you to the Kent Law School office staff who have undertaken the extra work needed to make this a successful event.

The Conference Organisers

SLSA Conference 2007

Kent Law School

Conference Programme

Conference overview

Tuesday, 3rd April		
09:00-17:00	Keynes Atrium	Registration
12:15-13:15	Dolche Vita	Welcome buffet
13:15-14:45	Various	Session 1
14:45-15:15	Keynes Teaching Foyer	Tea and coffee
15:15-16:45	Various	Session 2
17:00-18:00	KLT1	Presentation of Hart Early Career Book Prize followed by Plenary 1: Nick Blomley - Homelessness and the delusions of property
18:15-19:00	Mungos Bar	Wine reception
19:00	Eliot Dining Hall	Dinner
20:00	Mungos Bar	Feminist Legal Studies Quiz
Wednesday 4th April		
09:15-10:45	Various	Session 3
10:45-11:15	Keynes Teaching Foyer	Tea and coffee
11:15-12:45	Various	Session 4
12:45-14:00	Dolche Vita/EX9	Buffet lunch / SLSA AGM
14:00-15:30	Various	Session 5
15:30-16:00	Keynes Teaching Foyer	Tea and coffee
16:00-17:30	Various	Session 6
18:00-19:00	KLT1	Plenary 2: Martin Partington - Back to the future: the success and challenge of socio-legal scholarship
19:00-20:00	Mungos Bar	Drinks reception
20:00	Eliot Dining Hall	Conference dinner with Presentation of Hart Book Prize and Hart Article Prize
Thursday 5th April		
09:30-11:00	Various	Session 7
11:00-11:30	Keynes Teaching Foyer	Tea and coffee
11:30-13:00	Various	Session 8
13:00	End of conference and departure	

Plenary Sessions

Nick Blomley

'Homelessness and the delusions of property'

(3rd April, 17:00-18:00 KLT 1)

Nick Blomley has a PhD in Geography from the University of Bristol (1986). He has taught at UCLA and Boston, and is currently Professor of Geography at Simon Fraser University, in British Columbia, Canada. He has a long-standing interest in critical legal geography, authoring a book on the subject in 1994 (*Law, Space and the Geographies of Power*; Guilford, New York). He was also co-editor of the *Legal Geographies Reader* (2001, Blackwell) along with David Delaney and Richard Ford. He has a particular interest in the geographies of real property, and recently completed a project on everyday conceptions of public and private property in relation to garden spaces in inner-city Vancouver. He is currently exploring the geographies of rights in relation to anti-begging law in Canada. His most recent book is *Unsettling the City: Urban Land and the Politics of Property* (2004, Routledge).

Martin Partington

'Back to the future: the success and challenge of socio-legal scholarship'

(4th April 18:00-19:00 KLT1)

Martin Partington retired from full-time academic life at the end of 2005. Before, he taught at the Bristol, Warwick and Brunel Universities and at the LSE. He is now an Emeritus Professor of the University of Bristol, and Senior Research Fellow at the Institute of Advanced Legal Studies. With Professor Dame Hazel Genn, he helped to establish the SLSA.

He has sat on many public bodies, was an expert adviser to Sir Andrew Leggatt's Review of Tribunals, and Janet Gaymer's Review of Employment Tribunals and chaired the Advisory Committee for the Nuffield Inquiry into Empirical Research in Law which reported in 2006.

From 2000-2005 he was a Law Commissioner; he has been retained as a Special Consultant to the Commission until the end of 2007. He is also advising Sir Robert Carnwath, Senior President, on research relevant to the development of the new Tribunals Service. A barrister he still does some part-time practice from Arden Chambers, London. He was appointed CBE in 2002 and elected a bencher of Middle Temple in 2006.

His principal research areas were housing law, administrative law and administrative justice, and legal education. He has recently authored an *Introduction to the English Legal System*, the 3rd edition of which was published by OUP in 2006.

SLSA Annual General Meeting

The SLSA AGM will take place in EX9 from 12:45-14:00 on Wednesday 3rd April with lunch being served for those attending in the KLS Committee Room. The meeting is open to all SLSA members.

Streams and Panels

The following streams and keyword-panels to be held throughout the conference are listed below. Please note, that this information was correct at the time of print. An updated, detailed timetable of all presentations is provided along with this brochure.

Traditional streams and panels

- Child and Family Law and Policy (Convenors: Felicity Kaganas and Christine Piper, Brunel University)
- Environmental Law (Convenor: Paul Street, University of Exeter)
- European Law (Convenor: Naomi Salmon, University of Wales)
- Immigration Law (Convenor: Bernard Ryan, University of Kent)
- Information Technology and Cyberspace Law (Convenor: Mark O'Brien, University of the West of England)
- International Law in the 21st Century (Gbenga Oduntan, University of Kent)
- Law and Incitement (Convenor: Michael Kearney, University of York)
- Law and Religion (Convenors: Russell Sandberg and Norman Doe, University of Wales)
- Law, Race and Human Rights (Convenors: Fernne Brennan and Claudia Tavani, University of Essex)
- Legal Education (Convenor: Fiona Cownie, University of Keele)
- Medical Law and Ethics (Convenors: Rena Gertz, University of Edinburg, and Glenys William, University of Wales)
- Mental Health and Mental Capacity (Convenor: Peter Bartlett, University of Nottingham)
- Sentencing and Punishment (Convenors: Susan Easton and Christine Piper, Brunel University)
- Sexual Offences and Offending (Convenor: Philip Rumney, Sheffield Hallam University)
- Transitional Justice and the Rule of Law (Convenors: Mary O'Rawe and Jeremie Gilbert, University of Ulster)

Keyword related streams and panels

- Becoming Legal
- Development
- Embodiment
- Governance
- Justice
- Narrative
- Participation
- Participation & Justice
- Risk
- Sovereignty
- Sovereignty & Resistance

- Technologies

Special Panels

- SLSA Panel – Authors meet Readers (Rosemary Hunter, AHRC Centre for Law, Gender and Sexuality, University of Kent)
- I fought the Law, and the Law won (Rosemary Hunter, AHRC Centre for Law, Gender and Sexuality, University of Kent)

Social Events

Tour of Canterbury

Canterbury is famous for its Norman Cathedral but also boasts many other historical buildings and areas of interest – the Cathedral and St Augustine's Abbey form part of Canterbury's UNESCO World Heritage Site. We have arranged for a guide from the Canterbury guild of guides to conduct a walking tour on the morning of Tuesday 3rd April, showing all the main attractions - an excellent opportunity for those who wish to learn more about this historical city.

The tour will depart from the Cathedral at 9:30 and will start with a 75 minute guided tour of the Cathedral followed by the walking tour (a total of 2 hours, 45 minutes).

Please note that the tour has been pre-booked. Please visit the conference desk if you are interested in any remaining spaces. There is an additional charge of £14 for the tour.

Feminist Legal Studies Quiz

The after-dinner entertainment on Tuesday 3rd April will be a Quiz Night, sponsored by Feminist Legal Studies. Each table is a team... so be careful who you sit with! Fabulous prizes will be awarded, together with the customary wooden spoon.

Conference Dinner

The Conference Dinner, which the DCA is sponsoring in celebration of the 10th anniversary of the DCA Research Unit, is taking place in Eliot Dining Hall on Wednesday 4th April. We have an excellent band who will play throughout the evening.

The Eskalators were born over a pub table in 2002. As a four piece ska band they hid away in a sound proofed garage in Whitstable and began the long task of learning to play. Scouring through well known and obscure ska and two-tone records for interesting tunes to tussle with, they gradually rose up, multiplying along the way until now there's eight of them. Having emerged blinking and victorious on to the local music scene, they have since played numerous parties, dances, concerts and charity gigs. The Eskalators play tuneful dancy ska with a rock steady beat that will pick up your feet.

If you are looking for a quieter place to relax after the meal, both the senior common room and the upper senior common room will be open and will provide a comfortable and relaxing place to catch up with colleagues.

Abstracts in alphabetical order

Stephen Allen, Law School, Brunel University

Looking Beyond the Bancoult Cases: International Law and the Prospect of Resettling the Chagos Islands

Transitional Justice and the Rule of Law

In the mid 1960s, the US government entered into an agreement with the UK government to construct a defensive communications facility on the island of Diego Garcia in the remote Chagos Archipelago, which was then part of the British colony of Mauritius. After having procured the agreement of the elected representatives of the colony, the UK government enacted primary legislation to excise the Chagos islands from Mauritius. A new colony, the British Indian Ocean Territory ('BIOT') was established in 1965. It was subsequently leased to the US government in connection with the construction of the planned facility. The UK and US agreed that the population of Diego Garcia would be cleared before transfer. Between 1965 and 1973, against a background of UN-inspired decolonisation, the indigenous people of the entire Archipelago were banished without prior consultation, consent or compensation and the possibility of their return was prohibited by colonial legislation. The vast majority were transported to Mauritius where they became chronically impoverished. During the 1970s, the facility became a fully-fledged naval base; it has become a key site for the pursuit of US global interests, not least in its 'Global War on Terror'. In the Bancoult litigation, the English courts found the exile of the Chagossian people unlawful and that they possess a public law right of abode in respect of the Chagos islands. In Bancoult 2, the Divisional Court indicated that the UK government's premature conclusion that resettlement was infeasible did not displace the Chagossian legitimate expectation of resettling the islands. Building on this important finding, the paper examines whether, in principle, international law can facilitate resettlement of the Chagos islands. It explores the possibility of BIOT being listed as a 'non-self-governing territory', a development that would permit obligations contained within Chapter XI of the UN Charter and the right of self-determination to be invoked in favour of the Chagossian people. However, the Chagos islands are also claimed by the Mauritian government, which argues that they were annexed in violation of international law and should be returned to Mauritian sovereignty. The UN General Assembly initially endorsed Mauritius' claim and it still attracts considerable support in Africa and Asia. The UK government has also acknowledged Mauritius' reversionary title when the military base on Diego Garcia is no longer required for defensive purposes. This paper contends that the BIOT Question turns on nuanced arguments concerning the operation of the right of self-determination in small colonial territories and whether experiences of involuntary displacement and chronic impoverishment confer remedial entitlements on the Chagossian people as a matter of international law. In addition, it examines the possibility of securing compensation for past wrongs, particularly in relation to the loss of ancestral lands, as any such compensation would bolster the chances of successful resettlement. As colonial legislation abolished any land rights the Chagossians may have had under municipal law, this paper considers whether the international canon of indigenous rights can be used for this purpose given its recognition of extensive land rights as a consequence of indigenous status.

Mohammad S. Alramahi and Jasem M. Tarawneh

Freedom to use trade marks for Non-trade mark purpose; The case of Internet Domain Names

Information Technology and Cyberspace Law

A domain name is an electronic address which could function as a distinctive sign that can effectively indicate the trade origin of goods and services. Consequently, domain names could be

perceived and actually become trade marks when and if they satisfy certain requirements. Therefore, the wrongful use of domain names that conflict with a trade mark can fall within trade marks court jurisdiction and should be assessed according to established trade marks principles. Notwithstanding the existence of separate specific regulations dedicated to domain names. It is submitted under the general principles of trade mark law that trade mark proprietors do not have an absolute monopoly over the use of their trade marks. The adoption, by a third party without authorisation, of a word mark, as a domain name will amounts to use of that mark in the course of trade, which the proprietor is entitled to stop by reason of his exclusive rights, if that use affect the trade mark proprietor's interests. As a result, a third party is free to use a trade mark, as a domain name and this use would not be considered wrongful, if this was not a use in a trade mark sense that would harm the business of its proprietor. Bearing in mind, that courts need to balance trade marks proprietors' rights on one hand with freedom of speech, competition and unfair competition on the other hand. Otherwise, we will end up with unjustified expansion to trade marks rights over other legitimate public considerations.

Keywords: privacy, blogs

Olufemi Amao, PhD Candidate, UCC, Ireland

Extraterritorial application of home countries jurisdiction to EU corporations activities abroad: A window of opportunity?

European Law III

The European Community and the European Union have shown considerable interest in bringing perpetrators of human rights and humanitarian law violations to account. This is demonstrated by the fact that all EU member states have ratified the Geneva Convention and its first protocol, the UN Convention against Torture, the Genocide Convention and the Rome Statute of the International Court. As it relates to multinational corporations (MNCs), the EU has also been at the forefront of the search for means of controlling the activities of MNCs, which culminated in the publication of the European Union Green Paper on Corporate Social Responsibility (CSR). However, to date the situation has not improved significantly as many EU corporations are still being accused of involvement in violation of human rights in the countries of the South. A recent example is the case of a ship chattered by a Dutch Company to export hazardous waste materials to West Africa which resulted in the death of ten people with thousands others made ill. The situation is potentially more complex because of the exposure of EU companies to lawsuits in the US for egregious violation of human rights and international law under the Alien Torts Claim Act, 1789 (ATCA). While this paper recognizes and underscores the limits of the ATCA, it posits that it would be advantageous to the EU and its corporations and the furtherance of the goals of human rights and humanitarian law for the EU to facilitate the possibility of replicating a similar procedure to ATCA in the EU. The paper posits that with slight amendments to existing laws and the proposed Rome II, an ATCA like procedure can be achieved in the EU.

Keywords: becoming legal, justice

Rosemary Auchmuty, Reader, University of Westminster

The Civil Partnership Act, one Year on

Becoming Legal II

This paper will, first, analyse the statistics of civil partnership registration in England and Wales over the first year of the Act's operation and attempt to account for the numbers, gender balance and geographical distribution. Second, it will consider the different meanings that have been ascribed to the civil partnership status by lesbians and gays, the media, critics and theorists,

noting in particular the fundamental difference between those who consider it to be (as if) marriage and those for whom it is important to be not-marriage. The paper will ask whether its very ambiguity is its strength, and whether in the end it will reinforce, or unalterably change, marriage - or neither.

Keyword: becoming legal

Samia Bano, University of Reading

Diaspora, Shariah Councils and Muslim Legal Pluralism in Britain

Law and Religion - Religious Law

The renewed visibility of South Asian communities as part of a new 'Muslim diaspora' has led to increased discussions on the tenuous relationship between minority rights, multiculturalism and legal pluralism in Britain. This paper explores the complexities of socio-legal reality for South Asian Muslims in Britain. Muslim legal pluralism manifests in the area of family law whereby informal Muslim legal bodies known collectively as *Shariah Councils* provide advice and assistance in matters of Muslim law concerning marriage, divorce and custody. Drawing upon ethnographic research and a 'thick, deep, strong or new' description of legal pluralism this paper explores the contested 'space(s)' Shariah councils occupy between and within the boundaries of community and law. It suggests that a definition of legal pluralism must not only incorporate differing legal orders within the nation-state but that cultural and legal diversity must be understood as complex, negotiated, contested and historically unstable. In short, the relationship between social life and legal pluralism demands closer inspection than present literature suggests. The paper begins with an overview of how Shariah Councils have evolved within the wider context of rights, multiculturalism and social change within minority religious groups in Britain. It then draws upon fieldwork data with 5 Shariah Councils to explore the *process* of dispute resolution and the demands for communal autonomy and creation of 'self- disciplinary communities' in the context of family law. It is clear that this process is by no means an uncomplicated process and gives rise to an interesting set of cultural and religious practices, overlapping with state law and, at times in conflict.

Anne Barlow, University of Exeter

Community of Property - the logical response to Miller and McFarlane?

Child and Family Law and Policy

The House of Lords decision in *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24 edges us closer to a community of property approach to ancillary relief on divorce where assets exceed needs. Drawing on an empirical project funded by the Nuffield Foundation, this paper will consider whether discretion has had its day and should be replaced by a formal community of property regime in England and Wales. Its analysis will consider whether community of property should be considered a feminist solution to issues surrounding the redistribution of assets on divorce or separation; or whether it is a bastion of patriarchy.

Keywords: community of property, ancillary relief on divorce, feminism, patriarchy

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Peter Bartlett, Nottinghamshire Healthcare NHS Trust Professor of Mental Health Law, School of Law, University of Nottingham

Looking at Courts: Why Users Always Lose

A cursory glance at the outcomes of litigation regarding mental disability does not inspire confidence. In all four Mental Health Act cases considered by the House of Lords in the last

three years, for example, the patient has lost. The Court of Appeal's record is more mixed at least on points of procedure, but it is similarly rare that a user of mental health services has been successful on a point of substance in that forum. This may in part be because users have such dismal success at initial trials. While courts occasionally acknowledge the perception of injustice experienced by users (see, eg., Smirek v Williams [2001] 1 MHLR 38, para 14-16), they do not seem to acknowledge their own role in the problem. To be realistic, it is not much of an exaggeration to say that when they go to court, users of psychiatric services can expect to lose. This paper will argue that reasons for this lack of success include:

- Insufficient clarity of standards in existing legislation: neither the current mental health legislation, nor the Human Rights Act, was drafted with the rights of psychiatric users in mind
- A failure of judges to give meaningful content to the standards that do exist
- Evidential presumptions that work to the disadvantage of the psychiatric user or non-professional carer
- A failure to give sufficiently robust attention to the procedural and substantive differences between Human Rights Act claims, and those of other judicial review.

Alice Belcher, Professor, Dundee Law School

'Something distinctly not of this character': How Knightian uncertainty is relevant to Corporate Governance

Risk I

Corporate governance best practice now includes the requirement for a board to ensure that the system of internal control is effective in managing risks in the manner which it has approved. The Turnbull Guidance on this matter is 'based on the adoption by a company's board of a risk-based approach to establishing a sound system of internal control and reviewing its effectiveness' (Turnbull, 1999, para 9). This involves the identification and prioritising of risks and embedding the risk management approach in the culture and processes of the business. This paper concerns the impact of this corporate governance provision on board decision-making, especially in non-routine decisions where the company cannot draw on previous experience. This might be seen as decision-making under Knightian, or true uncertainty which has been shown to produce different behaviours from decision-making under risk, where outcomes can be estimated. Knight (1921) maintained that true uncertainty was something distinctly not of the character of risk. It applies occurs when '... there is no possibility of forming in any way groups of instances of sufficient homogeneity to make possible a quantitative determination of true probability. Business decisions, for example, deal with situations which are far too unique, generally speaking, for any sort of statistical tabulation to have any value for guidance. The concept of objectively measurable probability or chance is simply inapplicable.' It is suggested that a concentration on, an perhaps a spurious quantification of, risk could mask the difficulty of making board level decisions under conditions of true or Knightian uncertainty.

Keywords: risk, governance

Thieu Besselink, PhD European University Institute

The Loss of Authority and the Quest for Legitimacy

Sovereignty II

Whereas in the past, institutionalised roles fixed the images of authority and the behaviour appropriate to the kind of authority exercised, today, the figure of authority has to produce by himself both the imagery and the behaviour appropriate to his condition. This is true for political leaders and their institutions as well as the legal instruments that they propose, such as

referenda. With the fading of shared authentic and indisputable social experiences authority slowly dies, but the searching for authority still continues. This paper describes the search for legitimacy in the absence of authority of contemporary western democracies. What are the difficulties authorities face in cultivating their authority? And what are the solutions they come up with?

Keywords: sovereignty, governance

Vanessa Bettinson, De Montfort University

The future of claims to resist removal by HIV+ Sufferers: The mother and child claim

Child and Family Law and Policy

This paper aims to explore the potential basis for allowing claims to resist removal by mothers and their children who suffer from HIV/AIDS to countries that lack adequate medical facilities and or where there is a deep rooted stigma attached to HIV/AIDS sufferers. This paper will consider the legacy of N v SSHD [2005] 2 WLR 1124 where the House of Lords' prevented an individual with HIV relying on Article3 ECHR to resist removal to her state of origin where there were inadequate medical facilities. An overview of some of the important policy implications surrounding this decision will be raised. The paper will seek to distinguish mother and child cases from those of individuals, arguing that Article 3 ECHR could still be relied upon in these situations. It shall be considered whether certain scenarios involving mother and child can amount to exceptional circumstances given the added trauma faced by a mother with HIV of watching her child die an inevitably unpleasant death. The author will also consider whether certain cases could afford protection under the Refugee Convention where there is sufficient evidence of stigmatization in the country of origin, on the basis that sufferers form a particular social group.

Keywords: ***Immigration, HIV, Discrimination, Children, Health***

Phil Bielby, Law School and Institute of Applied Ethics, The University of Hull.

Emotions, Decisional Competence and Legal Capacity

The role of the emotions in conceptualising decisional competence has received surprisingly limited treatment in bioethics and virtually none in medical law. This is surprising, given the growth of philosophical interest in the emotions over the last twenty-five years (e.g. Frijda, 1986; Solomon, 1993) and the burgeoning interest of legal scholars in the relationship between law and the emotions (e.g. Bandes, 2001). So far, what debate there has been is characterised by a divergence between commentators who believe that emotions should occupy a central place in the theory and practice of determining decisional competence (Charland, 1998a, 1998b), and commentators who believe that introducing an 'emotion criterion' into a standard of decisional competence may be ethically problematic and difficult to operationalize (Appelbaum, 1998). In this paper, I intend to consider whether this impasse can be resolved. I begin by considering how emotions and decision-making are related and explain why 'emotional competence' constitutes an important criterion of decisional competence. I will argue that, contrary to much established philosophical thinking, emotions are cognitive phenomena and can be rational, rather than non-cognitive or always irrational, drawing on the work of Ronald De Sousa (1987) and Antonio Damasio (1994). I will go on to claim that taking such an approach in policy terms would have considerable ramifications for making judgments about the decisional competence of many 'cognitively vulnerable' individuals, especially adults with dementia and psychotic disorders. In the last section of the paper, I turn my attention to consider the paucity of discussion about emotion in recent legal discourse about decisional competence/mental capacity, particularly in respect of the Mental Capacity Act 2005, and conclude by assessing the prospects for an explicit

acknowledgment of emotion in decisional competence determinations, especially in 'marginal' or 'borderline' cases.

References:

Appelbaum, P. S. (1998). 'Ought We to Require Emotional Capacity as Part of Decisional Competence?' Kennedy Institute of Ethics Journal, vol. 8(4) pp. 377-387.

Bandes, S. A. (ed.) (2000). The Passions of Law, New York University Press, New York.

Charland, L. C. (1998a). 'Is Mr. Spock Mentally Competent? Competence to Consent and Emotion'. Philosophy, Psychiatry and Psychology, vol. 5(1), pp. 67-81.

Charland, L. C. (1998b). 'Appreciation and Emotion: Theoretical Reflections on the MacArthur Treatment Competence Study'. Kennedy Institute of Ethics Journal, vol. 8(4), pp. 359-76.

Damasio, A. (1994, repr. 2005). Descartes' Error: Emotion, Reason and the Human Brain (reissue with new preface), Penguin, New York.

De Sousa, R. (1987). The Rationality of Emotion, MIT Press, Cambridge, Mass.

Frijda, W. H. (1986). The Emotions. Cambridge University Press, Cambridge.

Solomon, R. C. (1993). The Passions: emotions and the meaning of life. Hackett, Indianapolis

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Anthony Bradney, Professor of Law, Keele University

Law and Faith in a Sceptical Age

Law and Religion - Society, Religion and Law

This paper will take as its premise the fact that Great Britain is a secular society that is in the process of becoming a cosmopolitan society. However, within this secular society there exist a small minority of people for whom institutionalised religion is a primary source of identity. This situation produces two challenges. One is an empirical challenge. To what extent do we understand how the minority of adherents live their lives and want to live their lives? More particularly, from the perspective of the law school, to what extent do we understand how such people interact with law, law being understood both as state law and as the pluralistic legal systems that exist in some faith communities? This paper will argue that there is too little information about these issues and that inhibits our ability to deal with the second challenge that arises out of a largely secular society having religious minorities. The second challenge is the conceptual one of working what space religious minorities can be afforded in a secular society. There is a superficial comparison that can be made with previous centuries when there was a need to accommodate different religious groupings within society. However the paper will argue that the present challenge is of a different order since the ontological basis of secular society and faith groups are, or are usually, radically different.

Anthony Bradney, Professor of Law, Keele University

Why Law Schools Should Be More Like Business Schools

Legal Education

It is commonly accepted that the last few decades have seen an attempt to redirect the focus of the university in the United Kingdom. The policies of both the main political parties are directed towards getting universities to realign themselves so as to service the needs of the economy both in terms of the research they produce and the students that they educate. Some also argue that these pressures are so strong as to make it impossible to resist to them except in rare individual cases; Newman's university is in ruins and nothing can be done about it; more than this perhaps nothing should be done about it. In the light of such views this paper will argue that law schools should turn their attention to business schools as being the most successful example of the new turn for the university and seek to emulate them. Drawing on the literature on business

schools and similar academic departments that has been published over the last decade the paper will see how business schools have developed and how law schools might profit from considering their progress.

Dr. Lindsey Brown, The Ethox Centre, University of Oxford University

The role of medical 'experts' in shaping disability law

Medical Law and Ethics

It is possible to identify a link between the ways in which disability is perceived and the laws that result from those attitudes. Frequently, courts are called upon to make quality of life (QL) judgments in health care law cases in which disability is raised as an issue. In this context, disability is often perceived to be incompatible with life satisfaction. But such judgments are subjective and based on cultural norms and values. Recent 'end-of-life' cases provide opportunity to analyze how UK courts typically approach QL assessments. Through analyzing the discourses employed by judges in key case law authorities in England and Wales, this paper seeks to demonstrate the almost imperceptible yet insidious impact of what may be called the 'medical model' of disability. Its profound and often detrimental influence stems, in part, from judges' reliance on medical professionals as 'experts' in these cases. Doctors' views of disability are formed as a result of medical training and contact with disabled people as patients. Consequently, their opinions often fail to take into account the lived experiences of disabled people. Instead, doctors tend to base their judgments on ignorance, negative assumptions, stereotypes and misconceptions. Yet the approach taken to considering disability by doctors tends to be highly influential over judges who make quality of life assessments—often even proving determinative of case outcomes. In place of the 'medical model', this paper proposes that a new approach is needed, one which views the law's operation through a critical lens that adopts a disability-rights theoretical perspective, thereby linking the study of law to disability theory.

Alexy Buck, Legal Services Research Centre & Tania Tam, Legal Services Research

Putting money advice where the need is - evaluating the potential for advice provision in different outreach locations

Participation & Justice II

The Legal Services Commission, the public body responsible for the provision of legal aid in England and Wales, has received funding from HM Treasury's Financial Inclusion Fund to pilot different methods of money advice outreach. The broad policy background for the pilot services reflects key Government concerns: tackling financial exclusion (no or limited access to mainstream financial services and products such as bank or building society accounts), reducing social exclusion and helping people address their debt problems. The expectation is that outreach advice is a more accessible and effective way of meeting the specific needs of disadvantaged and 'hard-to-reach' individuals. The Legal Services Research Centre (LSRC) is responsible for the multi-phased evaluation of the money advice outreach pilots. This paper presents results on the first phase of the research. A face-to-face survey in five different outreach location types, ranging from prisons to family and children centres, credit unions, community centres and housing offices, was undertaken. The aim was to assess the suitability of these different outreach locations types for the delivery of money advice to 'hard-to-reach' and disadvantaged groups. Findings demonstrate that the pilots could have a significant positive impact. The research reveals that the pilots are reaching highly deprived and financially excluded areas and groups. Results also show that there are important variations between the five outreach location types surveyed – with implications as to how to best deliver the outreach 'on the ground'. Given that

outreach advice should be moulded to the needs of its target groups, it is crucial that the pilots, and any subsequent policy initiatives, take account of this.

Keywords: participation, justice

Trevor Buck, Professor of Socio-Legal Studies, De Montfort University

Precedent, reporting and tribunal justice

Participation & Justice I

This paper explores the role of precedent and reporting in the UK's tribunal system. Though there is much literature relating to the doctrine of precedent and legal reasoning in relation to the courts, far less attention is paid to these issues in respect of tribunals. The paper builds on previous research published (Buck T, 'Precedent in Tribunals and the Development of Principles', (2006) 25(4) Civil Justice Quarterly 458-484) by the presenter and outlines the emerging findings of a research project conducted with the assistance of Nuffield Foundation funding. The research has involved the interviewing all the tribunal Presidents, recently reorganised into the new Tribunal Service under the sponsorship of the Department for Constitutional Affairs, in addition to some advice service personnel in a number of tribunal jurisdictions. There are at least two contested questions raised in the research. Firstly, the merits or otherwise of producing so-called 'factual precedents' in the tribunal sector; for example, 'Country Guidance' cases in the immigration and asylum jurisdiction; and secondly, the mechanisms chosen to select cases of more authoritative status. As regards reporting in the tribunal sector, practice has been variable and on occasion user access to reported decisions has been difficult in some jurisdictions. However, the almost infinite storage capacity of electronic media, though increasing user access, may also tend to produce over-citation in some jurisdictions. This paper further discusses the direction for the future development of a more coherent system of precedent and reporting in the tribunal sector in the context of the government's reorganisation under the Tribunals, Courts and Enforcement Bill into a 'First-tier Tribunal' and an 'Upper Tribunal'.

Keyword: Justice

Israel de Jesus Butler, Lecturer, Lancaster Law School

NGO Participation in the EU Law-Making Process: the example of Social NGOs at the Commission, Parliament and Council

Governance II

This article explores the avenues used by NGOs working in the sector of EU social policy to influence the law-making process at the EU. The Commission's current transparency initiative has focussed attention on the rules (or lack of) governing access to the Commission as the initiator of legislation. This article examines more broadly, on the basis of interviews, both the formal and informal means of accessing not only the Commission, but also the European Parliament (in particular through intergroups) as well as the Council. By using specific examples of legislation it illustrates the routes by which 'social' NGOs currently interact with these institutions, offering examples of how their work may impact on the output of the Commission, Council and Parliament. The article avoids an overly legalistic analysis with an original glimpse at the 'hidden' workings of the EU law-making process which has hitherto received little attention among legal academics and practitioners.

Key words: governance, participation

Israel de Jesus Butler, Lecturer, Lancaster Law School

Human Rights NGOs and the Unravelling of Sovereignty

Sovereignty I

Treaty-making has traditionally been the reserve of the state. The concept of sovereignty implies that individuals disappear behind the veil of the unitary state which acts on behalf of its people, creating international law through expressing its consent. However, research reveals that the majority of treaties adopted at the UN since the 1980s would not have come into existence and would not exist in their present form were it not for the activities of NGOs. This paper examines the various formal and informal mechanisms employed by NGOs to influence states with reference to examples from the UN Convention Against Torture and the Statute of the International Criminal Court amongst others. In light of the important role that NGOs exercise it asks what the implications are for mainstream legal scholarship on the concept of sovereignty and the positivist method of international law.

Keywords: sovereignty, participation

Dr. Felicity Callard, Independent Researcher, Honorary Visiting Lecturer, Department of Geography, Queen Mary, University of London

The challenge of anti-discriminatory principles within mental health law: some international, country-based case studies.

The paper draws on research conducted for the International Association for the Improvement of Mental Health Programmes. I have been reviewing international and country-based legislative and administrative actions that are potentially of use in combating discrimination experienced by those with mental ill-health. This ongoing review is attempting to distil the general legal and administrative principles that seem best to protect persons with mental ill-health from discrimination, as well as giving examples of specific legislation that has been successful in combating discrimination. Mental health and mental capacity law of course pose fascinating and complex questions in relation to principles of anti- and non-discrimination. This is not least because mental health law is, in Brenda Hale's phrase, 'a perpetual struggle to reconcile three overlapping but often competing goals: protecting the public, obtaining access to the services people need, and safeguarding users' civil rights'. Anti-discriminatory principles classically restrict the marking out of a 'difference' – whether that of gender, age, sexuality, impairment, etc. – to occasions when it is relevant to decision-making. The difficult question, remains, however, how to determine relevance – or irrelevance – to decision-making: it is this difficulty that lies at the heart of the paper. As regards consenting to treatment, there are strong anti-discriminatory arguments for irrelevance: the principle of capacity to determine consent to treatment need not distinguish between psychiatric and non-psychiatric treatment, and between those with a psychiatric diagnosis and those without. But matters become more complex when one moves to criteria for psychiatric admission, and to positive rights relating to mental disability (at what point does differential treatment of a certain class of individuals become necessary to ensure the successful exercise of civil rights and to combat social exclusion [see DN Weisstub and J Arboleda-Flórez, (2006) Canadian mental health rights in an international perspective Santé mentale au Québec 30(2): 15–41?). The paper employs specific, country-based examples to reflect upon some of these conceptual difficulties.

Prof Colm Campbell, Transitional Justice Institute

Mobilisation for Peace: Non-State Entities in Political Transitions

Transitional Justice and the Rule of Law

This paper draws on social movement theory to set out a decentred, socio-legal model for the transition of non-state entities in societies emerging from violent conflict. Law's role in this transition is explored by reference to contemporary social movement theory's core analytical devices: political opportunity structures, framing processes and mobilising structures. Analysis points to law's ambivalent role as a tool of repression and a site of resistance; its potential as a resource-provider, capable of privileging or obstructing particular mobilising structures; and its place in a legal consciousness that can be simultaneously conforming and resistant. This framework serves to question some of the more utopian accounts of transitional justice mechanisms, suggesting that law's role in devices such as truth commissions is more appropriately viewed as contributing to conflict-damping, rather than as providing a route to the truth in relation to past conflict. The framework is then applied and grounded by reference to fresh qualitative data drawn from interviews with meso-level activists convicted for offences associated with the main non-state entity in the Northern Ireland transition, the Provisional IRA. The data point to shifts in framing processes in relation to law; to perceptions of the utility of law in opening political opportunities; and to shifts in mobilising structures calculated to maximize up-take of resources in the new environment.

Fiona Kumari Campbell, Senior Lecturer, SLRC, Griffith University

Decolonisation, Anti-Conversion Laws and the Politics of Freedom

Governance III

Empires may cease, but their legacies through the enactment of knowledge production ensure a continuation of colonial epistemic lineages and sensibilities, especially within the purview of national identities. During a 500 year period of imperialist rule by the Portuguese, Dutch and British, colonialism was instrumental in reassigning religious, cultural and legal orderings and enforcing hegemonic Christianity. Today Sri Lanka has a population of approximately 18.5 million. An estimated 70% of the population are Theravada Buddhist, 15% Hindu, 8% Christian and 7% Muslim. Some Sri Lankan Buddhist's have argued that the island has a special claim as 'sons of the soil' (bhumi putra) to 'land' and 'space' as guardians of Theravada Buddhism. While the Sri Lankan Constitution (1978) accords Buddhism a 'foremost place', it does not recognise any one religion as the state religion. Religious freedom is provided for in the Constitution, and governments have generally respect. In the April 2004 Sri Lankan General Elections the Buddhist nationalist party, Jathika Hela Uramaya (JHU), emerged as a strong political force in the country, winning over 500,000 votes and nine seats in Parliament. With the third largest party, the Tamil National Alliance (TNA), the JHU hold the balance of power in Parliament. The JHU shortly after the election introduced a private anti-conversion Bill. Although the Supreme Court ruled two clauses of the JHU's bill unconstitutional, the JHU has yet to decide whether it will make the required amendments or whether it will (re)present the Bill to Parliament in its current form. In the last five years there have been a number of cases presented to the Supreme Court concerned with the question of 'forced' conversions, religious freedom and the status of Buddhism within the nation. This paper will consider recent attempts to introduce anti-conversion legislation within the context of reclaiming a particularistic relationship to spiritual cosmology and land, denied by colonialist regimes intent on Christianising the body politic. One aspect considered is the use of law as protection and remedy for 'religious injury' in a country cosmologically harmed by colonial incursion into the Sri Lankan landscape. The complex issue of traditional notions of nation as a specific guardian of land, juxtaposed with Enlightenment concepts of the 'secularism' and pluralistic religious freedom will be discussed including laws'

own role in framing the parameters of legal debate and as an (imported) tool for resolving tensions around religious diversity and religious specificity.

Keywords: governance, embodiment

Fiona Kumari Campbell, Senior Lecturer, SLRC, Griffith University

Disability, Law and Mobilisation in Sri Lanka

Development I

The major impetus for law and social policy reform around disability concerns in Sri Lanka has resulted from pressure by external forces outside of the country and to a lesser extent, advocacy of a fledgling homegrown disability rights movement. In 1996 the Sri Lankan Parliament passed three significant pieces of legislation: the Human Rights Commission Act, (No. 21 of 1996, the Protection of the Rights of Persons with Disabilities (No. 28 of 1996) and the Social Security Board Act (No. 17 of 1996). Such changes in the Sri Lankan legal framework are part of the country's ongoing alignment with the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993). This paper will discuss these developments in terms of legal education and mobilization by disabled people and capacity building for negotiating culturally different regimes of law and knowledge.

Keywords: development, becoming legal

David Capper, Queen's University Belfast and Lisa Glennon, Queen's University Belfast

Litigation Funding for Big-Money Divorces

Justice IV

The paper will begin by examining the jurisprudence in big-money divorce cases since the House of Lords' decision in White v White [2000] which gave the claimant spouse the opportunity to secure income and capital awards beyond the level required to meet their economic needs. Despite judicial attempts to establish clear principles of universal application, uncertainties remain even after the recent articulation by the Lords of the three 'strands' of distribution in the joint appeals of Miller v Miller/McFarlane v McFarlane [2006]. The paper will identify the live issues which remain and the potential grounds of future litigation before considering the funding options available to the less well-off spouse. In big-money divorces, given that the division of labour between the spouses tends to follow the paradigm female homemaker/male breadwinner model of family economics, one of the partners may be impecunious compared to the other. However, the legal issues faced by an applicant for financial relief may be complex and the quest for a 'fair' settlement long and stressful. Expert legal representation and support is essential, especially when the other partner can easily command it. The handling of a case like this would be well beyond the capabilities of most legal aid solicitors' firms and other firms could not perform the service adequately on a legal aid budget. The paper examines the limitations of funding mechanisms such as maintenance pending suit and charging the future settlement to the applicant's solicitors to secure payment before addressing the recent phenomenon of banks providing litigation funding for these cases. The paper examines the legal risk that these funding agreements might be unenforceable or that the proceedings might be stayed on the ground of champerty or that the funding bank may have to pay the costs of the other party in some circumstances.

Keywords: justice, participation

Helen Carr, Kent Law School

'The winner takes it all!' Thatcherism, the 'right to buy' and the reconfiguration of rights and responsibilities

Governance I

This paper is concerned with the discourse of 'ungovernability', its associated fears and the responses of governance to it. My argument (drawing on Dean) is that 'ungovernability' is simultaneously an organising principle and a central dilemma of liberal government. It is 'ungovernability' which determines what and who is to be governed and which marks out the limits of legitimate governance. In this paper I concentrate on Thatcherism because the political turmoil which preceded Thatcher's election success in 1979 was permeated by an overt discourse of 'ungovernability' disseminated in both popular and academic press. The 'ungovernability' of Britain was perceived to derive from welfare government which had eroded self-discipline and allowed excessive demands both from the welfare recipient and the organised and radicalised worker. The discourse was a significant factor in the Thatcherite victory, had particular implications for the housing of the poor and continues to impact upon housing and other social welfare initiatives whether initiated by government or non state actors. For fear of 'ungovernability' does not vanish in response to strong government; like all discursive motifs it has infinite mobility; it evolves, mutates, co-opts and transforms. Moreover it is a necessary constituent of authoritarian government, which it legitimates and perpetuates. The paper is in four parts. I begin with the vivid portrayal of the dissolution of the post war welfare consensus in the 'Winter of Discontent', perhaps most memorably depicted in newspaper photographs of decaying household refuse and rats in the centre of London.. The 'Winter of Discontent' represented for Thatcher and her followers the excesses of welfare and revealed the essential 'ungovernability' of Britain in the 1970s. In the second part of the paper I move from the intensity of the popular tabloid representation of 'ungovernability' in January and February 1979 to explore its more theoretical underpinnings. The third part of the paper focuses on the successful deployment of the 'Right to Buy' as a response to the conflicts caused by the disruption of class and the 'ungovernability' of welfare that were discursively presented as the consequences of pluralism. In particular I consider the connection between the 'Right to Buy' and the recurrent concern of liberalism in Britain to integrate the working class into society (see Dean 1999:126 -7). The final part of the paper concerns the irrepressibility of the fear of the ungovernable. My argument here is that the 'Right to Buy' was not only a response to one particular presentation of 'ungovernability' but was a crucial constituent of its re-emergence in a different form. I examine in particular Westminster council's 'homes for votes' scandal and its part in the unravelling of the Thatcherite view of and response to 'ungovernability'. In conclusion I will consider the ways in which both the concerns and collapse of Thatcherism shaped through co-option, mutation and rejection, the dominant features of Blair's New Labour project.

Helen Carr, Kent Law School , Dave Cowan, Bristol , Caroline Hunter ,Sheffield Hallam

'We are not rogue landlords': Resistance, representation and regulation in the construction of the private landlord

Governance IV

This paper draws on a small scale study of the responses of private landlords in England to the attempt by the Northern Ireland Housing Executive to ensure the regulation of anti-social behaviour of private sector (largely student) tenants, by imposing a requirement upon their landlords to discipline and exclude the anti-social amongst their tenants. Landlords resisted this attempt through a successful judicial review of the executive. Our concern in this paper is to explore this resistance via discourse. We are interested in the way in which contemporary discourse simultaneously is informed by, perpetuates and mutates historical representations and narratives and the impact of resistance upon this. We utilise the example of private sector

landlords to explore this complex interplay. We begin by exploring the historic and negative representation of private landlords and then trace government attempts to revitalise the private rented sector through the notion of the responsible landlord. Our argument is that landlords are torn between a variety of contemporary forms of idealised citizenship which can be clustered as firstly involving professionalism, pragmatism and consensus, secondly economic rationality and the logic of contract, and thirdly vulnerability, in particular vulnerability to state majoritarianism. The use of law as a tool of resistance matches one form of ideal citizenship but undermines the others. This highlights the fragility of the responsibilisation of private landlords particularly because of the potency of their 'roguish' image.

Keywords: resistance, governance

Kathleen Claussen, Queen's University Belfast

The international constitutionalization of citizenship

Sovereignty I

During the 20th century, the evolving international human rights regime dedicated much attention to special categories of individuals who lack access to citizenship or to the full range of fundamental rights granted to most individuals as a result of their citizenship. Though a right to citizenship in the state of one's choosing has not come to fruition, the development of international law concerning refugees, stateless persons and migrants represents significant evidence of the international constitutionalization of norms related to citizenship. The 'international constitutionalization of citizenship' refers to the generation of a set of constitutional structures beyond the state regarding membership to a polity and rights afforded to the individual therein. My paper explores this progressive movement by examining the consolidation, reinforcement, and transfer of organizational practices which have deepened cooperation among states and intergovernmental organizations with respect to citizenship. It examines international law and positions advanced by internationally respected legal and political scholars to argue that citizenship has been constitutionalized in the international sphere, but only to a limited extent. It investigates the shift away from broad indulgence of state discretion with respect to certain citizenship norms. Additionally, it identifies a citizenship norm that has detracted from constitutionalization as a result of not having been firmly established, and another, which, by its widespread transnational implementation, has contributed to constitutionalization. As a final point, the paper assesses the impact of the constitutionalization of citizenship and its correlative norms at the world level. The constitutionalization of citizenship has emerged from the evolving collectivization and institutionalization of its related norms. States retain autonomy in norm implementation; however, norm creation has been internationalized and the scope, specificity and acceptance of citizenship norms have increased. Citizenship is no longer exclusively what states make of it.

Keywords governance, sovereignty

Kathleen Claussen, Queen's University Belfast

Ultra vires or the ultimate validation? The UN and the discourse on sovereignty

Sovereignty II

In the 1990s, the claim that 'sovereignty' had lost its salience and validity as the grundnorm of IR was widespread in the literature. A closer look at the discourse indicates, however, that the multifaceted perspectives on sovereignty are much more nuanced. The institution has emerged historically as the legal expression of the character and legitimacy of the state, though its application and functionality has broadened beyond the boundaries of the state to contend with quasi-state and non-state constructs as well. This paper surveys the ontology and the

functionality of sovereignty through the lens of the United Nations state-building activity, paying particular attention to the development of UN protectorates. These protectorates have served a dual function: one of establishing transparent and authoritative structures of governance and a second intending to resolve territorial and national claims to sovereignty. These often conflictual purposes pose normative and institutional challenges for the UN missions. Thus, transitional administrations have faced difficulties in facilitating and realising effective local governance. The experiences of the UN protectorate in Kosovo, for example, have demonstrated how constitutional questions inhibit sociolegal institution-building efforts when reigning operational paradigms require the construction of a multiethnic state. The paper will address the conditions in which the UN generates, legitimates, exemplifies, contests, and modifies norms about sovereignty. It explores questions of ultra vires activism within UN missions as they potentially influence the outcome of international legal disputes between states and nations. It expounds on the dynamism of the international society of states in light of world political developments and attempts to fill the void of theory in this area created by an apparent vacuum of legal scholarship on global institutions and nations in limbo.

Keywords: Sovereignty, Governance

Gina Clayton

Principles of Entry

Immigration Law - Immigration law as an academic field

The authoritative texts in UK immigration law have been written by immigration practitioners. The needs of practice are pressing, often because the matters in issue are of crucial importance to the client, the rules are voluminous and technical and have often been difficult to access, matters may be urgent, and there is little money to be made. It may sometimes seem that immigration law cannot afford the luxury of developing principle or the elaboration of ideas. The irony is that there is probably no other area of law that is more value-laden than immigration but these values or principles are often not made explicit. The explication of ideas and principles is crucial to understand what is going on.

Dr. Bev Clucas, Law School, University of Hull

Children and surveillance: biometrics in schools

Technologies II

Technological developments can be exciting, innovative and valuable, but too often the question 'what can we do?' obscures considerations of 'what ought to be done?' A topical and deeply worrying illustration of this issue is the current use of biometric technology in schools. Many schools in the UK have collected already, and more schools are beginning to collect and store, the biometric details of children, for use in electronic registration and library systems. It seems that up to 3500 schools use biometric software, creating coverage of the data of roughly three quarters of a million children. Some of these children are as young as three. This data, for example in the form of photographs and fingerprints, is stored on unregulated data collection systems and school computer networks, engendering potential for misuse. In many cases, consent has not been obtained from parents -- and in some circumstances, parents have not even been informed. This practice has largely been taking place under the radar of most adults. In the meantime, the government's Building Schools for the Future (BSF) programme provides a friendly niche for biometric companies, one of which advertises itself as providing 'the preferred card or fingerprint solution for over 85% of BSF schools bids'. The data stored extends further than name: an evaluation of one such system enthuses about 'the way in which we are able to provide detailed statistics and monitor use of the library by gender, year group, ethnicity and individual progress in numbers of books borrowed…' This paper explores the main issues

relating to the procuring of children's biometric information in schools: the lawfulness of the schools' actions in the absence of valid consent; children's consent; data protection. It also considers relevant ethical considerations such as privacy.

Keyword: technologies

Dr. Cath Collins, Latin America Research Fellow, Chatham House, London

Rights Lawyering and Legal Responses to State Repression in Chile since 1973

Transitional Justice and the Rule of Law

This paper explores why human rights organising in response to dictatorship in Chile was primarily driven by lawyers, and the impact this has had in shaping both the transitional justice trajectory and the human rights movement up to the present day. It explores the kind of relationships and overlap which can be seen between human rights organisations, relatives and a core group of self-identified ´human rights lawyers in Chile; and discusses the coincidences and differences between professional/ legal logic and other goals in undertaking recent litigation against Pinochet and other former military figures. The paper is a political science analysis of legal actors in society, drawing on social movement literature models of political opportunity structures to analyse the sociopolitical context which lawyers help to construct and within which they operate.

Keyword: Transitional justice Lawyers, Political culture, Civil society, Human rights

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Pablo Cortes, PhD Candidate, University College Cork

Developing a European Procedure for Small Claims in the E-Commerce Era

European Law III

In order to promote increased consumer confidence and a truly integrated common market the European Commission has produced a proposal for the regulation of European Small Claims Procedure (ESCP) which is intended to be implemented by the year 2009. The proposed ESCP is predominantly a written procedure that deals with claims under €2,000 in value arising in cross-border disputes and it provides for the enforcement of contested decisions in any of the Member States without the present need of going through the formal mutual recognition of judgements. This paper discusses the challenges posed by the European Commission proposal as modified by the European Parliament and the European Economic and Social Committee. The main conclusion of this article is that the ESCP in conjunction with Information Communications Technology tools have the potential to realise more efficient enforcement of consumers' rights. However, the optimal effectiveness of this proposal may be hindered by some of its own restrictions. This article advocates that using the ESCP as an optional procedure for domestic disputes will provide a useful instrument in those European Member States which lack of a domestic small claims procedure and it will remove the numerous limitations of the existing domestic procedures. It also argues that including the recognition procedure for uncontested claims will stop those who would intend to delay the procedure. Finally, this paper suggests that the current economic limit should be raised given that this procedure may not be the best option for the lowest monetary claims. For such claims and many others Online Dispute Resolution methods (i.e. online negotiation and online mediation) are likely to be a more cost efficient and faster solution.

Keywords: becoming legal, technologies

Fiona Cownie, Keele University

Pushing the Boundaries? Exploring Legal Academic Identities in Canada

Legal Education

This paper builds on previous work exploring the culture of academic law and the professional identities of legal academics. It uses the results of qualitative research undertaken in several law schools in Canada to examine questions relating to academic identities, and to engage in some comparisons between legal academic identities in Canada and in England. It also looks at the whole question of comparative research in higher education.

Frank Cranmer, Cardiff University

'One Quaker's View of Human Rights in a Socio-juridical Context'

Law and Religion – Religion, Tolerance, Human Rights and Citizenship

Human rights as currently understood are not rooted in any specifically-Christian tradition. The New Testament evidence reveals attitudes on such matters as slavery that are simply impossible to reconcile with current thinking on human rights; and it has even been argued that the notion of human rights arose in opposition to institutional Christianity and oppressive notions of 'divine justice' - though this is by no means undisputed. The key documents relating to human rights are products of the Enlightenment and essentially secular in outlook, but much modern discourse on natural law and natural rights continues to be derived from mediaeval scholastic theology, however problematical that may be. Modern Roman Catholic canon law suggests that merely to oppose "rights" and "duties" may be to over-simplify a complex web of mutual responsibilities; and this might be a fruitful area for further exploration. But in legal, as opposed to moral, terms, unenforceable rights are of little practical value; therefore, though Quakers (and others) might look elsewhere for a moral basis for human rights, the positivist approach to their day-to-day enforcement should not be lightly dismissed.

Anthony Cullen,

Non-international Armed Conflict in the Rome Statute of the International Criminal Court: Some Remarks on the Drafting History of Article 8

Transitional Justice and the Rule of Law

The notion of internal armed conflict evolved in the final decade of the twentieth century to cover situations that had hitherto not been included within the scope of the concept. The jurisprudence of the international criminal tribunals for Rwanda and the former Yugoslavia was pivotal in this regard, setting new parameters for non-international armed conflict in international humanitarian law. While the concept of internal armed conflict contained in the Rome Statute of the International Criminal Court is partly derived from that propounded in the case law of these tribunals, its threshold of applicability is however less clear. This paper looks at the interpretation of the threshold for the application of the Statute to war crimes committed in situations of non-international armed conflict. The objective of the paper to advance an argument for the interpretation of the threshold contained in Article 8(2)(f) of the Rome Statute as one applicable to all situations of non-international armed conflict within the Court's jurisdiction. The scope of applicability defined by this provision is held to be distinctly broader than that of Protocol II additional to the Geneva Conventions of 1949. It is also contended that there exist reasons, despite differences in the text, to view the threshold contained in this provision as equivalent to that propounded in the case law of the International Criminal Tribunal for the former Yugoslavia. In order to illustrate the scope intended by the drafters of Article 8(2)(f), the paper will analyse the debate at the Rome Conference relating to the question of

subject-matter jurisdiction over war crimes committed in situations of non-international armed conflict. In supporting an argument for one uniform threshold of application for situations of non-international armed conflict, attention will also be drawn to the customary status of provisions in the Rome Statute relating to 'armed conflict not of an international character'. It will be argued that two thresholds of application places an unnecessary restriction on the scope of the instrument, limiting the protection provided to the victims of war crimes.

Derek Dalton, Lecturer, Flinders University Law School

Gay Male Resistance: the practice of every day desire

Narrative I

This paper documents how gay men who frequent 'beats' (or 'cottages' as they are called in the UK) resist attempts by agents of the law to foreclose on the pursuit and enactment of their desire in public spaces. This study is timely because gay men who seek out other men for sexual contact in beat spaces are sexual outlaws whose behaviour incites legal scrutiny, surveillance and regulation. This problematic facet of gay male sexual behaviour still provokes the law and engenders a general sense of social hostility, long after the decriminalisation era was ushered in the 1970s. Indeed, gay men who cruise for sex in public places threaten to invoke and evoke comparisons of homosexuality with deviance. For enacting sexuality in some public contexts still has the ability to stigmatise its practitioners. Drawing upon the personal experiences of interview subjects, De Certeau's writing on daily practices of resistance and Walter Benjamin's notion of the flâneur, the paper examines gay male practices of resistance: those tactics and strategies that men adopt to thwart the imposition of various forms of legal trauma (arrest and/or accusations of inappropriate and criminal sexual conduct in public). Additionally, the paper extends theoretical understandings of spatial practices as they intersect with knowledge of embodied practices relating to the expression of desire. Of particular relevance is the theme of vigilance – the manner in which gay men manage risk as they move through the space of the city in search of sexual pleasure.

Keywords: resistance, risk

Aoife Daly, Lecturer, Irish Centre for Human Rights, National University of Ireland Galway (PhD Candidate, School of Law/Children's Research Centre, Trinity College Dublin)

The Child's Right to Participation in Legal Decision-Making on Matters that Affect Them

Participation I

Because of Article 12 of the Convention on the Rights of the Child (CRC), states now have an obligation to facilitate children to be heard in all matters affecting them, if they are capable of doing so and have a desire to do so. However, the CRC does not provide guidance on how exactly states should go about implementing this right to be heard, leaving the right open to many interpretations. This paper will examine how and whether the right of children to be heard in court is being implemented around the world. It will explore the many situations which can arise where children may express wishes which authorities may deem not to be in the best interest of the child (e.g. to stay with abusive parents). It will outline how individual states are left to determine how to balance the right to be heard and the best interest principle. The diverse interpretations of the scope of the right to be heard will be examined. For example, different states (and even different judges within states) differ as to what age they consult children on such matters (if at all). The results of a detailed examination of the Comments of the Committee on the Rights of the Child will be presented. There will be conclusions on the extent to which children have a voice in legal matters that affect them. Examples of best practice (i.e. states that have the most successful systems from a human rights perspective) will be highlighted.

Keywords: participation, development

Penny Darbyshire, Reader, Kingston Law School

Criminal Business - Cameos of District Judges in the Magistrates' Court

Sentencing and Punishment

This paper uses observational work-shadowing and interview material from a broader study of every type of judicial work in England and Wales. It draws a portrait of the work of three contrasting district judges in inner London, outer London and a provincial city. Despite the writer's familiarity with magistrates' courts, she found her observations disturbing – especially those of the youth court, which is "out of sight, out of mind", to most academics, lawyers and other judges. The research subjects and senior judiciary have welcomed this paper and strongly encourage wide dissemination.

Penny Darbyshire, Reader in Law, Kingston Law School

The 'Family' of Family Judges – a guide for the complete stranger

Child and Family Law and Policy

This paper looks into the family courts and the work of family judges from the perspective of a complete stranger to family law. It is extracted from an unprecedented, in-depth study of judges in every type of court, at every level of the courts of England and Wales, in which the researcher was given almost unlimited access to the judiciary. 44 judges were work-shadowed and 77 interviewed. This paper uses findings from observations of all types of family court and interviews with all levels of family judge in all six circuits of England and Wales, to provide a broad and unique insight into judging family cases. The paper has been very warmly received by the judiciary, including the President and Vice-President of the Family Division, who strongly encourage wide dissemination. Outsiders and family lawyers alike have found these research findings fascinating and the researcher would welcome feedback from family lawyers and other 'outsiders'.

Penny Darbyshire, Reader, Kingston Law School

Where Do English and Welsh judges come from?

Justice III

This paper examines the backgrounds of 77 judges, using interview material from an unprecedented, lengthy, in-depth study of judges in England and Wales, from district judges to the law lords. This approach goes far beyond the usual statistical analysis of judges' educational backgrounds and by allowing the judges a 'voice' to tell the stories of their beginnings, provides a unique insight into their motivations, family ties and career backgrounds - with some revealing and astonishing findings. It strongly challenges the stereotype of judges as Oxbridge Toffs.

Keywords: justice, class

Shane Darcy, Transitional Justice Institute,

Accountability and the Legal Obligations of Corporate Entities in Times of Conflict and Transition

Transitional Justice and the Rule of Law

The past century has seen a spectacular rise in both prominence and power of the corporate entity. A large number of multinational corporations now exert more influence and control greater wealth than many of the world's sovereign nations. International law is struggling to place any meaningful legal control on this relatively new actor, which does not fit easily within the traditional international law paradigm. This dilemma is particularly troubling when one considers that the near-unrivalled power of corporate entities is deployed primarily for the purpose of maximising profits and control of markets, and that this has very often led to a negative impact on human rights, governance and the environment. Corporations have frequently contributed, either directly or indirectly, to violations of international law played during times of conflict. This paper seeks to address the legal obligations of corporate entities during times of armed conflict and the attempts which have been made to hold such bodies accountable for violative conduct during periods of transition. While there has been much focus on the attempts by the United Nations and other organisations to impose human rights obligations on multinational corporations in peacetime, the responsibility of such bodies during times of conflict and transition is a relatively unexplored subject. This paper considers the tentative attempts which have been made to place legal constraints on corporations under international humanitarian law and human rights law applicable in armed conflicts. It explores also how corporate entities have effectively remained outside the sphere of accountability provided by international criminal law, despite the efforts made at Nuremberg and in more contemporary times. The paper addresses finally the avenues of accountability which have been opened up by truth-telling processes and civil claims in domestic courts, both of which have seen corporate entities brought to book over their involvement in human rights abuses.

Bleddyn Davies, PhD Candidate, Liverpool Law School

The Segi Case and the Future of Judicial Protection in the Third Pillar of the European Union

European Law I

The growth of the EU's role in promoting police and judicial co-operation in criminal matters should have been matched with a commensurate growth in the judicial protections under the so-called third pillar, but it is becoming clear that it has not. The scope for scrutiny of third pillar actions by the Court of Justice is restricted severely by the provisions in Article 35 TEU which limits both the possibility of access to the Courts, and the provisions which they are empowered to review. Some of the third pillar legislative provisions, for example common positions and Conventions, are either entirely excluded from, or subjected to only limited scrutiny by the Court. The result of this is, for example, that decisions to label individuals or organisations as 'terrorist' are being taken by common position and are thus immune from any judicial scrutiny. Alternatives include the suggestions made by Advocate General Mengozzi in case C-354/04 P Segi to disapply the well established rule laid down in 314/85 Foto-frost and allowing national courts the power to review and even strike down third pillar legislation in their own jurisdictions. Clearly the preferable solution would be the reform of the Treaties themselves, but given the failure of the Constitutional Treaty, it seems that any kind of constitutional reform is, at best unlikely in the current political climate. With this in mind, this paper will seek to ask whether the solution proposed in Segi is the best approach, and if it is not, to ask what the solution is. It will ask whether the Advocate General's solution can be a valid and sustainable long term solution to the third pillar's judicial problems, and how far it is appropriate to seek reform of something as serious as fundamental rights protection through judicial creativity.

Keyword: justice

Fiona de Londras, PhD Candidate, National University of Ireland (Cork)

Towards Legality: The US Supreme Court's Resistance to Guantanamo as a Legal Black Hole

Sovereignty III

John Yoo recently wrote that the one thing every Administration lawyer could agree on after 11 September was that suspected terrorists should be detained outside the United States ('War By Other Means', 2006). To this end Guantanamo Bay was specifically selected as a detention centre. It was thought not to be US territory and therefore not to be within the habeas corpus jurisdiction of federal courts. In both Rasul v Bush (2004) and Hamdan v Rumsfeld (2006), however, the U.S. Supreme Court has clearly resisted the designation of Guantanamo as 'beyond the law', sometimes through dubious reinterpretations of precedent and congressional history. This paper argues that the jurisdictional reasoning in both of these cases shows a clear judicial preference for making Guantanamo detainees legal subjects and, in particular, recognising them as rights bearers. In contrast, it identifies the Administration's response to these cases (i.e. attempts through the Detainee Treatment Act 2005 and Military Commissions Act 2006 to strip federal courts of jurisdiction) as being one that denies their rights-enforcing character. The Administration's insistence on removing federal courts from questions of Guantanamo detention, or at least on minimising their role and the extent to which rights-based arguments can be raised in Guantanamo detention cases (Military Commissions Act 2006), forces the Supreme Court to either accede to the Administration's preference for 'lawlessness' or extend the status of Constitutional rights-bearer to Guantanamo detainees. This paper reads Rasul and Hamdan as showing a commitment to rights-enforcement that makes the latter option possible, probable and preferable.

Keywords: becoming legal, sovereignty

Caroline Derry, London Metropolitan University

Silencing and sexology: the 1929 prosecution of 'Colonel Barker'

Becoming Legal II

Colonel Barker was imprisoned for contempt of court following a failure to attend bankruptcy proceedings. On arrival at HMP Brixton, the Colonel was quickly discovered to be a woman, and later identified as Valerie Arkell-Smith. It was further established that in 1923, as Barker, she had married another woman. As a result, she was prosecuted in 1929 for making a false entry in the marriage register. At the time of the prosecution, two competing approaches to sexual relationships between women had recently become visible. First, in the 1921 parliamentary debates on an amendment to criminalise "gross indecency between women", a legal policy of silencing was articulated. As Lieutenant-Colonel Moore-Brabazon had argued, "leave them entirely alone, not notice them, not advertise them. That is the method that has been adopted in England for many hundred years …" Second, only months earlier, Radclyffe Hall's novel The Well of Loneliness had been the subject of obscenity proceedings. In the process, sexological accounts of lesbianism had come to public attention. It might therefore seem that silencing had been displaced and that the Barker prosecution reflected such a change of policy. However, I will argue that any such progressive narrative would be misleading. The Barker case, particularly the courtroom examination of the couple's sex life, illustrates the tenacity with which silencing has been pursued in the courts. Nonetheless, increased visibility brought its own changes, not least reluctance on the part of defence counsel to collude in silencing certain evidence. Indeed, with the court's combination of prurient curiosity and aversion to public discussion, this case set

much of the tone for the criminal justice system's approach to sexual relationships between women in the twentieth century.

Keyword: becoming legal

Mary deYoung, Grand Valley State University

'To catch a Predator': Narratizing Sexual Danger on a Popular American Television Show

Sexual Offences and Offending

"To Catch a Predator," a segment on the American television tabloid news show Date-line, is a series of hidden camera investigations focused on the identification and arrest of "sexual predators" who attempt liaisons with what they believe are the 12 or 13 year olds they had been chatting with on the internet. The popular segment has resulted in the arrests of 178 men for violation of federal laws that prohibit the use of the internet to entice minors to engage in sexual activity, and state laws that prohibit contact with children for immoral purposes. The popularity of this television show, that markets itself as a "wake-up call" to parents and society, has not made it immune from criticism. Legal experts have denounced its sting operations as entrapment and have questioned the ethics of using the mass media as a tool of law enforcement. Media critics have condemned its explicit sexual focus as pandering to viewers' voyeuristic impulses. One issue critics have not addressed, however, is its narrative. This paper seeks to redress that oversight by focusing on how the sexual danger posed by these alleged predators is narratized on the television show, and why the narrative takes the form its does. It first considers the social context of the television show by examining the cultural lag created by rapid advancements in cybertechnology, and the generational differences in its use. Then, using the show's transcripts as data, it deconstructs its narrative to reveal that far from being the "wake-up call" it claims to be, it is profoundly hegemonic. The narrative does little more than reiterate in modern terms oft-told cultural tales about sexual dangers to children, and recommends oft-repeated conservative and historically unsuccessful remedies for their protection.

Gavin Dingwall, Reader in Law, School of Law, De Montfort University

Deserting Desert? Reflections on the current role of retributivism

Sentencing and Punishment

This paper will consider the current role of retributivism in the criminal justice system in England and Wales. The accepted view is that this role has diminished considerably over the past fifteen years. Despite the fact that the Criminal Justice Act 2003 stated that sentencers were to take account of a number of utilitarian considerations, this paper will argue that it is easy to understate the role that retributivism still plays in the penal system. Firstly, with regard to adult offenders, the 2003 Act determines the availability of particular types of punishment with reference to the seriousness of the offence – an inherently retributive concept. Secondly, the Act retains 'the punishment of the offender' as one of the factors that sentencers are to consider in any given case. With regards to juvenile justice, given the proportion of offenders in this age category who are diverted, the most significant development has been the replacement of cautions with a statutory framework of reprimands and warnings. The Government justified this strategy largely on the basis that diversion should be more punitive, particularly for repeat offenders. As was the case with adult offenders, the determining factor as to which of the two options should be employed was offence seriousness even if warnings were, supposedly, based on restorative justice principles. It is important to set out the limits of my argument. I am not suggesting that retribution is as central to sentencing decisions as it was under the Criminal Justice Act 1991. Nor am I seeking to show that the consensus that there has been a shift to 'risk-based' penology is flawed. Instead my argument is more modest. I will argue that

retributivism has retained a residual importance in the criminal justice system that can easily be underestimated, despite the well-documented shifts in penal policy in the past decade and a half.

Norman Doe, Cardiff University

The Regulatory Systems of Christian Churches: A Global Perspective

Law and Religion - Religious Law

Historically, the ecumenical movement has sought to promote greater visible unity between the separated Christian churches. The principal focus of the movement has been theological: how to overcome the doctrinal divisions which exist between ecclesial communities. The movement has not explored the ways in which church laws enable or disable mutual communion. Further, outside ecumenism, the recently renewed interest in the study of church law (ecclesionomology), has focussed on the polities of individual churches in isolation. Little work has been done in the field of comparative church law. This paper examines what churches share juridically, the extent to which they employ laws and other regulatory instruments at the international and national levels, particularly in terms of their sources, subject-matter, purposes and effects. It asks: is it possible to induce from the functional laws of separated churches common principles which represent a distinctive "Christian law"?

Dr. Michael Doherty, Lecturer in Law, School of Law & Government, Dublin City University / Dr. Gerry Boucher, Lecturer in Sociology, School of Social Policy, Queen's University Belfast

New Governance, Old Ideas? Social Dialogue in Action

Governance IV

At European Union level, the role of the social partners in law-making in the field of social policy has increased dramatically in recent years. Article 138EC provides that the Commission, when considering enacting social legislation, must consult the social partners on the possible direction of Community action. In terms of 'soft law' the social partners are closely involved in the increasing use of the Open Method of Co-ordination. At the same time, the EU has also sought to encourage greater social partner involvement at Member State level (in the transposition of directives, for example). Since 1987, the Irish social partners have embarked on a new model of socio-economic governance that has resulted in the conclusion of a succession of national social pacts between the state, employers, unions and, intriguingly, the community and voluntary sector. The Irish social pacts represent a quite distinctive mix of voluntarism and institutionalisation, where a problem-solving approach designed to produce consensus has been adopted, and the Open Method of Co-ordination, influenced by ideas of deliberative democracy and soft law, has been prioritised over the laying down of constraining rules and procedures. This paper seeks to provide an empirically grounded perspective on the 'social partnership model'. The paper empirically tracks the process by which the soft law commitments (which, while not legally binding may have important practical effects) were laid down in the partnership agreements. To what extent were commitments made actually followed through and what were the practical results? By focusing empirically on what the partnership process has actually delivered in the Irish context, we can begin to assess the potential of these types of concertative arrangements as new forms of socio-economic governance.

Keyword: governance

Joel DSilva, PhD Candidate, University of Surrey - Dept. of Law

Nanotechnology : Risk, Ethics and Regulation

Technologies I

The Nanotech revolution has now officially begun. While products are just being introduced in the marketplace, its proponents are forecasting incredible possibilities especially for the poor, from abundant food to clean energy. Although it is true that there is much more for us to understand about nano-scale research and manipulation, we should recognize that nanotechnology is no longer a part of the distant future. It is a technology that is already an important part of the commercial marketplace, even if not yet widely acknowledged and recognized. The tenor of discourse on nanotechnology is changing, however, as the voices of critics begin to sound about a host of concerns ranging from the societal and ethical impacts, environmental devastation to inadequate legal regulation. As with any new and powerful technology, appropriate controls, in the form of regulations and legislation, must be tailored to fit the risk/benefit ratio. Sometimes these controls come about by trial and error. In the case of nanotechnology, passively waiting for regulations to develop may allow unnecessary harm to society, either in the form of technology unregulated, or technology undeveloped. As a result, the need for standards for regulation and risk assessment becomes significant to the future growth of the industry. Effective regulation establishes a climate of regulatory certainty. Regulatory certainty exists when the rules to be applied are clear and well understood. Certainty requires clarity as to which authorities will be responsible for enforcement and regulation. Research and technology are essential for economic growth and improvements in the quality of life. Regulatory initiatives must be able to protect research and technology infrastructure and avoid placing restraints on the freedom of scientific enquiry; but after carefully evaluating risks and potential conflicts. One way to positively control nanotechnology is to contemplate the likely directions new technologies will take and to prepare flexible legislation providing for appropriate regulatory schemes even before the products arrive in the marketplace. Nanotechnology research and development, and related discussions about how to best regulate and utilize new technological capabilities will engage with larger societal debates about technology and social values. Some of this debate will focus on the relevance of and various interpretations of 'precautionary principles', how to make decisions before solid scientific confirmation is available, who should bear the burden of showing that new technologies are safe or dangerous, and an appropriate balance between anticipatory planning and resilient learning responses. In the absence of consensus on underlying principles, specific arguments about nanotechnology issues are likely to be entangled with these more fundamental philosophical disputes. This paper explores this new technology by analyzing its socio-ethical implications, its risks and finally confronting legal regulation.

Keyword: technologies

Ron Dudai, SOAS (University of London)

Truth as a Human Right? A Critical Appraisal of an Emerging Concept

Transitional Justice and the Rule of Law

Truth-recovery regarding past human rights violations has been central in transitional justice initiatives worldwide, most notably with the innovative institutions of truth commissions, yet it was commonly perceived as a desired political or social goal, or a manifestation of other human rights – rather than an independent right by itself. Recently, however, various NGOs, scholars and UN experts have begun arguing that truth about past abuses should be recognized as a stand-alone human right, a process which has culminated with the UN Human Rights Commission adopting a report on the Right to Truth in early 2006. Yet what would a "right to truth" mean? Is it possible to move beyond rhetorical usage, and conceptualize and demand a

right to truth in the international legal sense? Does such a right exist already or is it in a nascent phase? Do we need such a new construct, or does its substance already appear in other, established, rights? Could, for example, the establishment of a truth commission become an international legal duty of post-conflict societies, and if so, would it necessarily be a positive development? This paper will interrogate the concept of the right to truth, and by offering an anatomy of this "emerging" right also reflect more broadly about the process and desirability of creating new rights. The evidence for an emerging right to truth will be found in diverse sources, including among others jurisprudence on disappearances, recent UN working groups' formulations of victims' rights, the duty to investigate gross human rights violations, the prohibition of Holocaust denial in various domestic laws, the right to receive information in the ICCPR, state apology as defined in the ICL articles on State Responsibility, as well as the practice of truth commissions, and more isolated examples such as the Argentinean "truth trials". I will then discuss whether all these can be weaved into a "larger" coherent right to truth about past human rights violations; consider various possible formulations of the content of such a right; and, finally, reflect on a few possible practical and normative problems with "legalizing truth".

Mikey Dunn, Isabel Clare and Tony Holland, Learning Disabilities Research Group, Department of Psychiatry, University of Cambridge

The 'best interests' principle and residential social care for people with intellectual disabilities: Towards a relational theory of substitute decision-making

The Mental Capacity Act (England & Wales) 2005 (MCA) authorises substitute decision-making for a person lacking the mental capacity to make a specific autonomous decision, providing that decision is both necessary, and in his or her 'best interests'. The MCA adopts a procedural approach – the 'best interests checklist' – to aid the determination of the person's 'best interests'. However, in the MCA, this process is a detached and consultative exercise, which pays scant regard to the interpersonal and embodied nature of decision-making. Drawing on data from an empirical qualitative study of residential social care provision for adults with intellectual disabilities, I show that care staff operationalise the process of making everyday substitute decisions in terms of their personalised, interdependent and context-specific relationship with the men and women for whom they provide support. By conceiving applied substitute decision-making as a social process, I use these empirical data to begin the tentative development of a relational theory of substitute decision-making. This theory, first, constructs substitute decision-making as a series of embedded care practices centred on a shared narrative of ordinary living; second, delineates between 'everyday' and 'strategic' interventions; and, third, reflects an ethics of care, rather than the 'traditional' ethical theories that underpin the development of the 'best interests' principle, and its conceptualisation in the MCA. Considering the implications of my findings, I suggest that the statutory procedures to determine 'best interests' may, in practice, operate to exclude the very elements of the care relationship that could foster the 'best' outcome.

Ferdinard Duru and Obinna Anosike, Doctoral Students, Amnbrose Alli Univrersity, Nigeria

Racism and Immigration Law in Europe

Immigration Law - Immigration law as an academic field

Immigration law and policy are informed by competing and often contradictory philosophies. Nevertheless, as the text of the law and legal discourse in the area of immigration has evolved from its explicitly racist orientation to one of objective neutrality, racism in its less obvious, systemic forms has persisted. From slavery to expulsion, immigrants of African and Caribbean descent have been the victims of a legal system that has worked to disadvantage and oppress. This paper seeks to review the defining features of European states' immigration law and policy

from the early 1990s to today, including immigrant selection, rules for refugees and humanitarian and compassionate cases as well as public danger and security provisions. A number of recent judicial decisions will be analyzed to illuminate the extent to which the terrain of racism in immigration law may have shifted, but the promise of transformative litigation remains unfulfilled for Europe

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Susan Easton, Reader in Law, Brunel Law School

Constructing citizenship: making room for prisoners' rights

Sentencing and Punishment

This paper considers the issue of prisoner disenfranchisement. Although the denial of the right to vote to convicted prisoners is well established in English law, the validity of this blanket ban was successfully challenged in the European Court of Human Rights in Hirst v UK in 2005. In the light of this decision the Government is now engaged in a consultation process with a view to amending the law. It is therefore timely to consider whether arguments for excluding prisoners from the democratic process are well-founded and what would be the best way of modifying the existing law. The purported justifications for the ban will be critically examined and the implications of re-enfranchisement will be considered.

Rod Edmunds, Queen Mary, University of London, and Emily Haslam, Kent Law School

Institutionalising Victim Participation at the ICC: Tensions and Challenges

Transitional Justice and the Rule of Law

This paper explores the increasing formalisation of victims' rights in international criminal law by focusing on the unprecedented victim participation regime at the International Criminal Court (ICC). Understandably, the recent judicial enrichment of victims' rights that has occurred through an expansive interpretation of the ICC's procedures has been widely welcomed both by commentators and civil society activitists working to enlarge the institutions' prosecutorial reach and facilitate victim representation and reparation. However, we argue that in so far as these developments promote the dominant approach in international criminal policy, which equates justice for victims with victim participation, they are problematic, and run the risk of undermining some of the promise of transitional justice, whilst appearing to enhance it. We explore three inter-weaving themes that emerge from the growing body of ICC decisions on victim participation. These are, firstly, the legalisation and stratification of victimhood; secondly, the tension between victim representation and participation; and finally, shifting notions of public and private in international criminal proceedings. It is our contention that these themes reveal a series of challenges to ensuring genuine victim participation, to which the optimism that has attended such a seismic development in international criminal law should not blind us.

Stephen Egharevba, Doctorial student, University of Turku, Faculty of Law

Exploring police minority relations in Finland with regard to disrespectful behaviour

Justice II

This study sets out to explore an issue which has not received much scholarly attention in academic literature in Finland, namely, the experiences of disrespectful behaviour allegedly suffered by the immigrant minority in Turku. The present study is an attempt to describe African immigrants' encounters and experiences with the local police in Turku. This is in addition, to exploring, how, when and where these encounters of disrespectful conduct take place. Thus, this study analyses how immigrants understand the word disrespect and its implications for their

views of the police in Finland. The author uses data collected in Turku among African immigrants and a semi-structured interview with N=97 respondents that had lived in Finland for six or more years prior to the present study and those that fulfilled the criteria of being refugees, naturalised citizens or having permanent resident status. The author analysed the participants' interactions and encounters with the Finnish police in order to identify any real conflictual problems as significantly alluded to by some segments of the African immigrant community in Turku. The variables used to analyse these encounters are age, gender, marital status, education and religion. The findings suggest that police behaviour is the most powerful indicator of their actions. Moreover, disrespect was significantly indicated in the respondents' responses in their various encounters with the police. The police were perceived as non-sympathetic to African immigrants' in the Finnish society. These perceptions by African immigrants indicated that there is a problem in these encounters. In highlighting the circumstances of these encounters, the present study has drawn attention to the need for a better understanding of African immigrant and police encounters in Finland.

Keywords: justice, order

Mairead Enright, Lecturer, The Law School, Manchester Metropolitan University

Interrogating the Natural Order: Hierarchies of Rights in Irish Child Law

Becoming Legal I

This paper presents a critical interrogation of the Irish concepts of parental autonomy and children's rights, with a particular focus on the recent Irish Supreme Court decision in N. & anor. -v- Health Service Executive & ors. [2006] IESC 60. N. focuses on the conflict of rights between a toddler's birth parents and her prospective adopters. In that case, Hardiman J. explicitly justifies Irish law's subordination of children's interests to parental autonomy by reference to concepts of the natural order of the family. His approach mirrors that recently adopted by the House of Lords in Re G. (Children) [2006] 4 AER 241. The paper argues that traditional appeals to the natural order are misplaced in the context of modern family law. It explores the currents of power which lie behind these arguments and suggests alternative methods by which the rights of the child can be secured in a meaningful way.

Keyword: order

David Erdos, ESRC Postdoctoral Fellow, University of York

Explaining rights review outcomes: the case of the New Zealand Bill of Rights (1990)

Becoming Legal I

This paper uses New Zealand's experience of sixteen years of a Bill of Rights instrument to contribute to the growing literature which seeks offer a socio-political explanation for concrete rights outcomes under these type of instruments. Despite instantiating a wide range of civil and political rights and being one of the most widely cited statutes in NZ, the NZ Bill of Rights has only had significant substantive legal impact in the area of the criminal law and freedom of expression. This paper will consider rival paradigms for explaining this somewhat limited outcome including those which emphasise drafting (Rishworth, 1997), judicial attitudes (Segal & Spaeth, 1992) or the availability of support structures for legal mobilization (Epp, 1998). Drawing on primary research already conducted in New Zealand it will be argued that, despite judicial protestations to the contrary with regard to the issue of drafting, no one factor can explain the outcomes observed.

Keywords: becoming legal, participation

Anne-Maree Farrell & Sarah Devaney, School of Law, University of Manchester

Much Ado About Nothing? Clinical Negligence Reform and Patient Redress in England

Medical Law and Ethics

This paper examines the government's reform of the current system of clinical negligence litigation in England, focusing on an analysis of the redress scheme for low value claims to be established under the NHS Redress Act 2006. The Act establishes a scheme to provide a package of redress to patients in circumstances where they have suffered harm as a result of negligence during the course of medical treatment provided by the NHS. One of the British government's central aims in embarking upon reform in this area was to provide a low cost, quick and genuine alternative to the current clinical negligence litigation system. This paper critically analyses this reform of the current system by reference to an examination of what constitutes a just redress scheme in the circumstances. Such analysis shows that the government has missed a golden opportunity to establish a scheme which truly 'makes amends' to patients who have suffered harm through medical treatment in the NHS. Instead, the scheme is likely to operate in practice as an administrative scheme for low value claims that serves the institutional and financial interests of the NHS, and therefore fails to address longstanding patient concerns over the provision of redress arising out of harm suffered through medical treatment. As a result, patient confidence in the scheme is likely to be undermined in the long term.

Michelle Farrell , PhD candidate, Irish Centre for Human Rights

Conflict and Law: A Resilient Prohibition? Torture in 'Times of Crisis'

Transitional Justice and the Rule of Law

The 'ticking bomb' situation, whilst conceded to be extremely rare, is, nevertheless, frequently used to justify torture occurrences. A construct it may be, but the argument, persists and has been confronted by domestic legal systems and the international community. A worrying development in torture relative cases is the introduction of a proportionality test and with it a return to the good versus evil paradigm. What shocked the conscience in the past is now subject to rigorous argument and debate and international law which seemed to have reached its conclusion on the question of torture is once again open for scrutiny. The practice of so-called 'extraordinary rendition', the holding of suspected terrorists for indefinite periods and the debates regarding the use of evidence procured from torture further indicate a shift away from the inviolability of the torture prohibition towards leniency in certain instances. Loopholes within the prohibition, such as that identified in the case of A (FC) and others (FC) v. Secretary of State for the Home Department in 2004, demonstrate the complexity of the issue. In this case, Lord Nicholls asked what should be done in situations where the security services of a country know or suspect that information received from overseas is the product of torture. He reasons that "if the police were to learn of the whereabouts of a ticking bomb [in this way] it would be ludicrous for them to disregard this information if it had been procured by torture. What this paper asks is whether or not such an act would breach a peremptory norm of international law, and, if the answer is affirmative, what does this mean for the status of the torture prohibition as a norm of jus cogens? Can the law disarm the ticking bomb theory or has this hypothetical penetrated upon the inviolability of the prohibition?

Philip Flaherty, Legal researcher, Law Reform Commission of Ireland

Sentencing the Recidivist: Reconciling harsher treatment for Repeat Offenders within Modern Retributivist theory

Sentencing and Punishment

This paper will examine the debate surrounding the proper treatment of prior convictions within retributive theory. Certain commentators believe that prior convictions should be simply disregarded at sentencing on the basis that it would impinge upon the principle that one should be punished for the crime one is convicted of. Other theorists favour a 'progressive loss of mitigation' or 'loss of discount' approach, effectively placing 'extra-culpability' on the repeat offender. The paper discusses high rates of recidivism in Ireland and the UK and its effect on prison population, specifically in the area of property offences. This paper will evaluate the recommendations of the 2001 Halliday Report and the subsequent Criminal Justice Act of 2003. It is submitted that this represents a move towards incremental increases in punishment for recidivists. It will be argued that this development constitutes an effective abandonment of the proportionality principle with the criminal record becoming a more central, guiding principle. This paper will discuss the varied causes of recidivism in a number of jurisdictions and will outline a broad set of mitigating factors that can be taken into account by the courts in assessing a suitable sentence for the recidivist. The nexus between deprivation and recidivist rates in the context of property crimes will be examined. Integral to this discussion will be the Canadian provision which recognises the unique position of aboriginal offenders within the criminal justice system. This paper will suggest that there is a need for concrete principles to guide the judiciary in sentencing. The paper will discuss the pressing need for sentencing guidelines in Ireland as there are no statutory guidelines for judges in their exercise of this important discretion. Developments in the UK such as the establishment of the specific agencies on sentencing; and the more prescriptive approach adopted in the US will also be evaluated.

Keywords: Recidivism, sentencing theory

Fernando Fontainha, Political Sciences PhD candidate at Université de Montpellier I – France, researcher of Capes Foundation, Ministry of Education, Brazil

All Those Judges: A monopoly based in a symbolic efficacy

Justice III

This paper examines the role of judges as major characters in the 'field' of law and their attempts to monopolize the 'managed capital' of this field, focusing on the case of Brazil. It begins with the work of Pierre Bourdieu and John Henry Merryman. From Bourdieu it takes the concept of legal capital as "the capacity to speak the law", as well as his account of the struggle for this capital between practitioners and legal scholars. Merryman argues that the particular system of law, and the traditions within that system, determine the dominant players in the national legal field. He affirms the civil law tradition as one in which legal scholars are dominant, while practitioners dominate in the common law tradition. The paper then draws on the work of Antoine Garapon and Claude Lévi-Strauss. Garapon provides a detailed description of the symbolic elements that compose the institution of "Judicial Power", including an array of "unnecessary" signs, rituals and liturgies. But Lévi-Strauss shows how such "unnecessary" formalities build an entire system of reference, a space in which the symbols gain efficacy, a phenomenon observed in any social structure. The paper concludes that Brazilian judges are invading the world of legal scholars, including their presence in the law schools, which is very unusual in the civil law tradition. The key element in that movement involves a conversion of symbolic capital into legal capital, a social strategy developed by the judges, and reinforced by their presentation of the law as a self-producer of references and meanings.

Keywords: justice, space

Mary Ford, University of Strathclyde

Becoming Illegal: Personhood and Mental Capacity Law

The Mental Capacity Act will come into force in April 2007, and among its effects will be the replacement of the common law test for capacity with a new statutory test. The new test differs from the old insofar as the ability to communicate / express one's capacity will henceforth be necessary, and I will take this as a starting point for an inquiry into the bioethical issues surrounding legal capacity / incapacity in the medical context, with particular reference to the nature and meaning of silence, the role of personhood theory and alternative, postmodernist conceptions of selfhood. In particular, I will argue that personhood theory is achieving the status of a dominant discourse in bioethics, make the claim that this is problematic, and advocate the exploration of other narratives and discourses of selfhood which are better able to take account of the realities of patienthood through their focus on the positive role of concepts like disordering, discursiveness, and 'otherness' in constituting identity.

Elizabeth Fortin, DPhil Candidate, Institute of Development Studies (IDS)

The politics of law-making, the politics of opposition; tenure reform in the former 'bantustans' in South Africa

Development I

The paper looks at the approaches to tenure reform over the last ten years in post-apartheid South Africa and considers how particular forms of knowledge of tenure have shaped approaches to its reform. The discussion draws upon a year's multi-sited fieldwork involving an ethnographic study in a community within the former Gazankulu 'homeland', as well as further research in policy-making, NGO and academic circles in South Africa. It considers how the knowledge of tenure, ownership and rights of key groupings participating in policy debates surrounding reform has been shaped in political arenas and by the ways such groupings have positioned themselves or have been positioned in those arenas. In many cases, for reasons of political expediency, it was necessary that their views, often incorporating academic or legal nuance of particular complexity, had to be presented not only as a coherent whole but also as a simplified 'package' for bureaucratic, political, public or media consumption. In addition, particular processes of legitimation for those views also had to be pursued. For insiders in law-making circles, these were shaped by the demands of policy coherence and politics, for 'outsiders', similar strictures also shaped not only the 'room for manoeuvre' that they found themselves in but also the ways they endeavoured to present their ideas. This paper looks first at discourses that have shaped the approach to tenure reform adopted by particular groupings and then at the processes of legitimation pursued to provide validity for their approach.

Keywords: becoming legal , development

Dr. Andrew Francis and Dr. Matthew Weait, Lecturers, Keele Law School

Lawyers, Activism and Social Justice: Theory and Practice

Participation & Justice I

Drawing on recent empirical research at PIVOT, a community-based legal organization in Vancouver, this paper has two objectives. The first is to explore the relationship between the job of lawyering and political activism. More specifically, it raises questions about the role of law in achieving just and meaningful outcomes for marginalized communities through the use of strategic and innovative legal mechanisms and techniques (in this case, the affidavit). This part of the paper is concerned to interrogate the traditional liberal distinction between legal methods and political action as modes of achieving social and economic change. The second objective of

the paper is to examine (a) the ways in which strategic legal interventions can contribute to community empowerment and active citizenship; and (b)the transition from cause lawyering to the use of law by the causes themselves, without the need for expert translation of those communities' social and political problems.

Keywords: participation, justice

María-Isabel Garrido Gómez, Titular Professor, Unversity of Alcalá (Spain)

Justice and Conflict: The Role of Social Rights

Becoming Legal III

The liberal concept of rights has its main corollary in Locke's statement: 'The greatest and principal aim which men seek when joining a State or communities, and submitting to a government, is to safeguard their goods'. These goods belong to all men in an equal way so that we can say that they are individual. They consist of life, liberty and property. Indeed, after the changes which have taken place, the liberal paradigm now considers that members of a society are actors in a market economy which guarantees the real conditions ensuring individual rights. In this way, social rights constitute subjective rights, representing a programme of distribution of goods through a balance between public, collective and private interests. This results in a singular structure with a special mechanism by which the State has to provide assistance and services, and create, strengthen and promote the conditions allowing individuals and groups to satisfy their needs. Thus their obligations are also related to the prerequisites for exercising positive liberty. The main point of departure is that individuals are moral subjects endowed with dignity. It defends the idea that we all have real capacity for choice and that we all direct our existence towards certain aims in life. The achievement of real equality by legal differentiations or inequalities is not obtained only through benefits. In addition, as we explained above, to know if something is equal it must be valued in relation to something else, using criteria which explain whether there are reasons for a different treatment. The key lies in deciding which real inequalities are arguable, and whether they are important enough to represent a sufficient reason when it comes to different treatment.

Keywords: justice, becoming legal

Adrienne Gavin, Reader in English, Canterbury Christ Church University

Legal Wrongdoer or Social Transgressor? Judging the Victorian Female Criminal

Narrative I

This paper examines female criminals in Victorian England during the 1830-1860 period. It discusses the ways in which social opinion and moral judgement often applied more than legal considerations of wrongdoing in nineteenth-century popular judgments of female offenders. Rarer than male crime, female crime in the nineteenth-century was, at least in terms of conviction levels, more widespread than that it is today, and early sociologists and criminologists were much exercised about the social and moral implications of female offending. Mary Carpenter in 'Our Convicts' (1864) wrote that 'Female Convicts are, as a class, even more morally degraded than men,' but also noted: 'As a general rule, it will be found that women are not brought before a public tribunal except for very aggravated crimes, or for a very long course of vice.' For some middle-class women, their status as 'respectable women' meant that they escaped conviction for crimes, while female criminals of all classes were judged less on legal grounds as criminals and more on moral grounds as women. Woman's crime was also sexualized, with criminality implying lascivious behaviour, and it was believed that a single female criminal would draw many men into crime. An 1866 commentator expressed a commonly held

view in stating 'it is notorious that a bad man ... is not so vile as a bad woman.' Even where a man and a woman are guilty of the same crime, the writer noted, the male criminal was redeemable while the female offender was not because 'The man's nature may be said to be hardened, the women's destroyed.' This paper assesses the gendered perceptions of female crime in a period which judged women for their moral and social failings rather than for their legal wrongdoing.

Keywords: justice, narrative

Vasiliki Germanakou, Irish Centre for Human Rights, National University of Ireland, Galway

Substantiating the Right to Democratic Governance: Internal Self-Determination as a Means of Empowerment

Transitional Justice and the Rule of Law

The 'right' to democratic governance is a composition of various principles and rights, which are explicitly protected by all prime international and regional legal instruments. Democracy by definition means the people's direct and indirect equal participation in the political, economic and cultural processes of their governance. The elements of democracy are linked with the protection of human rights and the maintenance domestic peace and security. Internal self-determination in practice is linked with every citizen's right to take part in the conduct of public affairs and government, to participate in elections, and have equal access to public service. Similarly, democracy etymologically, describes the political system in which the power of governance belongs and depends on the peoples' consent and will. It is the right to participate in the political processes of the state by practice of the civil and political rights, such as the freedom of speech, press, religion, assembly and vote. Internal self-determination accordingly, may be considered that is coterminous to democracy, when focusing to their common normative elements. Self-determination placed as article 1 in both International Human Rights Covenants, suggests that its application is an effective guarantee and observance of all individual rights. Moreover, it is provided that state-parties should describe their constitutional and political processes and take positive measures for the respect and protection of the right. Entitlement to self-determination could mean guarantee of internal stability and protection of all citizens regardless the multi-ethic character of a state or historical complexity. Self-determination affiliated with the principles of democracy may accommodate in preventing or assisting to decay internal diversities, which otherwise would lead in violence and possibly conflict. Self-determination, in its internal aspect, is the right to regulate, protect and affirm an active participation by the guarantee of a liberal, transparent and accessible government that has as a priority the safety and prosperity of all its peoples.

Keywords: Democracy Self-determination Governance Civil and Political Rights Non-Discrimination Participation

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Sean Goggin, PhD candidate, Irish Centre for Human right, NUI Galway

The Protection of Cultural Diversity in International Law. Anthropology and Minority Rights

Participation I

Culture is a problematic category for law. A general lack of clarity seems to exist on the subject, including in relation to the question of definition. This is particularly relevant to minority groups, in relation to the protection of their cultural existence. Minorities are frequently ascribed rights to 'culture' in international law. The substance of these particular rights would seem to dependant largely on the particular approach to culture that is adopted. For minority groups the definitional issue and the question of the properties of culture become highly significant in these

instances. Globalisation, in terms of the increased movement of people and greater levels of cultural interaction, poses considerable challenges to the protection of minority cultures. In response to this demanding environment, international law needs to adopted approaches to culture that properly reflect contemporary cultural life. This paper will argue that current anthropological cultural theory has considerable potential to this end. Based on field-research, anthropological theory has continuously evolved to describe cultural life at a grass-roots level, including today's diverse and creolized cultural landscape.

Keyword: participation

Emily Grabham, Research Fellow, Centre for Law, Gender and Sexuality, University of Kent

Impressing on the Law: Intersectionality, Ressentiment and Emotions

I fought the Law and the Law won

Wendy Brown's challenge to identity politics, through the theory of ressentiment, could also be applied to the analytics of intersectionality. Whilst raising a number of important questions for legal theory and practice, intersectionality has arguably disappointed in its promise to subvert the damaging effects of legal categorisation. Following Brown's critique, this is not surprising, given that current configurations of identity politics could be said to reinscribe victim status as the basis for oppositional politics. With Brown's observations in mind, the aim of this paper is to work through approaches to inequality that are not based on legal identity categories. I use Sara Ahmed's recent work on the cultural politics of emotion to discern how emotions create the effect of the surfaces of law. Whilst Wendy Brown and Ann Cvetkovich see resort to the law as a 'soft option', my argument is that legal claimants, as engaged and embodied individuals, make an impression on the law. It is by tracing the effects of these impressions that alternative models to intersectionality can be created.

Keywords: resistance, becoming legal

Palmira Granados Moreno - University of Toronto

Genetic Patents and Indigenous Peoples in the Third World

Information Technology and Cyberspace Law

This paper has three purposes. First, to question –and call everyone to question– a patent system that is more concerned with granting incentives to investors than with achieving a balance between the interests of three groups: inventors/investors, consumers/society, and indigenous peoples who donate their genetic samples for research purposes. Second, to evaluate –and call everyone's attention to– the possible impacts of said patent system on different areas, specifically when it involves pharmaceutical patents and genetic information collected from indigenous peoples. In this matter, the evaluation will deal with the impact the patent system may have on research and creation of drugs especially tailored for diseases that have particular behaviours in indigenous peoples, specifically in some Mexican indigenous peoples. The evaluation will also deal with the possible harm to indigenous peoples due to limited access to important drugs. Finally, it will also consider the way in which the current patent system may jeopardize religious and cultural beliefs of indigenous peoples who participate in pharmaceutical research. Third, to outline some of the proposals that I consider to be the most relevant ones to design a system that accomplishes my two main concerns. To design a system in which any human being, regardless of whether he or she belongs to a majority or minority group, has the right to benefit from the intellectual property system, especially regarding patents in the pharmaceutical sector. At the same time, to design a system that would maintain a continued pace of innovation in which all the advantages of the current technological era are fully exploited benefiting any member of the human race.

Key Words: Genetic patents; indigenous peoples; biotechnology.

Carolynn Gray, Lecturer in Law, University of Paisley

Victim or Villain? The Embodiment of Children in Child Prostitution Legislation

Embodiment I

The issue of how the law should deal with children involved in prostitution has been at the forefront of UK child protection policy in the last five years or so, however child prostitution is not a problem limited to the latter part of the twentieth century but rather it is a problem which was first given prominence in the 1880's and has, from then onwards, resurfaced periodically until it became the subject of the optional protocol to the United Nations Convention on the Rights of the Child 1989. The optional protocol of 2000 was concerned with the Sale of Children, Child Prostitution and Child Pornography. From this stemmed a Governmental preoccupation with children involved in prostitution which led to legislation being passed in the form of s.47 of the Sexual Offences Act 2003 applicable in England and Wales and s.9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 in Scotland. This paper is an attempt to show how the legislation used to deal with children involved in prostitution has, over the years from 1886, either embodied children as victims or as villains and how the legislation has at different periods in history flitted between the two dichotomous concepts. I aim to apply a form of Foucauldian feminist discourse analysis to the legislation to show the various ways law can be used from merely dealing with a social issue on its primary level to actually embodying the individuals it regulates. I aim therefore to show that the current conceptualisation of children as victims is not so much based on a universal truth of childhood but rather it is based on the contemporary dominant ideology of childhood which is subject to change.

Keyword: embodiment

Anna Grear, Senior Lecturer, University of the West of England

Embodiment, Disembodiment and Human Rights

Embodiment I

The argument to be developed in this paper attempts to respond to the corporate use of human rights discourse. The paper identifies a particular problem concerning law's relationship with human beings – the phenomenon of legal disembodiment (or what will be referred to as 'quasi-disembodiment') – and sets out to explore the relationship between embodiment/disembodiment, legal personality and the subject of human rights. In particular, the paper explores the centrality of human embodiment and its link with human vulnerability (in part using the sociological approach to human rights recently elaborated by Turner) as a means of reflecting on an ethically significant distinction between corporations and human beings. This approach offers an intriguing set of possibilities for the future theorisation of human rights, and in the process, arguably problematises corporate human rights claims.

Keyword: embodiment

Professor Elspeth Guild, Radboud University, Nijmegen

The Displacement of Immigration Controls Slicing through the internal market: The Schengen borders code

Since 1992, the EU's Internal Market has, in law if not in practice, been an area without internal border controls for the free movement of goods, persons services and capital. However, since

March 1995, the Schengen area within which border controls on the movement of persons were actually withdrawn and the Internal market have shared varying territory in common. At the moment, the internal market of the EU comprises 27 Member States and the right of border control free travel within that territory, in principle applies across the whole territory. However, the Schengen external border includes on the inside only 13 member States (Ireland and the UK are on the outside as well as all the 2004 and 2007 Member States). In 2006 the Schengen Border Code was adopted which regulates the movement of persons across the Schengen Internal and External Borders. This paper will look at the complexities of the Schengen Border Code as a mechanism which acts in opposition to the Internal Market while claiming to further its objectives.

Jessica Gunhammar

"The placement of wartime rape in International criminal law: legal gains and political losses".

Transitional Justice and the Rule of Law

On the 22nd February 2001, the trial chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) made history by convicting three male Serb defendants of rape, torture, and enslavement of Muslim women in Bosnia-Herzegovina. The decision was note-worthy in several respects. It was the first case solely to focus on the rape, torture and mistreatment of women during armed conflict in Yugoslavia; it was also the first time that an International War Crimes Tribunal prosecuted rape as a 'crime against humanity'. This decision in particular, was hailed a big achievement by the media, human rights NGO's, and a number of scholars alike. It was described as a step closer to achieving gendered justice and realizing women's rights as human rights. Five years on, and several international courts and tribunals later, these valorizing narratives are starting to fade. Feminists, scholars, activists and lawyers have started to question, and critique international justice for failing rape victims by pointing to, among other things, the dearth of cases and the poor treatment of witnesses. This paper explores some of these criticisms, but also moves the debate forward by critically interrogating the discourse that surrounds the topic of wartime rape. The argument is made, that in order to assess the merits and efficacy of applying international criminal law to wartime rape; one needs first to have a clear understanding of the context in which these legal proceedings take place. This means examining the process of constructing wartime rape as an international social problem and the ensuing selection of cases for prosecution.

Keywords: Wartime rape, International criminal law, ICTY, ,social construction, discourse of wartime rape, feminist jurisprudence

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Jessica Guth, Research Fellow and PhD candidate, University of Leeds

European Enlargement, Free Movement of Persons and Science: The impact of opening borders on the mobility of early career scientists.

European Law I

This paper, based on extensive empirical work with Polish and Bulgarian scientists in Germany and the UK, examines the impact of the EU enlargement including the free movement of persons provisions on the mobility of scientists from Eastern to Western Europe. It focuses on early career researchers and particularly PhD candidates and begins by sketching out the status and ensuing free movement rights of those scientists in European Law. It then moves to discuss the policy rationale for promoting scientific mobility and examines how this fits with the scientists' own perspectives. Following on from there the paper looks at various areas where the EU enlargement has had an impact including the continuing transitional agreements, cheaper travel

and the question of tuition fees and goes on to consider the symbolic power of law in influencing scientific mobility.

Keyword: space

Elizabeth Hall, Senior Lecturer in Law, Lincoln Law School

The role of the cooling-off period in consumer credit contracts - a middle class remedy? Consumer protection for the less privileged

Justice IV

In certain consumer credit contracts there is a right to cancel without giving a reason, and without penalty, during a cooling-off period of limited duration. The rationale for this interference with freedom of contract is that in certain circumstances the decision may have been poorly-informed, made in haste without premeditation and the contract entered into because of techniques of pressure selling exercised by the salesman. As a result of one or more of these factors the consumer should be given time to reflect on his decision and have the opportunity to make a comparison with other available offers. It is argued however that this right to a cooling-off period does not take account of the different categories of consumer, and in particular the position of the lower-income consumer. The consumer with limited means has for a long time been identified as being particularly vulnerable and yet legislation does not recognise this category as justifying specific protection. The less-privileged consumer may not be in a position to have time to reflect on the wisdom of his decision to enter into the credit agreement, nor have the luxury of a range of offers from which to make his choice and so is likely to have to pay a higher charge for his credit. In contrast, the more affluent consumer may make better use of available information and therefore be able to take advantage of the period of reflection to make a comparison with a wide range of other available offers. In identifying the activities of the trader as a reason for the cooling-off period, legislation does not recognise the restricted choice of the financially disadvantaged consumer. Whilst there are cooling-off periods in other areas, such as doorstep and distance selling, timeshare sales and distance marketing of financial services, it is in the area of credit that the financial position of the consumer is likely to have the most impact. Moves towards increased transparency of consumer credit contracts, including greater awareness of the availability of right to a cooling-off period, are more likely to help the privileged consumer who can be expected to make an informed decision.

Keyword: class

Margaret Isabel Hall, University of British Columbia, Faculty of Law

Consent and capacity in relationship context: elder abuse and exploitation

"Abuse" attracting investigation and possible intervention is defined in British Columbia's Adult Guardianship Act as intentional wrongdoing; unless those acts are also criminal, a finding of abuse will result in an offer of intervention and connection with support services. The person to whom this offer is made is conceived as free to refuse or accept, unless he or she is shown to be "incapable." The autonomy/incapacity duality poses mentally capable adults as, by definition, autonomous and self-interested decision makers (the corollary being that the adult who is not "autonomous" in this sense is not capable). Abuse and exploitation of older adults in the domestic setting will often be a function of the relationship in which it occurs, however, rather than a discrete, intentional act. The effect of relationships of power conducive to abuse or exploitation is to impair the autonomy of the "weaker" party- not through diminished capacity but through the power dynamics of the relationship. The autonomy ideal is particularly inappropriate when applied to the current generation of older women, whose understanding and experience of personal choice will have been deeply informed by the cultural expectation that women's self interests should be subordinated to others (children, husbands) in traditional family

relationships. Refusal of services for older women living in this kind of relationship context may have little to do with either autonomous free choice or diminished mental capacity. To what extent does the inclusion of "undue pressure" in Scotland's vulnerable adult legislation incorporate this analysis of relationship context, autonomy and consent, especially for women? Or is the intention to focus on pressure as the intentional application of duress, as opposed to the more pervasive experience of domination arising from the relationship itself?

Lynne Harne, Research Fellow, School for Policy Studies, University of Bristol

Child contact: assessing the risks to children in relation to violent parenting

Child and Family Law and Policy

This paper outlines key research findings from an in-depth study undertaken with domestically violent fathers attending perpetrator programmes The study focuses on their perceptions of their parenting practices and their relationships with their children when they have contact post-separation. Drawing on the research findings, the paper argues that despite changes in the law and in the policies of CAFCASS in relation to domestic violence, insufficient attention is being paid to parenting and the need to safeguard children in private law contact decisions. Using findings from the research as well as other relevant models, the paper will propose a model for assessing the risks of `unsafe parenting` when contact with a domestically violent parent is being considered by the family courts.

Keywords: child contact, domestic violence, risks, parenting, domestically violent fathers, risk assessment, safeguarding

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Dr. Karen Harrison, School of Law, University of the West of England

Partnerships, contestability and commissioning in the probation service. The ultimate insult or the light at the end of the tunnel?

Sentencing and Punishment

Over the last few years the probation service has experienced much change. We have seen the introduction of the National Probation Service, local probation boards and finally the National Offender Management Service (NOMS). In addition to structural change, there has also been conceptual change with the practice of contracting out some of the work with offenders to voluntary and community organisations (VCO's), and the setting up of purchaser-provider agreements. The next fundamental change to affect the probation service would now appear to be the introduction of contestability and commissioning. This paper looks at what these concepts are and draws upon empirical research to discuss whether their introduction into probation work is the ultimate insult to probation officers or is actually the light at the end of a dark tunnel.

Keywords: partnerships, contestability, probation service.

David Harte, Newcastle University

Legal Instruments of Pluralism

Law and Religion - Society, Religion and Law

A number of well known recent controversies have highlighted the conflict between secular and plural visions for the future place of religion in society; one relegating religion to the private sphere; the other welcoming its contribution in the public arena. The nature of a plural model has been explored, notably by Rivers (eg in Ahdar (editor) *Law and Religion,* Ashgate 2000, chapt 7, "From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United

Kingdom's Human Rights Act", and in 7 Ecc LJ 267ff "In Pursuit of Pluralism: The Ecclesiastical Policy of the European Union"). The significance of a plural model has been recognised for the debate over liberalism and religious liberty in the major study by Ahdar and Leigh, *Religious Freedom in the Liberal State*, Oxford University Press, 2005, pp 84ff. This paper will seek to identify further characteristics of a plural model and to inquire to what extent recent developments in the law are compatible with such a model. It will consider to what extent a coherent framework may be identified or is possible which is acceptable to those with religious convictions and within which a balance may be maintained when such convictions conflict with one another and with other interests recognised by the European Convention on Human Rights. Particular attention will be given, first, to section 13 of the Human Rights Act 1998 and generally to the place of different organisations and of different religious traditions and organisations in relation to the problems of conflicting belief systems. Second the relevance and potential scope of conscience clauses will be considered for allowing individuals to opt out of requirements imposed by the general law under different circumstances.

Alison Harvey, Barrister at Law

Juxtaposed Controls: The conflict of laws

Immigration Law - The displacement of immigration control

The operation of juxtaposed control zones raises fundamental questions of sovereignty and conflict of laws to which the international agreements governing operations in these zones provide only partial answers. These agreements make reference to laws relating to frontier controls, but this does not serve to delineate a clear corpus of law given the diverse legal regimes and social policies that have been co-opted to achieve the end of immigration control. One example is that separate, and arguably conflicting provision, is made for the application of the criminal aw, whereas in practice many immigration laws are backed by provision for criminal sanction. Questions of forum conveniens and of double jeopardy arise. Other areas of law, such as tort, child protection, administrative, contract and human rights law are not addressed. That states are entering into contracts with commercial companies to carry out operations in control zones increases the likelihood that these questions will arise. In practice, States attempt to muddle through. But what is happening underneath? Are new notions of sovereignty and of the border being developed? To what extent do these affect a State's relations with its own nationals, and its treaty relationships with third States. This paper argues that an appeal to European law and international human rights standards fails to fill the conceptual lacuna and that new questions of conflict of laws arise for determination.

Jordan S. Hatcher, AHRC Research Centre for Studies in IP and Technology, University of Edinburgh

Mesh Networks: A look at the legal future.

Information Technology and Cyberspace Law

This paper examines the legal and regulatory implications of wireless mesh networking. Current approaches to internet regulation focus on centralized points of control, such as traditional ISPs. Wireless mesh networking is a decentralized architecture, thus increasing the difficulties of regulating behavior on the internet. This paper also looks at the regulatory impact of two significant players made possible by wireless mesh networking: community-based and municipally-owned networks and their relationship to internet governance.

Keywords networks, technologies

Professor Mark Hill, Cardiff University, Senior Visitor, Emmanuel College, Cambridge

Church, State and Civil Partners: Establishment and Social Mores in Tension

Law and Religion - Church and State

The Civil Partnership Act 2004 came into force on 5 December 2005 amidst a furore of media attention, much of it prurient, and under protest from evangelical Christian groups and others. It generated a spirited exchange in periodicals such as the *Ecclesiastical Law Journal* (see J Humphreys, 'The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England' (2006) 8 Ecc LJ 289, M Scott Joynt, 'The Civil Partnership 2004: Dishonest Law?' (2007) 9 Ecc LJ 92) but the practical implications are yet to be fully evaluated. This paper will provide an analysis of three particular ways in which the Act necessitates a re-visiting of the constitutional relationship of Church and State: f irst, the sacramental and secular concepts of marriage and the degree to which they have been altered by the creation of the legal construct of the civil partnership. A comparison will be made with other jurisdictions in the European Union. Secondly, the implications for clergy of the Church of England, who are commonly understood to be under a legal duty to solemnise the marriage of parishioners irrespective of their religious beliefs or lack of them, and yet are canonically restrained from blessing a same-sex union. Thirdly, two specific provisions of the Act which empower Ministers of the Crown by order to amend or repeal Church legislation, thereby jeopardising a century of progress towards self-governance and autonomy on the part of the established church in England. Charting the altered legal landscape, the paper will demonstrate that changes effected by the Act to the conventional understanding of Church and State, whether promoted by accident or design, are as real as they are apparent.

John Kong Shan Ho, PhD Student, School of Law, Dundee University

The Converging of Shareholder and Stakeholder Values: A Case-Study Analysis

Governance V

Over the last few decades there has an emergence of the stakeholder theory of the firm, which focuses on whether the notion of overemphasis on shareholder value ignores the claims of other stakeholders that ought to be represented in the company. In particular, it questions whether the traditional legal scope of directors' duties in the English-speaking world should be widened to include the interests of 'all stakeholders' and not just those of shareholders. The term 'stakeholder' is broadly defined as any individuals who may be affected by the activities or affairs of corporations. A corporation that embraces the stakeholder theory is thus one which recognises not only its direct legal and statutory responsibilities to its shareholders, creditors, bankers, external auditors, customers, employees, central and local government, and all those who facilitate the running of its business. However, ideal as it may sound it is argued that stakeholder theory is not effective in challenging the dominant view of business as an economic activity in the practical world. This is because stakeholders are all those who can affect or are affected by the organization, thus the number of people whose benefits need to be taken into account is infinite. In order for a balance to be struck, their numbers must be limited, yet stakeholder theory offers no guidance as to how the appropriate individuals or groups should be selected. Based on a case-study analysis, this paper investigates how a Hong Kong based public-transportation company, the MTR Corporation (MTRC) endorses stakeholder engagement and corporate social responsibility. The MTRC approach indicates that a balance can be struck between shareholders and non-shareholding stakeholders, and could be used as a design guideline for other organizations seeking to improve their social sustainability.

Keyword: governance

Loveday Hodson, Lecturer in Law, Leicester University

Whose Responsibility? Refugees, Migrants and the Prevention of Torture and Ill-Treatment

Sovereignty III

This paper addresses the question of whether States can be compelled to act in order to prevent torture that has taken place outside of their jurisdiction. Particularly relevant to this conference is whether States can be compelled to act in such a manner on behalf of their migrant and refugee populations. This is not purely hypothetical musing: a number of British residents (including those who have been granted asylum in this country) continue to be detained by US authorities in Guantanamo bay without representations being made by the UK government for their return, in spite of allegations that they have suffered from torture and ill-treatment. It is suggested in this paper that the use of diplomatic law to address the issues presented in such situations is unsatisfactory. The conventional understanding of diplomatic law is that it is a sovereign right that inheres in States in order to protect their legitimate interests. Consequently, the individual who experiences torture in a foreign territory is merely the object of diplomatic law: she has no right to diplomatic protection in such circumstances. States have used this conventional wisdom to support the argument that they are under no obligation to act where one of their nationals suffers a wrong in another country they merely have the right to choose to do so. The obvious inadequacy of such a discretion where States are unwilling to act on behalf of their nationals is plain; but diplomatic law is even more useless for refugees and stateless people who are entirely disadvantaged when nationality is the means by which State interference in extra-territorial matters is legitimised. Although alternative approaches to diplomatic law are explored in this paper, the author remains somewhat pessimistic about the utility of diplomatic law as a means of compelling states to prevent torture in other countries. This paper concludes that it should be possible to develop a human rights approach that strengthens States responsibility to protect those who are tortured and those who are at risk from torture in extra-territorial jurisdictions. Under international human rights law the violation of a human right is legitimately the concern of all. This is reflected in the erga omnes character of human rights and in the fact that human rights treaties provide inter-state mechanisms to ensure compliance with their provisions. The principle that States have a legitimate interest in torture that occurs extra-territorially, without reference to the nationality of the victim, is already a part of international human rights law. But States have been unwilling to adopt voluntary action in this respect. Consequently, it may be time to clarify what States obligations are in respect of violations of peremptory norms of international human rights law that occur outside of their jurisdiction. It is suggested that it should be possible to develop a theory of such obligations that is not dictated by considerations of nationality. The hope is to that efforts to secure protection for those who are victims of torture will be seen as humanitarian gestures, and not as expressions of State power.

Keyword: sovereignty

John Horne and Kevin Kerrigan, Northumbria University School of Law

Mental disorder and dangerousness – punishment or treatment?

The Criminal Justice Act 2003 introduced a wholly new regime for the punishment of offenders deemed to be a serious danger to the public. A new range of public protection sentences came into operation on 4 April 2005 and replaced the hotchpotch provisions on extended licence, longer than commensurate sentences and mandatory life sentences. The new sentences can be applied in a wide range of specified violent and sexual offences (there are over a hundred qualifying offences). If, following conviction, the court finds "significant risk" to members of the public of "serious harm" from the offender, through further specified offences then it must impose a public protection disposal of a life sentence, an indeterminate sentence or an extended

sentence. Of real significance for offenders with mental health problems is the fact that the dangerous offender provisions do not preclude clinical disposal under the Mental Health Act 1983. Thus even where an offender is deemed to meet the dangerous offender criteria s/he may still be eligible to be dealt with by way of Hospital Order. The criteria for the imposition of public protection prison sentences are very similar to the criteria for the imposition of a Hospital Order with Restrictions under sections 37/41 of the Mental Health Act. However, no guidance is given in the legislation as to which disposal the judge should select. This paper will compare the two disposals and seek to generate a dialogue on the factors that should influence judges as to how to deal with dangerous offenders with mental health problems.

Dr Anthea Hucklesby, Centre for Criminal Justice Studies, University of Leeds

Restriction on Bail: a successful initiative?

Sentencing and Punishment

This paper discusses the findings of an evaluation of the Restriction on Bail (RoB) pilots. The restriction on bail provisions were brought in by the Criminal Justice Act 2003. They enable courts to apply a condition of bail for defendants who test positive for specified drugs at charge to be assessed for and receive drug treatment during their time on bail. Where defendants refuse to undergo assessment and/or treatment courts shall remand them in custody. Pilots of the provision were undertaken in three areas between May 2004 and October 2005. This paper provides an overview of the operation of RoB including the extent to which RoB was used, its effect on remand decision making, offending on bail and channelling and retaining defendants in drug treatment as well as compliance. The paper draws on a range of data including monitoring data collected from the pilot sites, reconviction and treatment data, court observations and interviews with defendants, staff and stakeholders. The paper will suggest that RoB provides an effective mechanism to put drug using defendants in contact with drugs services.

Keywords: Bail, drug-using defendants

Edel Hughes, University of Limerick

Using the EU Accession Process as a Tool for Promoting Human Rights and Conflict Resolution: An Assessment of the Turkish Experience

Transitional Justice and the Rule of Law

The European Union (EU) has, in its numerous incarnations, purported to maintain a robust commitment to the protection of human rights. Article 6 of the Treaty on European Union proclaims that it "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law" whereas Article 7 warns that member states that violate human rights in a "serious and persistent" manner run the risk of forfeiting their rights under the Treaty. States desiring membership of the EU must meet a number of criteria relating to trade, economy, political stability and labour. Crucially, they are also obligated to ensure that their domestic human protections are of a certain standard and it is this latter requirement that often proves problematic for some prospective members. Since the formulation of the 'Copenhagen Criteria' in 1993, the requirement that applicant states "have achieved stability of its institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities" has proved a stumbling block for potential members. Importantly though, it has also provided the catalyst for internal human rights reform in many of the new member states and accession countries. Turkey's road to EU accession has been paved with obstacles; from concerns over economic and fiscal performance to the continuing stalemate regarding Northern Cyprus, with accession negotiations now suspended it is unclear if or when Turkey will obtain full membership. Nonetheless, the accession process has prompted huge reforms in Turkey's domestic human rights protections and to some extent has promoted

working towards a solution to the conflict in the Southeast. This paper will examine the complex issues surrounding the EU's most disputed prospective enlargement. It will outline the reforms that the accession process has engendered in Turkey and the effect, if any, that these reforms have had on achieving a solution to the Kurdish conflict.

Keywords: human rights, rule of law, conflict resolution, European Union,

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Caroline Hunter, Principal Lecturer, Sheffield Hallam University

Judges Resisting the Law: the avoidance of possession in mandatory cases

Justice III

The court room, particularly the lower courts are not often thought of as sites of resistance. This paper draws on research for the Department for Constitutional Affairs on judicial discretion in rent arrears cases. It focuses on decision-making by district judges when confronted with claims for possession under Ground 8 of the Housing Act 1988, where unusually judges have no discretion but must order possession if the facts are proved. The paper illustrates how judges have resisted this mandatory requirement to different degrees and using varying techniques. It also examines how judges justify this resistance to the clear requirements of the law.

Keywords: resistance, governance

Rosemary Hunter, Kent Law School

Close encounters of a judicial kind: 'hearing' children's 'voices' in family law proceedings

Child and Family Law and Policy

A recent Department of Constitutional Affairs consultation paper on Separate Representation of Children canvassed the possibility of judges speaking directly to children in family law proceedings, in order to overcome perceived problems in current procedures whereby children's views are usually provided to the court via a CAFCASS Children and Family Reporter. The consultation paper constructs CAFCASS Reporters as 'unreliable informants'. Yet the notion that children's 'authentic' voices can be 'heard' via a direct encounter between the child and the judge may also prove to be a fantasy. This paper explores and deconstructs assumptions about judicial interviews with children found in the consultation paper and other literature, by reference, among other things, to research evidence from an Australian Family Court program involving the capacity of judges to interview children.

Professor John Huntley and Shivon Byamukama, Glasgow Caledonian University

The Gacaca process in Rwanda: Some reflections on Transitional Justice

Transitional Justice and the Rule of Law

The 1994 Rwanda genocide led to approximately 1 million deaths. A similar number was implicated in the crime of genocide and crimes against humanity - more that a third of the adult population. The massive social, political and economic problems generated in an already impoverished country are matched by the implications for justice and human rights. The Gacaca process, a traditional form of dispute resolution was adapted in 1999 and from 10th March 2005 embarked on processing the huge numbers of prosecutions arising from the catastrophic events of 1994. Much has been said about the Gacaca by human rights and international lawyers from a variety of perspectives on whether it meets international fair trial standards; but little consideration has been given to more fundamental issues that determine whether the Gacaca

process can bring lasting justice and reconcile a deeply divided society like Rwanda. The very objectives of reconciliation and forgiveness and the breaking of the culture of impunity lie at the heart of the controversy. They represent two separate and conflicting conceptions of justice, one retributive, the other restorative. Although there can be no compromise on fundamental rights and universal adherence to them, how do trial standards designed for a purely retributive system apply to restorative practices in a transitional justice context? As a transitional justice process, Gacaca aims not only to see that justice is done, but also that reconciliation takes place. The centrality of confession and the nature of penalties in Gacaca trials clearly testify to this. Considering the nature of the genocide and based on fieldwork recently carried out in Rwanda, this paper reflects on the intricate system of punishment, compensation and reintegration in the Gacaca process, its fitness for purpose in its specific context and the more general implications that it raises.

Toni Johnson, Ph.D student, Kent Law School.

'Standing in the way of control': disruptive practices and the reclamation of agency in lesbian and gay refugee hearings

I fought the Law, and the Law won

This paper will critically analyse the relationship of adjudicator and refugee in asylum hearings. Using observational data, interview materials and documentaries on the asylum process, I will analyse the production of testimony by lesbian and gay asylum seekers and the possibilities for resistance within that production. Drawing on Michel de Certeau's 'Practice of Everyday Life' I will highlight the words and deeds, narratives and actions of the refugee and the way in which such actions create a site of resistance within the court space, thereby potentially imbuing the refugee with an active and embodied agency.

Keyword: resistance

Jackie Jones, Senior Lecturer, University of the West of England

Same-sex marriage – a comparative analysis of constitutional interpretation

European Law II

The same-sex marriage debate in the USA continues to cause an enormous amount of polarisation of opinion and feeling. This is reflected in the constitutional and legislative debates taking place in each of the States. No two states' arguments around the same-sex marriage issue are exactly the same. Some have enacted constitutional amendments banning same-sex couples from marrying or having their rights recognised once they have married in a state or country that does recognise same-sex marriage (for example, Canada), while others have adopted the institution of civil unions, granting same-sex couples all the rights and obligations of marriage without the name. Yet others provide some administrative rights under the domestic partnership regime. Constitutional arguments abound in this area. Not only is the Fourteenth Amendment (equal protection, due process clause) utilised to argue in favour as well as against same sex marriage, but also the full faith and credit clause. Both are used by traditionalists who view this about whether or not the right to marry someone of the same sex is a fundamental right so enshrined by the forbears that it must be recognised or by the living constitutionalists who argue that the real question is whether the someone has the right to the pursuit of happiness to marry the person of their choice as the fundamental right to be upheld. In Canada, the position of gender-neutral marriage laws was the same as in the USA. However, over several years, and the Canadian Supreme Court's interpretation of the Charter of Rights, section 15, these laws were interpreted as allowing same-sex couples to marry in the name of equality. A federal statute was enacted which enabled this, whereas before states were free to regulate on this issue. Commentators have criticised Canada's 'social experiment'. In the European Union's

draft constitution, Article 9 of the Charter of Rights and Fundamental Freedoms permits people to marry, according to the national laws of that country. This right is worded differently to the ECHR's Article 12 right and thus may be interpreted in a different way. The European Court of Justice uses the concept of 'common constitutional traditions' as an interpretative tool. This can be compared to the traditionalist interpretations. The search for common constitutional traditions has led the court to find common laws on a variety of subjects, including human rights and fundamental freedoms. The right to marry is one such fundamental right. Looking at the laws of different member states (UK, Germany, Spain, France) can the ECJ interpret Article 9 (as well as other provisions) to mean same-sex couples have the right to marry the person of their choice despite the saving clause?

Nadja Kanellopoulou, University of Edinburgh

Group Consent in Genetics Research

Medical Law and Ethics

Current regulation of research advances in biology pose grave challenges for group participation in genetics research. These include concerns on group representation, consultation and communication of research risks and benefits, recognition of group claims in controlling the design, direction and conduct of research, interests in feedback mechanisms, acknowledgement of group contribution in research facilitation, structures for distribution of research benefits to groups. In the context of particular projects since the early 1990s, attempts were made to develop protections at group level primarily by obtaining 'group consent'. This paper discusses the invention of group consent and model ethical protocols developed as a result, together with crucial limitations in their application. Alternative models have been proposed in more recent attempts to highlight the significance of diverse social, cultural, ethical, political and historical circumstances in forging group relationships with researchers and mutual expectations from research involvement. These complementary approaches offer great insight in the contexts within which group beliefs, values, interests and needs are formed. A critical examination of these approaches is urgently needed to expose the limitations of current group consent approaches and help devise protections that take appropriate account of the substantially complex nature of group research. Suggested models propose conditions for appropriate group representation, authority, timely consultation in research design, direction and conduct, mechanisms for feedback, transparent communication of research-related interests including commercialisation, to enable mutually beneficial arrangements between researchers and participants. These models draw on lessons learned from tribal participatory agreements and advocacy representation structures. This paper highlights the need to acknowledge group concerns, review consent provisions, and develop protections that ensure meaningful group involvement in research. This task cannot be achieved by law in isolation but in combination with interdisciplinary efforts that integrate scientific, ethical, sociological and anthropological expertise in the regulation of biomedical research on human groups.

Keywords: Governance, Genetic Technologies, Research Participation, Groups, Consent, Risks, Benefits, Justice, Sovereignty

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Dr David Keane, Brunel University

Do the 'Danish Cartoons' Represent Hate Speech under the European Convention on Human Rights?

Law and Incitement

In 2005/2006, the prosecution of David Irving in Austria for Holocaust denial, and the controversy over the cartoons of the Prophet Mohammad in the Danish newspaper Jyllands-Posten, highlighted two very different approaches to freedom of expression in Europe. While in

the former, Irving was sentenced to three years in prison with comparatively little media sympathy, in the latter, no criminal proceedings resulted from the publication, and in the general media debate, freedom of expression was emphasised over the rights of religious minorities. The UN Special Rapporteur on Contemporary Forms of Racism noted in his 2006 report that: "these newspapers' intransigent defence of unlimited freedom of expression is out of step with international norms that seek an appropriate balance between freedom of expression and religious freedom, specifically the prohibition of incitement to religious and racial hatred". The issue of racist speech engages both Article 10, the right to freedom of expression, and Article 17 ECHR. The European Commission on Human Rights invoked Article 17 in an initial admissibility decision on racist or xenophobic speech, Glimmerveen and Hagenbeek v. the Netherlands, but subsequent decisions, for example Kuhnen v. Germany, gave preference to conducting the analysis under Article 10. The paper will ask whether a hypothetical prosecution of the artists of the 'Danish Cartoons' would have represented a violation of Denmark's obligations under Article 10 or Article 17 ECHR. The answer will hinge on whether defamation of religion is equivalent to hate speech. Article 17 states that 'nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.

Michael Kearney

An International Crime of Incitement to Aggression?

Law and Incitement

This paper will propose that a distinct crime of 'direct and public incitement to aggression' be included in the Rome Statute of the International Criminal Court. Efforts are currently underway at securing a definition of the crime of aggression for the purposes of the Statute, and while suggestions have been made regarding the inclusion of a specific criminal offence of incitement to aggression, there has been little academic or other analysis of the consequences of such a provision. This not only stands in marked contrast to the volume and quality of analyses of other crimes of incitement such as hate speech and incitement to genocide, but is unfortunate given the widespread use of propaganda and incitement in fomenting and justifying wars of aggression. In proposing that the states parties should support the inclusion of such a crime, the paper will outline historical developments – from the Charter and judgment of the IMT at Nuremberg to the ICC's Working Group on the Crime of Aggression – in order to demonstrate the necessity of such a provision being enshrined in international criminal law. The paper will commence with an analysis of the judgments of the Second World War tribunals and the location of crimes of incitement therein, before charting the fate of proposals regarding incitement to aggression during the International Law Commission's efforts at drafting a Code of Crimes Against the Peace and Security of Mankind. In proceeding to draw on the experiences of the ad hoc international criminal tribunals for the Former Yugoslavia and Rwanda with regard to the role of propaganda and incitement in the initiation of the most serious crimes, the paper will conclude by encouraging the ICC's Assembly of States Parties to include an inchoate crime of 'direct and public incitement to aggression' in the Rome Statute.

Smita Kheria, PhD Candidate, Queen's University Belfast

'Authorship' missing in the debate on moral rights in the digital age

Technologies I

Digital technology came with remarkable opportunities for creativity for 'authors' but also posed important conceptual hurdles for the moral rights doctrine protecting authors' personality interests. Legislative development on this front remains absent with these interests of authors being sidelined by technical issues of digitisation, concerns of businesses and users. The academic

literature on the issue has on the other hand generated a wider debate but most of the arguments against 'authorship' are based on what are at best assumptions about authorship in digital age, without sufficient studies to back them. The debate on protecting moral rights in the digital environment requires a careful analysis based not only on legal arguments but adequate interdisciplinary research because moral rights, unlike other more 'economic' intellectual property rights, have a strong cultural emphasis, where the creativity of individual artist is valued over all else. And a cultural dimension will remain missing from the debate till 'authors' are adequately represented. This paper examines the arguments put forward in the debate on protecting moral rights in the digital environment and seeks to highlight and illustrate the issues overlooked therein. Specifically it points out how 'authorship' remains missing from the debate as the authors' perspective has been either underrepresented or ignored in the debate. The paper then goes on to address the desirability of including authors' perspective and suggestions on achieving the same through a socio-legal approach to the issue. The paper concludes on the note that such an approach will not only give credibility to the arguments already put forward in the debate but also generate newer themes to take the debate a step further.

Keywords: technologies, participation

Mat Kinton, Mental Health Act Commission

Between codified and common law – mental health legislation in England and Wales after the Human Rights Act

Commentators on mental health legislation and practice often start from an assumption that one consequence of the enactment of the Human Rights Act 1998 (HRA) should have been to further the protection of patients by redrawing and pulling inwards the boundaries around what sorts of interference with patients' lives are permissible in law. As such, debate on the effect of the HRA has often centred around the question of how effective it has been in these terms, with many commentators arguing that the HRA has had, or has yet to have, significant impact in limiting the exercise of coercive power over patients. This paper suggests that the actual or potential impact of the HRA may be more complex than many such analyses assume. It examines the possibility that, notwithstanding the use of the HRA in courts to challenge certain practices, a paradoxical effect of the codification of law and practice within the framework of a discourse about 'human rights' may be an extension of coercive power over patients. This suggestion is considered theoretically, through the lens of Foucault's distinction between sovereign and disciplinary power, and practically, taking as examples debates about the extent of police powers; the redefinition of powers relating to 'conditional discharge' of patients; and the ongoing extension of Mental Capacity Act powers to provide authority for psychiatric detention.

David Lambert, Cardiff University

Religion in Wales Post-Devolution

Law and Religion - Church and State

At present, church groups and the State operate cooperatively in certain areas of law, such as education, childcare, burial grounds and adoption. There are Acts regulating each one of these subjects. Until now, the Assembly has only been able to exercise powers in these subjects in the same way that Government Departments in England have been able to exercise powers (i.e. under enabling provisions in Acts of Parliament). This situation is set to change. From May, the Assembly will have powers under 20 fields to make law within prescribed areas. These laws can make the same provision as Acts of Parliament. Consequently, the Assembly, if operating within their conferred competence, will be able to amend, revoke, or add to Acts of Parliament, or make new provision in their place. This raises the question of how far the Assembly would be prevented legally from changing the role that has been given to religious bodies under existing

Westminster legislation. Legally, it initially seems that it will be difficult to challenge laws made by the Assembly, provided they are acting within the competencies given under the enabling provision. Under the Government of Wales Act 2006 the new Supreme Court only has jurisdiction to declare a proposed or enacted law to be illegal if the Court considers it to be outside the powers of the Assembly. This does not appear to allow the court to decide whether the law is or is not unreasonable. It would appear to be very difficult to challenge the substantive grounds of a Measure if made under very flexible enabling powers. An example of such a flexible power was, incidentally, used in the White Paper published in 2005 on the future governance of Wales, which suggested the Assembly's competence could include 'The Heath and Welfare of Children in Wales. 'Apart from being subject to the jurisdiction of the Supreme Court, Assembly law 'must not contravene the provisions of the Human Rights Act 1998' (according to S.94(6)). Thus challenges to Assembly law may be made if there is either a real or suspected contravention. Generally however, particularly as Parliament has no power to scrutinise a proposed law to be made by the Assembly once the Assembly has been granted the competence to make that law, it does seem that the Assembly could make laws which could have considerable and different effect on religious bodies to the laws applying to such bodies in England.

Sarah Lamble, AHRC Centre for Law, Gender and Sexuality, Kent Law School

Queerly Up Against the System: Autopoiesis theory, legal politics and transgender bodies

I fought the Law and the Law won

Transgender bodies and identities pose a potential challenge to the categorical rationality of law. Refusing to abide by the conventional legal categories of male and female, and destabilizing concepts of sex, gender and sexuality, transgender persons often resist law's categorical impulse. Drawing from and critiquing autopoiesis theory, this paper examines several cases involving transgender anti-discrimination claims in Canada and analyses the ways in which law responds to bodies and identities that do not readily conform to legalized thinking.

Keyword: resistance

Ruth Lamont, Doctoral Student, Liverpool Law School

International Child Abduction in EU Law: Failing to Address the Issue of Women who are Escaping Domestic Violence

European Law I

Regulation 2201/2003 (known as Brussels II bis) is the EU's latest intervention in the area of private international family law. As well as dealing with jurisdiction and recognition and enforcement of judgments in matrimonial and parental responsibility disputes, the Regulation legislates in relation to international child abduction within the EU for the first time. The Regulation aims to build upon the Hague Convention on the Civil Aspects of International Child Abduction 1980 by altering the way some of the rules of this Convention operate between EU Member States. The Regulation aims to reinforce the principle that a child should be returned to their habitual residence following an abduction. It is now more common for women to abduct their child than for men to do so. It is thought that some women abduct their child when they remove them across international borders in an attempt to escape domestic violence. The operation of the return remedy under the Hague Convention 1980 where the mother has been subjected to domestic violence has been criticised by feminists such as M Weiner. The child is normally returned to the State they were removed from and their mother will usually return with them, placing them both at risk of further abuse. This paper will argue that Regulation 2201/2003, in reinforcing the principle of return, further exacerbates this problem. It will consider whether the law relating to international child abduction within the EU reinforces

notions of the traditional family and of the appropriate role for women as 'mother'. Following an abduction due to domestic violence, the mother's conduct becomes the subject of scrutiny and condemnation, rather than the focus being on the abuser's behaviour. This paper will question whether the Regulation's emphasis on return can deal appropriately with cases where women have been subjected to domestic violence.

Keyword: justice

Bettina Lange, School of Law, Keele University and Nafsika Alexiadou, Dept. of Education, Keele University

New forms of European Union Governance in the Education Sector? - A Preliminary Analysis of the Open Method of Co-Ordination

European Law

This paper critically explores how a new form of European Union (EU) governance - the Open Method of Co-ordination (OMC) - impinges on education policies. The first part discusses three key characteristics of the OMC, in particular its flexibility, reflexivity and reliance on the techniques of new public management. It also outlines briefly why the OMC is being applied to EU education policy. The second and main part of the paper develops a critical analysis of the OMC in education by questioning to what extent it can be considered as a new form of EU governance and with what vision of Social Europe it is associated. Most importantly the second part argues that there may be significant potential for the politicization of mutual policy learning in the context of OMC education measures.

Keywords: governance, order

Dr. Sylvie Langlaude, University of East London

The right of the child to religious freedom under article 14 UNCRC

Law and Religion – International Human Rights Perspectives

This paper considers the issue of the right of the child to religious freedom under article 14 of the 1989 UN Convention on the Rights of the Child. It argues that after 14 years of work, the analysis of the Committee of the Rights of the Child is disappointing. Religious freedom is clearly not an issue for the Committee, and when it considers the issue it does so in a way that is fairly erratic and inconsistent. There are problems at all levels of the Committee's analysis. There are tensions underlying the whole Convention, and they carried on by the Committee. The principle of the evolving capacities of the child should be the overarching principle guiding article 14, yet the Committee also refers to participatory rights and age-limits, which can be fairly confusing. The Committee highlights the importance of the family yet this is overshadowed by its interventionist stance in the privacy of the family in order to protect the best interests of the child. It is true that the Committee only comments on what there is before it, yet there is no systematic analysis of the right of the child. In addition, the Committee gives the concept of evolving capacities a meaning that is far too broad and elastic: it gives too much autonomy to young children without justification. The Committee also treats the child as an autonomous religious believer, which does not reflect the place of the child within a relationship with family and religious community. Finally, the Committee has an impoverished understanding of religion, and tends to excessive intervention in the child's and the parents' religious beliefs. In conclusion, this paper shows that although religious freedom is important, the work of the Committee does not reflect the importance of the issue and does not deal properly with the right of the child.

Anna Lawson, School of Law, University of Leeds.

Mental Disability and the United Nations Convention on the Rights of People with Disabilities: Reminders and Re-imaginings

The UN Convention on the Rights of Persons with Disabilities opens for signature on 30 March 2007. The international disability movement has long campaigned for such an instrument and civil society has played an unprecedented role in its elaboration. It has been greeted with excitement and high expectation by disabled people across the globe. The purpose of this paper is not to provide a detailed analysis of the provisions of this new Convention. Rather, it is to draw attention to some of the issues, of particular relevance to mental disability, which emerge from this Convention and the process of its elaboration. For some, these points will constitute reminders of problems or views with which they are already familiar, even if in a different context. For others they may represent new and different understandings and approaches. Points which will be covered include:

• the Convention's aim - ensuring that the human rights of all are enjoyed and protected fully and to the same degree – and the implications of this for mental disability;

• the location of mental disability issues within the disability movement more generally; and

• issues of terminology and identity, together with relevant implications for legal definitions and for the language conventionally associated with the social model of disability.

It will be suggested that the Convention represents an opportunity for us all to re-imagine our societies as ones in which people are respected and valued as individuals who may participate in the world around them to the fullest extent to which they are able, regardless of any intellectual, psychosocial, neurological, or neuro-diverse impairments or conditions they may have.

Oliver Lewis, Mental Disability Advocacy Center, Budapest

Research findings of guardianship and human rights in eight countries

I will present findings of research conducted by the Mental Disability Advocacy Center, an international NGO which advances the human rights of adults and children with actual or perceived intellectual or psycho-social (mental health) disabilities. Focusing on Europe and central Asia, it uses a combination of law and advocacy to promote equality and social integration. The paper will examine whether guardianship systems in eight countries – Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Kyrgyzstan, Russia and Serbia – comply with international human rights law and standards. Although the laws in these countries are all different they share some similarities. All countries rely on plenary (all-encompassing) guardianship, an all-or-nothing approach which fails to take into account the adult's functional capacity and in which procedural irregularities are common. There are few alternatives to guardianship, resulting in large numbers of people being deprived or restricted of legal capacity. An all-too intimate link exists between guardianship and the automatic deprivation of the right to vote, work, choose place of residence, manage property and assets, marry and respect for family life. Governments must commit to the paradigm shift towards autonomy and non-discrimination called for by the newly-adopted UN Convention on the Rights of Persons with Disabilities.

Dr. Majbritt Lyck, PhD from Centre for Conflict Resolution, Department of Peace Studies, University of Bradford.

When Peace Clashes with Justice: International Peace Enforcers and Indicted War Criminals: The Case of Ramush Haradinaj

Transitional Justice and the Rule of Law

Since the end of the Cold War the UN has become increasingly involved in rebuilding peace in societies torn apart by internal violent conflict. A dominating part of the UN's approach to building sustainable peace is the deployment of peace enforcement missions that can assist the countries affected by internal violent conflict in implementing the peace agreements that the former warring parties have agreed to obey. Another feature that has gradually become an important part of the UN's approach to building sustainable peace is the establishment of international criminal tribunals that can hold individuals accountable for gross violations of human rights committed during the violent conflict. This article will argue that the UN has failed to adequately address the dilemma between justice and peace that the combination of these two features creates. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the United Nations Mission in Kosovo (UNMIK) and especially the case of Ramush Haradinaj will be used as a case study. It will be examined how the objectives and actions of the two institutions clash and it will be discussed how this dilemma can be dealt with in the future.

Key Words: peace, justice, war criminals, international peace enforcement, ICTY, UNMIK and Ramush Haradinaj

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Ken Mackinnon, University of Waikato, New Zealand

Redefining the facts: the marginalisation of claimants in tribunal fact-finding

Participation & Justice II

In this paper I take a look at the nature of the facts that administrative adjudicators are expected to 'find' as part of their decision-making processes. I do this with particular reference to the review process that is built into the New Zealand accident compensation scheme. My thesis is that within the ACC review process there has been a shift from identifying 'brute' facts to a focus on 'institutional' facts and the legal rules. This has consequences for the nature of the review process and has a particularly severe impact on unrepresented claimants who can be unable or ill-prepared to provide the evidence and arguments necessary to win their case, and become marginalised in the review process. One of the prime reasons for abandoning the common law as a means of compensation for injury was the inadequacy of tort law remedies pursued through the courts. If the ACC route does not in fact provide better and more accessible remedies, then a significant part of its rationale vanishes. I suggest some improvements for making the review process more suited to claimants, through, for example, the provision of pre-hearing advice. I raise the question of the effect on adjudicator impartiality.

Keywords: participation, justice

Louise Mallinder Research Assistant Queen's University Belfast

Assessing State Practice in Implementing Amnesty Laws Following Conflicts and Despotic Rule

Transitional Justice and the Rule of Law

Amnesty laws are political tools that have been used since ancient times by states wishing to quell dissent, introduce reforms, or achieve peaceful relationships with their enemies. In recent years, however, they have become contentious due to a perception that they violate the provisions of international law, particularly those relating to the rights of victims, and contribute

to further violence. This paper will provide a structured and systematic analysis of state practice regarding amnesties since the Second World War in order to challenge assumptions that states are moving away from amnesties and to examine the impact of state practice on customary international law. This paper will use the Amnesty Law Database, which was created by the author, to explore state practice and place considerations of the legal framework against impunity within a factual context. The database contains information on 421 amnesty processes in 127 countries and includes data on the nature of amnesty processes: their recipients, crimes and conditions; and on the political and social contexts which contributed to the amnesties' introduction. Data has also been gathered, where appropriate, on the complementary transitional justice mechanisms that accompanied the amnesty processes, such as truth commissions, community-based justice initiatives, lustration programmes and reparations. The Amnesty Law Database will be used in this paper to highlight patterns in state practice such as the relationship between amnesties and truth commissions, and explore whether states are moving away from granting amnesty for international crimes. Furthermore, it will illustrate that there is a wide disparity in state practice relating to the types of amnesty laws introduced, with some aiming to provide victims with a remedy, whereas other aimed to create complete impunity for perpetrators. The paper will argue that this disparity indicates that amnesties can be tailored to meet specific strategic and legal objectives.

Keywords: amnesty, customary international law, conflict resolution, transitional justice, reconciliation

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Jane Matthews Glenn, Professor of Law and Urban Planning, McGill University, Montreal, Canada and Véronique Fortin, Master Student, Onati International Institute for the Sociology of Law, Onati, Spain

When Ownership Means More Than a Legal Title: Stories of purchasing a house-spot in a Barbados tenantry

Stream or Session

'Give legal titles of ownership and improve your formal property system, you will alleviate the poverty problems in your country.' This affirmation, in a very simplistic manner, summarizes Hernando de Soto's theory set out in his famous book, 'The Mystery of Capital'. For de Soto, in giving people secure title to their homes, you provide them with a mortgageable asset, and thus the means to access the 'dead capital' that is otherwise locked away. These assumptions are very attractive, but the results of our field work in Barbados in 2005 suggest that they do not adequately reflect Barbadian reality. This Bajan reality is an interesting, and unique, form of land tenure, known as 'tenantries'. Throughout the island, it is common to see people owning their house but renting the land on which it stands. These houses are typically wooden houses resting on boulders, without being affixed to foundations in any way. These 'chattel houses' (as they are called) are often grouped on private landlords' plots of land in an informal subdivision, and these subdivisions are described as tenantries. One of the objectives of our research project was to learn more about the'Transfer of Title Programme' in tenantries, as implemented by the Urban Development Commission of Barbados. This programme, clearly aligned with de Soto's theory, was meant to fast-track the process in which tenants in urban tenantries could purchase their house-spot. For many reasons, this programme has encountered a low response rate. In our paper, we will consider how a social concept of land ownership, different from de Soto's vision of legality and extralegality, could help us understand tenants' reluctance to acquire freehold. We will argue that tenants have a very singular perception of ownership and that they see much more in a house… than a mere asset waiting to be turned into capital.

Keywords: space, becoming legal

Karen Mc Cullagh - University of Manchester

Blogs: a Privacy Perspective

Information Technology and Cyberspace Law

Blogs are permeating most niches of social life, addressing a range of topics from scholarly and political issues (Glenn, 2003) to family and children's daily lives (Turnbull, 2004). By their very nature blogs raise a number of privacy issues as they are easy to produce and disseminate, resulting in large amounts of sometimes personal information being broadcast across the Internet in a persistent and cumulative manner. As blog writers become increasingly prolific, however, they are likely to encounter issues of privacy and liability. For example, accounts of bloggers hurting friends' feelings or losing their jobs because of materials published on their sites are becoming more frequent (Bray, 2004; Nussbaum, 2004; O'Shea, 2003; Pax, 2003; Phillips, 2003; Sarnataro, 2003; St. John, 2003; Whitworth, 2003). Indeed the issue has come before the courts in the Lindqvist case (C-101/01). The study of privacy requires an understanding of the changing nature of technology and the social world created by that technology. However, the emerging media of blogs has not been fully explored to date. This paper reports the preliminary findings of an online survey of blog authors' from around the world. It explores their subjective sense of privacy by examining their blogging practices and their expectations of privacy when publishing online.

Padraig McAuliffe, PhD student, University College Cork

Capacity-Building for Defence Lawyers in East Timor's Hybrid Tribunal

Transitional Justice and the Rule of Law

This paper examines the failure of UN transitional missions to develop the capacity of East Timor's defence counsel during its hybrid court Serious Crimes Process from 2000 to 2005. It argues that in under-supported hybrid courts, transitional political goals of drawing a line in the past is prioritized, at the expense of a slower but fairer and more rigorous approach to successor trials, thus undermining the development of the local criminal justice system and jeopardizing the long-term prospects for transition. In keeping with changes in UN peace-keeping operations policy, UN Transitional Authority in East Timor and its successor missions were given a responsibility to develop the capacity of judicial institutions in East Timor. One of the rationales behind the move from fully international courts to mixed domestic/international criminal courts is that involvement of local lawyers and judges will help develop their professional abilities as they learn from their more experienced international counterparts. While it had a level of success in developing prosecutorial capacity and the skills of judges, the UN failed completely in relation to defence counsel. My paper examines the nature of this failure. I argue that the prioritization of the short-term political goals of transitional justice which emphasise a prosecution-driven speedy series of trials and where fairness is a secondary concern has taken precedence over a more long-term approach which would emphasise the need to use the trials to demonstrate how high standard fair trials operate and to develop the professional abilities of local lawyers. I argue that the failure to develop defence capacity is due to an omission to provide adequate personnel and the alienation of local lawyers from the defence process. My paper will conclude by suggesting how the UN should alter its approach if their commitment on paper to capacity-building in hybrid courts is to be realised

Key Words: Transitional Justice, Capacity-Building, Institutions, Hybrids

Morag McDermont, Karen Morgan and Dave Cowan, School of Law and Centre for Market and Public Organisation, University of Bristol

Risk, Trust and Betrayal: A Case Study of Social Housing

Governance I

This paper discusses a research project that will examine ways organisations use contracts or agreements to govern relationships, balance risks and maintain trust. The contract is a key medium through which the parties set out their needs and demands and the processes to address these, seeking to avoid a breach of trust or relationship breakdown. Where the organisations are mutually reliant, any breach of trust may be more keenly felt as a betrayal, particularly if previously accepted norms appear rejected. An important question will be the extent to which the contract-making process involves the imposition of external understandings rather than the establishment of local needs and concerns. We study these themes in the context of social housing, focusing on local authorities that retain statutory obligations to households in housing need but have transferred the housing stock to a Registered Social Landlord (RSL). The local authority will have an agreement to nominate households to the RSL's housing. Particular problems occur where the nominated household is perceived as 'risky' to the RSL – such households are frequently homeless, and with high support needs. Such micro-cases lead to feelings of betrayal and breakdown in the contract, crisis in 'public service' concerns of meeting housing need, and renegotiation of relationships.

Keywords: governance, risk

Professor Kieran McEvoy, Director of the Institute of Criminology and Criminal Justice School of Law Queens University Belfast

Justice, Legalism and Transition 'From Below'

Transitional Justice and the Rule of Law

This paper draws widely from criminological, anthropological, developmental and socio-legal literature as well as number of years engaged in practical grass roots transitional initiatives in Northern Ireland and elsewhere. It suggests that contemporary transitional justice discourses are overly dominated by legalist concerns. The author critically examines three key broad themes associated with the putative legalistic dominance of transitional justice. These are Legalism as Seduction, Legalism as the Triumph of Human Rights and Legalism as 'Seeing like a State'. The author then suggests three correctives to these tendencies including 'Engendering Legal Humility', Human Rights as Development and promoting a non-romanticised perspective of Justice Beyond the State. The author suggests that an increased awareness of these limitations associated with legalism, together with the potential of transitional justice 'from below', is crucial for the development of the field both in terms of theory and, more importantly, praxis.

Jean McHale, Faculty of Law, University of Leicester.

Medical research and adults lacking capacity- is the Mental Capacity Act 2005 truly 'fit for purpose'.

Following the decision of the House of Lords in Re F in 1990 the legality of the inclusion of adults lacking mental capacity in medical research- in particular non-therapeutic research was thrown into doubt. Although the Law Commission Report in 1995 included considerable discussion of the inclusion of adults lacking mental capacity in medical research this issue was conspicuous by its absence from the original Mental Capacity Bill. The inclusion of provisions concerning medical research into the Mental Capacity Act 2005 can be very much seen as an afterthought and much was still left to regulations. This paper explores the new regulatory

regime for research under the 2005 Act and related regulations. Issues examined will include the appropriateness of the enhanced role of research ethics committees, the role of "carers" in the consent process and the question of "emergency research". While accepting that the 2005 Act provides some much needed clarity in an area which was previously fundamentally uncertain the paper questions whether the new law will ultimately prove truly "fit for purpose".

Sharon McLaughlin, Ph.D. Student, National University of Ireland, Galway

Regulating Violent Video Games: The Virtual World - A Law Free Zone?

Technologies II

Media depictions of a violent nature have long been susceptible to scrutiny at both governmental and parental level. Traditional mediums of entertainment have long been subjected to various codes and standards aimed at regulating, albeit as restrictively as possible, their portrayal of materials considered graphically or gratuitously violent in nature. The video games industry is fast becoming the focus of similar concerns. Since the emergence of the first home gaming consoles in the late 70's and early 80's the industry has developed at a phenomenal rate and the resulting product, the video game itself, now constitutes a truly realistic – and all too often a truly violent – gaming experience. This paper examines the role of the legislature with regards the regulation of content within the video games industry. Governmental intervention in the entertainment sphere has long been denounced and instead, it appears that a system of self-regulation has developed alongside the video game industry. This paper will examine the process of self-regulation, its advantages and disadvantages, and the operation of regulatory bodies set up under its auspices. It is also the intention of this paper to discuss legislative attempts at regulating video games to date, drawing primarily on the American experience, and whether such attempts are likely to prove successful in the future - both in the USA and closer to home. Content based regulation must be examined in conjunction with freedom of expression rights, protected on a national, European and International level, by several instruments including the First Amendment in the United States and the European Convention on Human Rights. Unprecedented technological advancements in conjunction with the widespread convergence of existing technologies have rendered the formulation of suitable regulatory measures an excruciatingly intricate process. Indeed it is questionable, given the rapid development of the video game industry, whether regulation in its traditional form has any role whatsoever to play in what is becoming an increasingly virtual world.

Keywords: technologies, risk

Angela Melville and Hannah Quirk, School of Law, University of Manchester

The Hand that Feeds Us: Strategies for conducting socio-legal research

Governance I

Recent years have seen a boom in Home Office funding for external research, which has largely been attributed to the government's much vaunted enthusiasm for 'evidence led' policy. It has been argued that this input of funds has significantly impacted on the conduct of socio-legal research. Our paper reviews existing commentatory concerning the conduct of socio-legal research for a policy audience with the aim of investigating the problems faced by researchers working in this field. We do not, however, believe that policy research is simply a process of researchers passively obeying 'the pull' (Sarat and Silbey 1988) of the policy audience, and so our paper is also aimed at investigating the strategies and tactics that researchers claim to use when conducting socio-legal policy research.

Keyword: governance

Hugh Middleton and Ian Shaw, University of Nottingham

Understanding Treatment without Consent – an analysis of the work of the Mental Health Act Commission

This paper is a historical exploration of the work of the Mental Health Act Commission (MHAC), established to ensure the care and rights of people subjected to the various sections of the 1983 Mental Health Act. The paper emerges from a Department of Health funded research project, which analysed the data held by the MHAC and informed the government's review of the Mental Health Act. The authors include reference to that analysis and other issues that arose from the project in the presentation her, but their aim is to go beyond that research project, and to offer a broader exploration of mental health provision in both historical and contemporary contexts, discussing whether mental health reforms have learned the lessons of history. The paper is designed to complement earlier work on treatment without consent by Phil Fennell, by providing a more policy-oriented account of mental health law and regulation in the context of health service modernization, discussing contemporary issues facing the MHAC and looking at its future role and, in particular, its planned merger with the Health Care commission in 2008.

Valsamis Mitsilegas, Queen Mary University of London

The Many Borders of the 'Area of Freedom, Security and Justice'

Immigration Law – The Displacement of Immigration Control

Recent years have witnessed the proliferation of border controls at EU level. Deemed necessary on the grounds of constitutional developments (such as the EU eastward enlargement) and the 'war on terror', and promoted under the banner of 'border management' and 'border security', controls extend to a number of levels within and outside the Union. The paper will examine these developments by focusing in particular on: the intensification of surveillance within the territory by the routine provision to immigration authorities of everyday personal (passenger) data and the deepening of surveillance via biometrics; the externalisation and centralisation of EU operational action via the European Border Agency and its by-products; and the externalisation of the border via the implementation of the European Neighbourhood Policy. The tensions between the Union's internal and external policies, as well as between the intensification of surveillance and the objective of the development of a borderless area of 'freedom, security and justice' will be explored.

Sule Momoh, University of Benin

Human Right and Shari'a law in Nigeria

Since 2000, twelve states in northern Nigeria have added criminal law to the jurisdiction of Shari'a (Islamic law) courts. Shari'a has been in force for many years in northern Nigeria, where the majority of the population is Muslim, but until 2000, its scope was limited to personal status and civil law. The manner in which Shari'a has been applied to criminal law in Nigeria so far has raised a number of serious human rights concerns. It has also created much controversy in a country where religious divisions run deep, and where the federal constitution specifies that there is no state religion. This paper does not attempt to study the Shari'a system as a whole. It concentrates on Shari'a in the sphere of criminal law as applied in northern Nigeria and identifies specific aspects of the legislation and practices, which have led or are likely to lead to violations of human rights. Some of these practices violate what many Muslims consider to be Shari'a's own rules and principles, as well as provisions within the constitution.

Sule Momoh and Daniel Stephen, University of Benin

Human Rights and the Law

There is an understandable tendency in modern times to see human rights as perpetually in a state of crisis. From the failure of academia to present human rights in an accessible and definable way to the evidence of abuse constantly on show in the media, human rights appear as a conceit that rarely live up to their promise. This paper suggests that notwithstanding this environment human rights are capable of rescue. However, it requires a dual appreciation. First, that the crisis is partially the result of a failure to acknowledge suffering and society's response thereto as the central and active component of human rights discourse. Second, that reliance on law as a means by which human rights might be realised is flawed.

Daniel Monk, Senior Lecturer, Birkbeck College, London

Criminalising HIV transmission: constructing a new sexual morality?

Narrative I

In the UK criminalising the sexual transmission of HIV was, until recently, an 'academic' question only. And policy makers and the Home Office were agreed that it would not be in the'public interest'. The recent convictions have shattered this status quo and raised complex questions: for legal academics as to the meaning and limit to the defence of 'consent'; for health campaigners as to the consequences for medical confidentiality and safer sex campaigns; and for people with HIV as to how to deal with the increased stigma and challenges to sexual life. While this paper takes these questions as a starting point its central question is: why criminalise now? From a close and critical reading of the key cases this paper answers this question by locating them within broader contexts of shifting notions of sexual rights and responsibilities; (post) liberal ideals of psychological self-governance; an increasingly prevalent criminological model of 'the eliminative ideal'; and, at a European level, the patterns of race in prosecutions. Arguing that the trials are reckless themselves this paper concludes that the construction of the new sexual deviant has little to do with 'HIV' and more to do with other fears and cultural shifts.

Keywords: governance, narrative

Elena Moore, PhD Candidate, Trinity College Dublin

The significance of 'home-maker' contributions upon divorce

Justice IV

This paper reviews the real value of non-financial 'home-maker' contributions in divorce proceedings, i.e. how dependent spouses' contributions are evaluated by the judiciary upon marital breakdown. The aim of this research was to examine how Art.41.2.1° of the Irish Constitution protects a complimentary domestic role for women in the home and how the courts interpret and apply Art.41.2.1° of the Constitution in divorce hearings. The researcher employed a case study approach to analyse the division of assets at High Court divorce cases from 1997–2005. The data for this research was categorised in terms of the wives participation in the labour force. Participation in the labour force varied from case to case and was explained in terms of 'regimes' or 'contracts'. Some families in this study adopted a traditional gender regime based on a family model of a male breadwinner and a dependant domestically based 'housewife'. Other families attempted to adopt an 'equal status' contract, whereby the husbands and wives share the same responsibilities and duties. By classifying the ancillary orders, granted upon divorce, into a given support model typology the findings present the similarities and differences between the judiciary's evaluation of economic and non-economic contributions made by the wife.

Keywords: justice, class

Bronwen Morgan, Professor of Sociolegal Studies, University of Bristol

Globalisation with a Human Face: Access to Water and the Pivotal Paradoxical Role of France

Development II

Globalisation with a Human Face: Access to Water and the Pivotal Paradoxical Role of France Universal access to clean safe drinking water has emerged as a 'global policy problem' around which numerous policy-making initiatives have converged, not least the Millenium Development Goal of halving the number of people worldwide who lack such access by 2015. This paper examines the pivotal role of France in diffusing what can be called 'global water welfarism' as a developmental model. French politicians and civil servant appointees (sometimes working through European-wide processes) structure aid in ways that shape national legislative programs in developing countries. French corporations invoke international arbitral dispute resolution in ways that cast a powerful shadow over national domestic politics. French professional associations draft the rules in the International Standards Organisation that may govern global water services in the future. French NGOs take part in the discursive construction of 'the right to water' in ways that influence the possible emergence of an international treaty on the right to water. This combination of strategies mirrors what scholars have argued is a typically French strategy of 'managing globalisation': one that aspires to formulate and codify the 'rules of the game' in ways that claim to synthesise economic flexibility and social cohesion. But this claim is deeply contested and reflects the paradoxical nature of the 'French model' – even while France lays claim to a model that can externally diffuse the principles of 'service public' to the global arena, its internal governance of water services has long embedded relatively unregulated private sector participation. I argue that the pivotal and paradoxical role of France in global water policy debates reveals the complex interdependency of public and private in state-led capitalism, that this ; interdependency underpins the notion of 'le service public' that is arguably at the core of the 'European model' of capitalism, and that it is unravelling in the context of global governance.

Keywords: development, resistance

James Mulcahy, Legal Researcher with the Commission of Investigation into the Dublin Archdiocese; Senior Tutor in Law, University College Dublin

An Assessment of the Functional Approach to Capacity

The functional approach to capacity is the most fashionable approach amongst law reform bodies and legislators throughout the common law world (England and Wales, Scotland, Ireland, South Africa, Australia and Canada). It has recently been incorporated into the law of England and Wales through the Mental Capacity Act 2005. The paper will note that despite its popularity, the functional approach has not been held up to a high level of scrutiny, academically or otherwise. The paper will assess the merits of the functional approach to capacity in relation to the other commonly recognised approaches (the status and outcome approaches). A more probing critique of the functional approach will be carried out. A major advantage of the functional approach is that it best adheres to the social model of disability. When coupled with enablement focused principles and policies, the functional approach can increase the sphere of activities over which an individual with decisional impairments can make decisions. Another advantage of the functional approach is that it understands that capacity is time/decision specific and can fluctuate. Reference will be made to the various international human rights instruments which direct or recommend a function focused approach to capacity. From the above, it is reasonable to conclude that the functional approach is the most progressive model. However, before endorsing it outright, an examination of the possible defects of this model is necessary. During

the passage of the Mental Capacity Bill through Parliament, a word of caution was offered at parliamentary joint committee stage by the Master of the Court of Protection Denzil Lush. He drew attention to what shall be referred to as the 'general incapacity' argument, which, in essence, relates to a situation where an individual may be deemed to lack capacity even where they have the capacity to make certain decisions. This is because the decisions form part of a larger transaction e.g. management of a portfolio of shares or decisions to be made during litigation. The Government were satisfied that general incapacity was not incompatible with the functional approach. Interestingly, the Irish Law Reform Commission have relied on the decision of Arden LJ in Bailey v. Warren in their endorsement of a "common sense" approach to legal capacity. This approach rejects a purely functional approach to capacity, and suggests it should be moderated by common sense. The workability of this shall be discussed. Another potential problem with the functional approach is that it prizes respect for autonomy over protection of the vulnerable. Given that people with decisional impairments are already vulnerable, to varying degrees, to abuse, the wisdom of erring on the side of autonomy will be discussed. The paper shall briefly assess the employment of the functional approach in Scotland under the Adults with Incapacity (Scotland) Act 2000. The overall aim of the paper is deepen the discussion on the key aspects of the functional approach at a conceptual and practical level. A qualified endorsement of the functional approach will be given.

Linda Mulcahy, Anniversary Professor of Law and Society, Birkbeck University of London

Virtual worlds of justice: the impact of information technology on the dynamics of the trial

Participation & Justice II

In recent years scholars have become increasingly interested in the ways in which the internal and external architecture of courts impacts on the dynamics of the trial and provides clues about perceptions of law in our society. The emphasis in these studies is on the materiality of the courtroom, its barriers and divisions and the symbolism of decoration which provide clues to prevailing ideological assumptions about the function of the trial. The materiality of the modern is critical to the dynamics of the trial. As design principles have matured the tendency has been towards the creation of a series of private areas within the courtroom and segregation of participants despite the general understanding of courts as public places. This has increased the capacity for regulation of behaviour and surveillance of participants. In this paper I will attempt to draw attention to the ways in which the use of technology within the courtroom has the potential to seriously disrupt this scheme. At one extreme, the very possibility of the 'virtual trial' threatens to render concerns about interior design of courtrooms, the positioning of tables and chairs, the creation of physical barriers within the court, so intricately detailed in the Court Design Guide, obsolete. As a government consultation paper argued in 1998 courtroom drama in which the parties gather together could become a thing of the past. What are the implications of these processes of fragmentation and loss of face to face transaction on the dynamics of the trial? To what extent do we need to address changes in the spatial organisation of social relations in the justice system and to rethink the unity of space and place assumed by our forebears? These problems are hardly unique to the law. It has been argued that rejecting notions of place identity is a central task for intellectuals today as the notions of enclosure so important to our concept of place become unsettled and the clear causal relationship between buildings and their content becomes disrupted. What implications does this have for our understanding of law and due process? As the old order of exclusive places dissolves is justice left placeless and disorientated?

Keywords: participation, justice

Gerardo J. Munarriz, PhD student, University of British Columbia

Indigenous Peoples Struggles and the Janus-Faced Nature of International Human Rights Law

Justice II

This paper discusses the paradoxical Janus-Faced Nature of International Human Rights Law and the struggle of indigenous peoples. Focusing on critical legal approaches and postcolonial theories of law, this paper questions whether the established international human rights law and discourse can serve as a strategic tool for indigenous peoples struggle for justice and recognition. It argues that, on the one hand, the official international human rights law and discourse, following the tradition and exclusionary logic of modern international law, is constituted in the rejection and yet reception of the 'others' (the savages, primitives, indigenous), and it operates as framework for a contemporary civilizing mission integrated to the expansion of the market economy and the 'humanitarian' intervention of Western powers in the Third World countries. On the other hand, international human rights law provides indigenous peoples a discursive legal space within the global arena to bring their stories, narratives, worldviews, and to contest its exclusionary logic and Eurocentric liberal individualist foundations. Indigenous peoples' narratives, and demands for international legal personality, collective rights, and sovereignty have directly contested the continuing efficacy of the modern nation-state and law and revealed ongoing dominant and exclusionary representational categories as established by Eurocentric international law.

Keywords: resistance, justice

Nell Munro, School of Law, University of Nottingham

Mental Health Act reform: what would Luhmann do?

The publication of the Mental Health Bill 2006 may represent the final staging post on what has been a long and at times painful journey towards the reform of the Mental Health Act 1983, which began soon after Labour first came to power in 1997. Since the bill will now only amend the 1983 Act, the question needs to be asked why has it taken so long to come such a short distance? Opposition to earlier drafts of the bill was raised on all sides; parliamentary committees; mental health professionals and service user advocates all highlighted flaws in the governments proposals. When deadlock was reached it became clear that either radical revisions or a complete redrafting would be necessary to move the process forward. The government has chosen the latter option. The key players have explained this deadlock in terms of the vested interests of professionals and NGOs or the populist agenda set by government. Inevitably these accounts tend to be partial. This paper will examine the 10 year history of the reform process, and ask how we can make sense of the unexpected conflicts which arose, and the even more unlikely alliances which were forged during this period. It will examine whether conceptualising these debates as being between colliding systems of meaning, as Luhmann would encourage us to do, elicits useful insights into the nature of the reform process. It will also explore the role of the mass media both in framing terms, and in influencing the way in which systems contributed to the debate.

Professor Fionnuala Ní Aoláin & Catherine Turner (Research Associate) Transitional Justice Institute

Gender, Truth and Transition

Transitional Justice and the Rule of Law

Transitional Justice has been of substantial interest to both domestic and international lawyers for many years. Both have had a healthy pre-occupation with what might be called 'Dealing with the Past', namely the morality and law of holding human rights abusers accountable at the point of societal change. However, accountability mechanisms have clear and often profound implications for women; a fact which has gone largely unrecorded in the vast swathes of writing generated by transitional justice discourse, and has resulted in little analysis of how and where gender fits within this institutional scheme. On closer examination, we come to understand that justice operates pragmatically in the transitional context, and a fundamental premise of this paper is that the pragmatics of justice in transition are no less gendered than their formal counterpart, despite the informality and flexibility of operation which might at face value lend itself to assumptions about gender neutrality. We suggest that a sustained analysis of what 'wrongs' are accounted for and which are not, and the relationship between a gendered truth and a politics of transformation for both men and women in new political dispensations has been missing from conceptions of transitional justice. This paper will explore the multiple ways in which transitional justice processes have conceptualised the forms of violence for which accountability is sought. We specifically claim that bodily violence has a particular status which maps onto a gendered understanding of violence and harm in the transitional context. Using case studies of specific truth commissions the paper explores how gender is addressed in accountability processes and whether the construction of the concept of 'harm' currently relied upon in the transitional context takes sufficient account of women's articulated experiences of violations in conflicted and authoritarian societies.

Keywords: Gender; Accountability; Human Rights

Aoife Nolan, Lecturer / Assistant Human Rights Director, Queen's University Belfast

Children's Economic and Social Rights: a Case of the Courts vs. Democracy?

Participation I

Children have been provided with a wide variety of economic and social rights (ESR). However, the high levels of deprivation experienced by children worldwide demonstrate that these rights have often not been effectively vindicated by law- and policy-makers at a domestic level. The failure to give effect to children's ESR is most often the product of legislative or executive indifference and inertia in relation to child ESR issues. This paper will focus on one particular means by which children's ESR may be guaranteed or implemented: judicial action. I will consider the legitimacy of judicial efforts to guarantee the ESR of children who are effectively excluded from the majoritarian democratic decision-making processes that are key to the realisation of such rights. I will make the case that the courts may do so even where such behaviour on the part of judges appears prima facie to be undemocratic and arguably results in the courts' exercising control over the discretion of the other organs of government with regard to law- or policy-making. In doing so, I will concentrate particularly on the claim that, when dealing with children's ESR, courts violate the separation of powers doctrine as such activity involves judges exercising control over the law- and policy-making functions traditionally regarded as allocated to other branches of government. I will discuss the courts' function under the separation of powers in light of their duty to ensure that children's ESR are upheld by all branches of government. I will consider the implications that children's relative powerlessness within democracy has for the judiciary's role as 'guardian of rights' and for the courts' approach to separation of powers doctrine in the context of children's ESR.

Keywords: justice, participation

Rohaida Nordin, Lancaster Law School

Indigenous Peoples' Rights in Malaysia – A Domestic Issue

Development III

Indigenous peoples' rights have received attention from international institutions including the United Nations and International Labour Organisation. However, the dedicated international instruments on indigenous peoples' rights such as the International Draft Declaration on the Rights of Indigenous Peoples, the International Labour Organisation Convention No 169 and the Convention on Biological Diversity are example of soft law and will not create obligations for any country under international law. Adoption of the instruments will not make a State accountable to the international community for its actions towards its indigenous peoples. Therefore, it will remain a domestic issue between the respective indigenous people and the State government. In recent years, several governments, including the Malaysian government have amended their constitutions and legislation in line with the initiatives made internationally to respect and protect indigenous peoples' rights. However, in practise, the existing constitutional and statutory provisions are often ignored by the executive branch of the State. Often national needs for 'economic growth' appear to supersede the legal provisions protecting indigenous peoples' rights. When this conflict arises, the judiciary does not play a decisive interpretative role in favour of indigenous peoples. This is particularly the case where the conflict arises between indigenous peoples' rights and the State duty to ensure development, i.e. between private rights of indigenous peoples and the public right of Malaysian citizens for economic development. Therefore the constitutional and statutory provisions in Malaysia do not necessarily ensure the actual enjoyment of indigenous peoples' rights. Much depends on the interaction of the regulatory and institutional framework of indigenous peoples' rights in Malaysia.

Keywords: development, governance

Dr Gbenga Oduntan, Kent Law School

Tracing Stolen Funds from Developing States to Developed States: The Emerging Regime of International Cooperation

International Law in the 21st Century

A silent revolution is going largely unreported in legal and political scholarly discourse. The first cases of stolen funds from sovereign coffers (transmitted through various ingenious methods into the ready and waiting hands of banks and other financial institutions situate in another sovereign territory) being repatriated has gone largely unsung in scholarly journals even though it is clear that this development could set important precedents which would be useful to international lawyers and governments in the 21st Century. Countries of the Southern Hemisphere that have been systematically defrauded in this manner include Kenya and Nigeria and the paper will seek to outline the legal regime that has made the return of significant sums into coffers of these states possible. The experience of these states would be used to establish the new imperatives of cooperation to repatriate stolen funds as well as combat corruption in the international system. The paper would be concerned with stolen capital from government coffers (at all levels of government local, regional or national) by public officials through the abuse of their position whether by fraudulent accounting, embezzlement, kickbacks and bribery the bulk of which are then transferred to personal accounts in Western States or the leading safe havens for international capital with strict banking secrecy rules and tradition. Other forms of damaging corruption which also ensure the steady flow of illegal funds away from the national economy in developing states include corruption by multinational corporations, corporate fraud,

fraudulent and corrupt activities in the private sector, questionable and fraudulent loan practices and the paper would examine perspectives that may put a stop to this and the challenges they would pose to the emerging duty to return stolen funds.

Adaeze Okoye, Hull Law School

Corporate social responsibility [CSR] as a contested concept: socio-legal perspectives

Becoming Legal III

CSR is an essentially contested concept causing incessant arguments about its accurate meaning. The conditions for essentially contested concepts are laid out in Gallie's seminal work. Firstly CSR is appraisive therefore crediting some kind of valued achievement; secondly this achievement is of an internally complex character. Thirdly, any explanation of CSR value must therefore include reference to the respective contributions of its various parts or features; fourthly this accredited achievement must of a kind that admits to considerable modification in the light of changing circumstances; fifthly the concept must be used both aggressively and defensively; sixthly, there must be a derivation of any such concept from an original exemplar or 'core' whose authority is accepted by all contestants and finally the probability that continued competition for acknowledgement as between the contestant users enables such CSR's 'core' achievement to be sustained and developed in optimum fashion. Yet to accept CSR as a concept is essentially contested does not mean that it is without a core meaning or 'original exemplar'. This core can be found within the purpose that CSR seeks to achieve. This is to give legitimacy to pervasive corporate power which has the ability to affect lives within society. Legitimacy in this sense refers to subjecting such power to adequate constraints and control. Often CSR is defined as corporations going beyond the legal but where law is viewed Llewellyn's sense of law-jobs (that is, from the perspective of law's role in society) then definitely, there is a strong role for law in the legitimacy of corporate power. Nonetheless this role may not be adequately fulfilled within the CSR agenda as it currently stands.

Keywords: becoming legal, governance

Javier Oliva, University of Wales, Bangor

Devolution of powers in Spain and religious denominations

Law and Religion - Church and State

In 1978 the Spanish Constitution established a territorial model which can be regarded as a hybrid system between a centralist and a federal State. It has recognized two types of regions: 1) Historical regions, those with wider functions which were allowed to exercise joint powers with the State from the approval of their regional laws or estatutos de autonomía. 2) The remaining regions which had to wait for five years in order to reach the same level of competences as the historical ones. Ever since, the constitutional development in the Spanish State has witnessed an ongoing struggle between both categories and the homogenisation of the powers of all regions across Spain has created resentment amongst those which were regarded as 'especial' by the Constitution: Catalonia, Basque Country, Andalucia and Galicia. In the last few years Spain has evolved towards a 'quasi-federal' model of State and a second decentralization is currently taking place in those historical regions. The Catalan estatuto de autonomía was enacted last year in an extremely controversial period for the Socialist Government. Very recently the text of the Andalusian estatuto de autonomía has been agreed by the different regional leaders and it will be subject to referendum in February 2007. These reforms of the fundamental laws of the Spanish regions are undoubtedly crucial from the point of view of Ecclesiastical Law (that legal branch which deals with relationships between public authorities and religious denominations). Several 'regional Ecclesiastical Laws' are emerging in the Spanish territory and this legal branch has

stopped being an exclusive matter of the State legal framework. The contribution of religious denominations to areas such as education and health is a fact and the powers of Spanish nations on these fields are almost exclusive nowadays.

Olaoluwa Olusanya, University of Wales Aberystwyth.

Granting immunity to child combatants supranationally

Transitional Justice and the Rule of Law

This paper examines the issue of granting immunity to child combatants supranationally. This issue raises a legal dilemma, that is, whether the policy of granting immunity to children who commit crimes in times of war can act as a shield for protecting the most vulnerable members of society. Or alternatively, whether a wholesale approach to immunity for children who commit crimes will only lead to abuse, as children have varying rates of cognitive, emotional and physical development and may therefore need different levels of treatment by the criminal justice system. The starting point for the discussion in this paper is the examination of the practice of the international criminal tribunals in relation to attributing criminal liability to child combatants for international crimes such as war crimes, crimes against humanity and genocide. This examination paves the way for subsequent explanation of how children found to have perpetrated these atrocities should be treated once they have been apprehended. The paper will identify and elaborate upon how children who commit crimes generally are dealt with under supranational criminal law. It will achieve this by focusing on attempts at trying to establish a universal age limit for which such children would be immune from criminal prosecution and explaining why these attempts are unworkable in the supranational criminal law system. The discussion will also demonstrate how this issue transcends the traditional divide between common and civil law countries. Thus intra and inter state efforts at grappling with the question of establishing a universal age limit for children constitutes the focal point here. The third part of the discussion in this paper involves the issue of immunity for child soldiers in the context of theories of punishment which are common to the supranational criminal law system such as rehabilitation and retribution. The emphasis here will be on the different approaches to this issue by countries within the supranational criminal law system. The final part of the discussion will focus on the term 'youth'. Here the paper will highlight how the use of the term 'youth' as a mitigating factor in the context of sentencing by the International Criminal Tribunals for the former Yugoslavia and Rwanda, leads to controversial results.

Melanie O'Brien, Nottingham

The Potential Role of the International Criminal Court in Transitional Justice with Reference to Iraq and Victims' Rights

Transitional Justice and the Rule of Law

It is probable that the International Criminal Court will encounter the majority of its cases involving crimes committed in states which have previously found themselves in a situation of armed conflict, and thus likely have progressed to a situation of transitional justice. This is the case with the current situations under investigation by the ICC, of Uganda and the Democratic Republic of Congo. One situation which the Office of the Prosecutor has declined to initiate full investigations into is that of Iraq. In February 2006, the Chief Prosecutor of the ICC released a communication concerning the situation in Iraq, which addressed different communications the Prosecutor's Office had received alleging the commission of crimes with the jurisdiction of the ICC. The communication addressed allegations of genocide, crimes against humanity, and various war crimes. This presentation will briefly look at why the Prosecutor decided not to undertake an investigation into allegations of war crimes, in particular those of wilful killing and inhuman treatment. It will then examine the impact that this negative decision may have on the victims of

these crimes, emphasising the strong role that victims are designed to play in the procedures of the ICC. Even in the situation where the crimes were likely committed by nationals of a Western state party to the Rome Statute of the ICC, the ICC may still have a role to play when the territorial jurisdiction of the crime committed is a country in a state of transitional justice. Examples of the lack of investigation into and prosecution of crimes committed by foreign troops in Iraq prove the potential for this role in criminal justice for war crimes. Primarily, the ICC has the potential to ensure lack of impunity for perpetrators, and to guarantee that victims of war crimes receive the justice they deserve.

Keywords: International Criminal Court, international criminal law, victims' rights, Iraq, war crimes

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Charles O'Mahony, Legal Researcher, Law Reform Commission of Ireland

The Effectiveness of Human Rights Law in Realising Adequate Standards of Healthcare in the Prison Setting

Sentencing and Punishment

The failure of states to deliver adequate healthcare services to prisoners is a recurrent theme. Ensuring minimal standards of healthcare under international law is essential as imprisonment often has a detrimental effect on the mental and physical well being of prisoners. This paper discusses the international law relating to healthcare provision in prisons. This paper will discuss the European Convention on Human Rights, ECtHR case law, United Nations documents on the treatment and detention of prisoners, and Council of Europe recommendations and rules. The work of the Committee on the Prevention of Torture in promoting better standards of healthcare in the prison setting will also be discussed and assessed. The paper will examine the effectiveness of this body of international law in realising adequate standards of prison healthcare, with a particular focus of its application in Ireland and the United Kingdom. The paper will suggest that UN sources of law are ineffective in realising adequate standards of healthcare for prisoners. In support of this thesis Irish and UK case law will be discussed and the hostility of the judiciary to such sources of law will be highlighted. The language of human rights is increasingly being employed by the Government and prison authorities in Ireland in respect of healthcare policies. Nevertheless, the standards of services delivered are not compatible with human rights norms. Important to this discussion will be the Irish Prison Rules (2005), which will be comparatively analysed in the light of the standards for prison healthcare outlined in the Council of Europe Prison Rules (2006). Additionally, the paper will examine the international trend of integrating prison healthcare services within national healthcare systems. This examination will involve a comparative analysis of the divergent policies in Ireland and the United Kingdom. Finally the paper will outline some of the difficulties that impede the delivery of effective healthcare in the prison setting. Issues such as drug and alcohol abuse, mental illness, and communicable diseases will be considered from a legal and policy perspective.

Keywords: Prison, Healthcare, Human Rights Law.

Mary O'Rawe, Transitional Justice Institute, University of Ulster

Accountable Intelligence and Intelligent Accountability: The Shadow of Collusion in Northern Ireland

Transitional Justice and the Rule of Law

Finding fertile terrain in US and UK policy on 'the War on Terror', intelligence led regime policing is in the ascendancy on a global level. This has huge implications for human rights protection. It poses serious and often delegitimated questions in terms of the transparency and accountability of state-based and international security structures, systems and processes. Time and again law has proved its inability to gain sufficient purchase in this area to render security

services subservient to a Rule of Law Model. The ramifications of this are particularly keenly felt in conflicted and post conflict societies. This paper explores, through the prism of the Northern Ireland conflict and post conflict experience, how counter insurgency strategies have operated to undermine and distort the Rule of Law in the 'fight against terrorism'. While accepting the need to provide security and deal with threats to that security, the paper problematises the sanitation and reification of 'covert intelligence' schemes and questions the extent to which such systems contribute to insecurity rather than security. Drawing on investigations by NGOs, senior police officers and, more recently, the Office of Police Ombudswoman in Northern Ireland, the paper points to what we know and what we still do not know bout the collusion of state agents in crimes up to and including murder. It further explores how that comes to happen within a supposedly democratic framework and examines where and why law, internal organisational systems and civilian oversight processes have neither prevented not adequately controlled 'national security' elitism and the development of 'force within a force' paradigms. The paper further considers the difficulties of truth telling in this area, the implications of such legacies for peacebuilding and the lessons that might be gleaned beyond Northern Ireland in terms of the prosecution of the 'War on Terror'.

Keywords: security, human rights, policing, intelligence, collusion, accountability,

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Danny O'Rourke, Graduate Student, York University Canada

Bridging Internal Reason and External Violence: Toward a Substantive Theory of Law and Globalization

Sovereignty & Resistance

With the traditional role of the nation state shifting toward the facilitation of international competitiveness, the normative function of law has expanded with astonishing complexity. This paper seeks to explore the changing political and ideological role of law given the impact of globalization (or the international expansion of capital markets) on state and regulatory regime restructuring. The key assumption of this analysis is that with the supposed 'bypassing of sovereign state capacities' the normative and regulatory tasks of 'the rule of law' have been elevated as both a vehicle of dissent and social justice while remaining indispensable to the legitimacy of liberal democracy in resolving tensions pertaining to social cohesion. These contradictory functions are best captured by the ubiquitous political importance of regulatory principles such as 'transparency,' 'harmonization,' and the juridical expression of 'universal rights.' This analysis suggests that the relationship between the nation state's demise and the promise of international and domestic law transforming into the administrative law of the 'cosmopolitical society' are premature and require further scrutiny. The law continues to govern and normalizes open-ended fields of large social interests by expressing a vision of society as it secures the consent of a political authority that seemingly no longer exists. While supposedly functioning as a bulwark against pre-political violence and chance, law (with its unique political and historical function in the reproduction of legal subjectivity, norm and normalization) proves more politically expansive. Only by drawing on various theories of its own nature can we begin to assess the political significance of law, therefore moving toward a more sophisticated understanding of the contradictions inherent in the relationship between the liberal law, politics and globalization. A critical theory of law and politics begins as an interdisciplinary endeavor that seeks to examine the structural and philosophical complexity of law (it's relative-autonomy) in an effort to provide insight to the material and moral foundations or 'social sources' of liberalism's sustainability amid global changes.

Keywords: sovereignty, resistance

Augur Pearce, Cardiff University

'The Polity of English Dissenting Protestantism: from independency to centralisation'

Law and Religion - Religious Law

Every Christian tradition has known tension between the desire to take decisions locally, where issues are understood and personalities known, and the need for consistency, guidance, and external support that only collaboration beyond the immediate locality can satisfy. Classically, however, there has been a question how far such collaboration can properly go. The Savoy Declaration of 1658 denied the claim to divinely-instituted authority of 'any church more extensive or catholic' than the 'particular societies or churches' met for mutual edification and public worship; whereas congregations in the presbyterian tradition never felt complete without integration into a wider structure of oversight and recourse. Yet lines of demarcation which could have been clearly drawn a mere 150 years ago have become increasingly blurred as falling numbers, financial necessity, external regulation and the perceived need for a 'public face' have drawn independent congregations into greater dependence on a *de facto* centre. While others could perhaps illustrate this trend in terms of statistics or of developing ecclesiology, this paper tells the story in terms of structural and constitutional change, showing how a religious rule system can sometimes struggle between social reality and historic principle. Episcopal protestantism is no longer immune to countervailing tensions, now that the 'voluntary principle' has taken hold and 'people in the pew' have realised how dependent diocesan structures are on local resources. But it is in the non-episcopal churches that the historical shift can best be noted, and this paper will therefore confine its focus to English branches of the Congregational, Baptist, Quaker, Presbyterian and Methodist families.

Ole W. Pedersen, School of Law, University of Aberdeen

Theoretical Issues of Environmental Justice: Who is Justice for?

Environmental Law

Theoretical Issues of Environmental Justice: Who is Justice for? Socio-Legal Studies Association Conference, Kent Law School, 3-5 April 2007 Ole W. Pedersen, School of Law, University of Aberdeen Environmental justice as we have come to know it from its origin in the United States and its bourgeoning emergence in the UK does not necessarily fit in well with traditional environmental concerns. The concept of environmental justice has traditionally been taken to imply justice to specific social groups in an environmental context and not per se for the environment. This paper will aim at analysing the concept of environmental justice in two parts. Firstly, it will be argued that the state of the environment has not conventionally been a concern for the environmental justice advocates. Traditionally environmental justice preoccupies itself with concern for human health and unequal treatment of minorities and not necessarily with the environment. Hence, in order to incorporate environmental concerns into a definition of environmental justice it must be combined with and borrow from concepts relating to environmental ethics. The paper aims at discussing a number of relevant theories that will allow for such combination. The discussion will, for example, draw inspiration from the ongoing debate in the environmental justice literature dealing with the linking of environmental justice and sustainable development. Secondly, it will be argued that an idea of justice for the environment is generally in opposition to traditional liberal theories of justice that have born the greatest significance in the legal theory. It will instead be argued that the 'proceduralisation' of environmental justice can be explained by reference to some of these theories of justice and that the emphasis on procedural mechanisms is an important aspect of environmental justice although experience from the US shows it has its flaws as well. The paper will conclude that this emphasis away from strictly environmental concerns and towards anthropogenic aspects and areas of law

is no new line of thought and this is perhaps indicative of where the future boundaries of environmental law may lay.

Keyword: justice

Amanda Perry-Kessaris, Senior Lecturer, Birkbeck Law School

Can you trust through law if you don't trust in law? Civil society, government, foreign investment and the courts in Bengaluru.

Development III

Drawing on the work of Roger Cotterrell, it is possible to argue that legal systems can, should and do act as a communal resource for (a) supporting interactions among those who are engaged in stable, trusting relations (networks of relations of community); and (b) mediating interactions between those whose relations are not stable, and/or trusting. This paper asks to what extent the Indian courts are willing and able to perform these functions in respect of relations surrounding foreign investment in Bengaluru (Bangalore). It emphasises in particular the significance of trust between the judiciary and its consumers as a determinant of the ability of the courts to support relations of community. The paper is based on research funded by the SLSA and the Leverhulme Trust, to appear in Global Business, Local Law: Trust, foreign investor-government-civil society interactions and the Indian legal system, Ashgate, forthcoming 2007.

Keywords: development, networks

Dr. Peter Petkoff, Bristol School of Law and Balliol College, Oxford

Legal, Religious and Secular Perspectives in the context of the Changing Nature of Religious Rights under International Law

Law and Religion – International Human Rights Perspectives

The paper explores the new questions which emerge in the context of the ECHR and UN religious rights' discourse and studies the ways 'secularist project' has shifted the direction of human rights protection from resolving specific conflicts and tensions towards the creation of a secularist ideological code. The paper analyses in what ways from international lawyer's perspectives this process has an impact of the human rights protection and jurisprudence and identifies the following overarching themes which re-emerge within this jurisprudence and present the tensions between legal, religious and secular perspectives: Universality v subsidiarity; Legal Perspectives v Religious perspectives; Community v individual; Religious rights and other equality agendas. In studying these points of conflict the paper advocates a more dynamic religious rights jurisprudence which views the above tensions as a hermeneutic principle, as inherent paradoxes of interaction between the religious and secular worlds rather than as a problem that has to eliminated.

Alexandra Pimor, Liverpool John Moores University

The spiritual/religious dimension of European citizenship

Law and Religion – Religion, Tolerance, Human Rights and Citizenship

As an element of national responsibility, religious matters seem to fall outside the realm of Union competences. Nevertheless, religion has recently become an item in the European political debate, particularly with the controversy about whether to include references to 'God' and Europe's Christian heritage within the Union's draft constitutional treaty. In response to these concerns, the final draft states in its preamble that the EU Constitution draws inspiration from the 'cultural, religious and humanist inheritance of Europe', whilst the Charter of

Fundamental Rights refers to the 'spiritual and moral heritage' of the Union. The ensuing discussions on European cultural identity seem to imply that religion may have a significance in the development of the Union. Social studies have recognised the role played by Christian believers in the Union's birth and integration process; however, it was pointed out that although "Christian religious traditions… have contributed to the ideological and cultural support of the European Union… [i]f in fact this contribution is now diminishing, the question for European elites is whether or not ideological support for the market and individual cost-benefit analyses will be enough to maintain affective support for the Union…" (Nelson & Guth 2005:10). The quest for affective support of the European project has been essentially determined by the advancement of European citizenship. However, a citizenship primarily based on market-oriented rights may not necessarily produce the kind of emotive attachment that the Union, as a political entity and community, is seeking. Therefore, arguments that Europe needs a soul tend to bring attention towards spiritual (and religious) issues. Consequently, given the spiritual references contained in the EU draft treaty and Charter, the paper explores the possibility that (the legally engineered) European citizenship concept may have a spiritual/religious dimension, which could be a factor in the development of a sense of ownership and belonging of the European project by its peoples.

Christine Piper, Professor, Brunel Law School

Is there a role for punishment impact in sentencing?

Sentencing and Punishment

Some people experience punishment more keenly than others. There are two common responses to this: 'They should have thought of that before they committed an offence' or 'It's unfair if punishment is worse for some people through no fault of their own'. The circumstances which, typically, elicit these responses include severe illness, old age, separation from young children, loss of home and employment, and extreme vulnerability to bullying and abuse in prison. The classical justifications for punishment can be used to support or critique both of these approaches. Further, the differing factors which cause punishment to impact differentially may not be amenable to generalised 'solutions'. Indeed, there is no consensus as to whether there is a problem' and whether solutions should be sought. This paper reviews the current law and practice in relation to allowing impact to be taken into account as a mitigating factor. It then suggests that there should be a proper discussion of principles which could allow impact to have some effect on sentencing in such a way that just punishments were more, not less, likely.

Rosario Ponce de Leon, PhD Researcher Lancaster Law School

The Utopia of the International Law Implementability vs. Implementation Practicalities

Development II

The majority of texts, reports and official national and international documents in relation to human rights give no attention to the difference between Implementability and Implementation. Implementation is the most regular concept used to explain the practical action of putting something into effect or action, to that end, tools or other means are provided to do something, to pursuit some aim or goal. Specifically in relation to the human rights realm, the importance to implement plans, guidelines and strategies is extreme. Results of Programmes and Plans of work found as part of innumerable reports account the impossibility of invigorating the Charter of the United Nations as the Legal Guideline for the world, to adequate it, many other version of the same aims had to be written, some of them are considered binding instruments as hard international law and other are given the status of international soft law even though they are as important as the others. It is also well known the difficulties United Nations Bodies have

encountered to reach Agenda 21 targets and Millennium Development Goals not letting aside the fundamental human rights enshrined by both the International Covenants on Civil and Political and Economic, Social and Cultural Rights originally stated since 1976 and fully consecrated in many other binding instruments. The concept of Implementability is still in formation. Arjun Sengupta coined the term as part of the theory of the Right to Development. Implementability is also best known in the Science Area and in Economics; in fact Nash Implementability is the theoretical support of the Games Theory which should not be so apart from the Social Sciences territory due to the possible study of the probability of getting social alternatives for consumers based on it. The concept of utopia, as it was presented by Zygmunt Bauman will be considered in the elaboration of the theoretical framework of Implementability. Implementability will be understood as a Process in which every knowable variable may influence the outcome of such course of action. Implementability will be seen as the utopia, as an option of solution to problems United Nations is facing. 'Utopias pave the way for a critical attitude and a critical activity which alone can transform the present predicament of man'. Thus, the paper intents to make a compilation of the later argumentation to present the difficulties encountered in the path of the human right to water pursuit.

Keywords: development, becoming legal

David Prendergast LLB (Dub), LLM (Lond), BL (King's Inns)

Inchoate liability and glorifying terrorism

Law and Incitement

The inchoate offences of attempt, conspiracy, and incitement sit uncomfortably in the criminal calendar. Criminal law theory asserts that limiting liberty by means of the criminal law requires strong moral justification and that liability should attach only for commission of previously promulgated, specifically defined offences. Inchoate offences fall short of these requirements because they are vague and have a wide reach. Incitement, which necessarily involves communication, has the additional problem of encroaching on free speech principles. Incitement's cousins at common law, sedition and public mischief, create similar tensions. Judges and academics have sought to identify the parameters of these common law offences, typically refraining from and expanding liability. In contrast, Parliament has often expanded liability, the Terrorism Act 2006 being a recent emphatic example. My paper examines new offences of encouraging terrorism enacted by the Terrorism Act 2006 in light of traditional principles of inchoate liability. Using specific examples, I will show how the new offences stretch traditional inchoate liability further than ever before. The key difference between traditional inchoate liability and the new statutory regime is that direct incitement – as opposed to indirect incitement – is no longer required for liability. For example, conviction may lie under section 1 of the 2006 Act for a reckless expression of opinion that can be understood as approving or "glorifying" terrorist acts. For this reason, the new statutory regime put in place by the 2006 Act can be likened to a doctrine of thought-crime.

Michael Quilter, Senior Lecturer, Department of Business Law, Division of Law, Macquarie University, Sydney.

The Impact of Socio-economic Factors on the Development of Bankruptcy - A Critical Appraisal

Risk 1

This paper traces the development of the law of bankruptcy with a view to contextualising the socio-economic forces that have shaped the law since its origin. Bankruptcy is an example of an area in which the development of the law has reflected the diverse essence of emerging social and economic systems. Historically bankruptcy developed in tandem with the need to both,

encourage, and guard against, risk. That the development of the law of bankruptcy was always closely tied to the advance of credit is no accident as the risk involved in credit demanded that the law find an effective way of dealing with debt. The history of the development of bankruptcy has paralleled the development of great empires such as Rome during the late Republic and early Empire; and England during its age of exploration and discovery - and involved great men such as Caesar, Shakespeare and Defoe. An effective bankruptcy system is integral to the development of complex commercial society and the forces that have shaped the development of the law of bankruptcy are indicative of the forces that shape much law, past and present - these include the punishment of socially unacceptable conduct, encouragement of entrepreneurship, and management of risk. In fact the key tenants of the law of bankruptcy today, being proportionate distribution and discharge of the debtor, have in varying degrees remained core to its development from its origins. Shakespeare laments the 'poor and broken bankrupt' in As You Like It, has Shylock 'whet' his knife 'to cut the forfeiture from the bankrupt there' in The Merchant of Venice and Elvis Costello sings of London's 'bankrupt souls' in London's Brilliant Parade. The concept is universal, its development particularly illustrative of this universality.

Keywords: development, risk

Hannah Quirk, Lecturer, School of Law, University of Manchester

Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer

Justice I

This article examines the different ways of identifying wrongful convictions in public, legal and academic debate. It considers the importance and exclusivity of these definitions in the light of recent calls to change the statutory test applied by the Criminal Cases Review Commission to consider innocence rather than the 'safety of the conviction'. Campaigners' claims for innocence, and their associated attempts to establish Innocence Projects, are examined against the current appellate structure, the role of the CCRC and the effectiveness of innocence as a campaigning tool. Despite the rhetorical power of 'innocence', it is contended that to import such a standard into the legal system would be retrogressive and counter-productive, both as a safeguard against wrongful convictions and in protecting the integrity of the system.

Keyword: justice

Filipa Raimundo, Institute of Social Sciences, University of Lisbon Portugal

Prosecuting the political police (PIDE/DGS) in Portugal's Democratization

Transitional Justice and the Rule of Law

On April 1974, a military coup d'état put an end to forty-eight years of authoritarian rule in Portugal. During almost half a century, the political police of the Estado Novo (Salazar's regime) followed orders to repress the opposition – particularly communists and extreme-left groups – to control state boundaries, and from 1961 onwards to help the military defeat the rebels that fought for independence at the Portuguese African colonies. During the revolutionary period of the transition to democracy – that lasted until 1976 – a strong debate emerged on "how to deal with the past". Left-wing movements were highly demanding, the press supported an intense public debate and the political elite could not escape from taking political and legal decisions on "what to do with the pides and its snitches", since the political elite was given the chance to escape transitional justice. What started out to be an apparently punitive legal process, end up being somehow moderate in what concerns final court sentences. These legal processes – held by military courts – were preceded by preventive detentions and didn't start before the end of the "revolutionary period". The question of retroactivity was inevitable. This paper on the Portuguese political police and transitional justice will provide the political science view on the

"revolutionary laws" produced during the transition to democracy in Portugal and the prosecutions that determined the degree of punishment and accountability that the Portuguese transitional justice process represents to other comparative cases. I shall sustain that the type of transition to democracy is seminal to the extent of the transitional justice applied

Keywords: transitional justice, political police, "revolutionary laws", retroactivity, accountability, rule of law, democratization

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Fiona Raitt, University of Dundee

The role of the judge in facilitating children's participation in family law proceedings

Child and Family Law and Policy

Across the common law world family justice systems encounter difficulties in finding ways to listen effectively to children and to make sure their participation is meaningful. In circumstances where legislation expects that the wishes and feelings of children will be ascertained one method available in most jurisdictions is for the judge to speak to the child. However there is often considerable reluctance to do this, not least because of the uncertain status of any communications between judge and child. In particular, contrary to what children may prefer, they cannot be given any guarantee of confidentiality for their views. In this paper I outline the main advantages of the "judicial interview" as well as the objections raised against them. I draw on the findings of an empirical study I conducted recently with judges and sheriffs in Scotland, where such interviews are quite common, to argue in favour of more widespread use of interviews. I suggest that there are dimensions to judicial practice in Scotland which are both innovative and creative in terms of how they facilitate children's participation whilst also accommodating issues raised by confidentiality.

Marcus Redley, Senior Research Associate, Learning Disability Research Group, Section of Developmental Psychiatry, University of Cambridge

Implementing the Independent Mental Capacity Advocacy (IMCA) service in the health service: 'serious medical treatment' decisions

This presentation draws upon the recently published evaluation of the pilot IMCA service and current research looking at 'serious medical treatment' decisions in order to identify enablers and barriers to the implementation of IMCA in health service. We will present and discuss i) demographical data documenting current demands for IMCA services in respect of 'serious medical treatment' decisions and ii) qualitative interview data documenting health care practitioners' attitudes towards the new IMCA service, how they see the service being implemented across a hospital in particular medial specialisations, their experience of using the IMCA service, and how they believe the IMCA service can benefit patients who need serious medical treatment lacking decision-making capacity.

Niamh Reilly, Transitional Justice Institute

Rising Fundamentalisms and Women's Human Rights

Transitional Justice and the Rule of Law

'Rising Fundamentalisms and Women's Human Rights' considers the political and conceptual relationship between rising fundamentalist forces and local women's counter movements in transitional contexts. I suggest that the nexus between the two offers a valuable window on the relativist/universalist divide and the prospects for reclaiming the radical promise of universal human rights while recognising the merits of anti-universalist/relativist critiques. Specifically, I

argue that cultural relativism (from both 'left' and conservative angles) which advances the notion that the pursuit of gender equality and rights is a 'Western' agenda, ignores and fails to theorise the signficance of efforts by locally-situated women's movements, which have been at the forefront of resisting fundamentalist forces (and their wider attack on democracy and human rights) since the 1970s. Drawing on specific examples, (e.g. Malaysia, Bangladesh, Nigeria), I argue that the actions and analyses of these movements suggest modes of praxis that address legitimate relativist critiques of Western hegemony, while also retainining core commitments to critically revised universal values such as gender equality and the rule of law. Further, by defining the actions and analyses of such movements as inherently 'Western', uncritical relativists perpetuate problematic political and ontological assumptions; they refuse to acknowledge the legitimacy of local women's movements (and other internal critics) by preemptively denying their 'authenticity' and, hence, credentials to represent the 'local culture' that they dare to criticise. Ultimately this is an incoherent position that reproduces gender bias and undermines the efforts of indigenous human rights and democracy advocates against fundamentalist forces.

Marny Requa, Queens University Belfast

Truth, Transition and Obfuscation in Northern Ireland: The Inquiries Act 2005 and the Quest for Public Accountability

Transitional Justice and the Rule of Law

The Inquiries Act 2005 significantly expanded executive control over public inquiries, establishing a regime that allows a minister to determine the duration of an inquiry and restrict public access to information, proceedings, and reports, and to interfere with budgetary decisions, among other means of control. The legislation jeopardizes inquiry independence and public confidence in inquiries as truth-seeking mechanisms. In the context of transition from conflict in Northern Ireland, in which public inquiries have a limited but potentially significant role to play, the 2005 Act is poised to limit truth recovery and subsequent reform and accountability. This paper analyses the 2005 Act and discusses the political atmosphere in which it was enacted, considering the legislation in the context of transitional justice in Northern Ireland and the legacy of unresolved, lethal force deaths. The paper finds that an Article 2-compliant investigation does not seem possible under the 2005 Act. It also considers the impact that the Patrick Finucane case may have had on the government introducing the Inquiries Bill at the time that it did, in the form that it did. The 2005 Act raises the issue of whether some elements of the state are particularly resistant to transitional justice related to the conflict, and whether government policy was influenced to obfuscate the truth.

Stephen Riley, Lecturer in Law, Sheffield Hallam University

The Law of Exhausted Peoples: Nietzschean Critique and International Law

Sovereignty & Resistance

One of the few genuine historical events mentioned in Nietzsche's fictive history of moral phenomena, 'The Genealogy of Morals', is the Thirty Years' War. It is at this point that the 'slave revolt' in morality becomes victorious. Evidenced by an etymological inversion in the connotations of 'good' (from 'noble' to 'useful'), Nietzsche intimates that this inversion of healthy valuations was linked physiologically to the exhaustion experienced by Europe after this brutal war (a war producing widespread hysteria and the high-point of witch-trials in central Europe). We might note that it is precisely at this moment in European history that another morally ambiguous history begins: that of international law. I wish to defend two broad arguments derived both from Nietzsche's Genealogy and from the earliest manifestations of public international law. First, that international law is fruitfully approached, and critiqued, through Nietzsche. While Marxist approaches to law emphasise the power of the 'strong over

the weak', Nietzsche emphasises ways in which the weak find ways to exercise power over the strong. Accordingly, seeing international law driven, not by powerful states, but by the will to dominate powerful states, we can make sense of the moral 'failings' of international law as it tries to harness, rather than negate, inequalities of power. Second, I would argue that Nietzsche offers a way to critique some forms of canonical and contemporary international legal theorising. Contra Kant et al, a democratic 're-constitution' of international law is not to be achieved through a cosmopolitanism which presupposes the evolving benevolence of the state, but rather away from the state-system altogether. In other words, critical approaches to international law have to invert the assumption that international law has a moral core which can be nurtured, and find healthy, non-legal, evaluations of the international arena.

Keywords: resistance, sovereignty

Andrea Ross, Senior Lecturer, School of Law, University of Dundee

Why legislate for sustainable development? An examination into the effectiveness of sustainable development duties in UK and Scottish legislation

Environmental Law

The move towards sustainable development requires public sector change and different mechanisms can be used for implementing such change. Many countries have used legislation to drive their sustainable development agendas forward at a comparatively early stage. In sharp contrast, the UK's approach to the sustainable development agenda has been largely non-legislative. Over the past few years, however, references to sustainable development have become more commonplace in UK statutes mostly by creating duties in regard to sustainable development. This paper critically considers how imposing on public bodies statutory duties in relation to sustainable development can make a difference to the sustainable development agenda. It is based on a detailed study of the 'sustainable development' provisions in Acts of the Scottish and UK Parliaments from 1991 to the present. The paper assesses the clarity, strength, qualifications and enforceability of the duties both inside and outside court. It concludes that sustainable development duties have a place in UK legislation not only for symbolic reasons but also in their own right and as a means of resolving conflict between other duties and objectives. However, while some statutes create the means of monitoring, reviewing and enforcing the duties, many do not. It is argued that if a provision is to be more than simply symbolic, then there needs to be some statutory (often formal) means to monitor and review compliance using administrative, political, legal or other mechanisms. Furthermore, greater clarity and precision are required where the sustainable development duty actually acts to create a framework for balancing conflicting duties and objectives to aid decision-making.

Andrea Ross, Senior Lecturer and Hazel Hughes, Teaching Assistant, School of Law, University of Dundee

Can multi-level governance deliver environmental justice – a study of the implementation of EC environmental law post devolution Scotland

Governance II

Devolution was supposed to provide Scottish solutions to Scottish problems. EC legislation, while intended to create a fair playing field and tackle economic, social and environmental concerns across the Community, is also designed to ensure Member States can implement their obligations in ways best suited to their own systems and needs. This paper explores how Scotland differs from the rest of the UK in its transposition of EC environmental legislation post devolution. It focuses on legislative form, timeliness, scrutiny, distinctiveness and the consequences this has for the constitutional settlement. It draws on the findings of an AHRC funded project which examined the means used by Scotland, England and Wales to implement all

EC legislation enacted under Title XIX (The Environment) between January 1st 2000 and December 31st 2006. The paper observes that generally there is little difference in timing between the transposition of EC environmental legislation in England and Scotland, that the decision to go alone can simply be a political one rather than meeting some specialised Scottish need and this is reflected in proportionally high occurrence of copying out of English regulations by the Scottish Executive. There are however, examples the other extreme, whereby Scotland has exceeded the requirements of Directives and used primary legislation to transpose their obligations. Finally, it concludes while devolution generally makes little difference to the political scrutiny that transposing legislation receives, what it does ensure is that the scrutiny legislation receives in the Scottish Parliament is focused on the particular interests of Scotland.

Keyword: governance

Catherine Russell, Manchester Metropolitan University

Online accessibility: the W3C Guidelines – a smokescreen for bad practice?

Information Technology and Cyberspace Law

The Internet boom has sparked a vast amount of interest in online regulation and the harnessing of commercial potential, but much less attention has been paid to widening access. A so-called 'digital divide' has been recognised; the phenomenon of certain groups being left behind as new technology progresses. Disabled Internet users such as the partially sighted or those with impaired motor skills can enjoy full access to websites as long as they are enabled to support this access. The preliminary legal developments in the area of online accessibility include the landmark Maguire v SOCOG case, and cases brought in the USA under the Rehabilitation Act 1973 and the Americans with Disabilities Act 1990. Section 19 of the Disibility Discrimination Act 1995 states that it is unlawful for a service provider to discriminate against a disabled person in the provision of services, including access to and use of means of communication and access to and use of information services. The Special Educational Needs and Disability Act 2001 which came into force on the 1st September 2002 extended the scope of service providers covered to include educational institutions. It has been accepted that in order to fully comply with the relevant law websites should conform to the standards outlined in the World Wide Web Consortium (W3C) Web Accessibility Initiative's Web Content Accessibility Guidelines which depict three levels of potential compliance. Witt and McDermott1 argue that certain websites in the academic domain claim a level of compliance higher than has actually been achieved. This paper seeks to evaluate the impact of the relevant legislation on the publication of websites both in the academic and commercial sphere. An analysis will be made of the W3C's guidelines in order to determine whether they stand as effective requirements to ensure full compliance with the legislation.

Bernard Ryan, University of Kent

Britain's extraterritorial immigration controls

Immigration Law – The Displacement of Immigration Control

The UK engages in two main forms of extraterritorial immigration control - entry clearance at posts around the world, and 'juxtaposed' controls at points of departure in France and Belgium. This paper will examine both domestic law and international law aspects of these extraterritorial controls. In relation to domestic law, the focus will be on whether the protections which ordinarily govern the decisions and conduct of immigration officials are applicable in an extraterritorial context. In relation to international law, the focus will be whether British is under any duties as regards the admission or non-return of persons subject in extraterritorial situations. In either case, the aim of the examination is to identify gaps in the domestic or international law frameworks which deserve of reform.

Dr. Naomi Salmon, Dept. of Law, University of Wales, Aberystwyth

The European Laboratory: The Construction of Consumer Rights in the EU

European Law II

Using the food market as the reference point, this paper considers the characterisation of the consumer as a rights bearing stakeholder within the EU market arena. The aim here is to consider the extent to which the rhetoric of consumer protection and consumer rights touted by the EU institutions, and in particular, by the European Commission, resonates with the reality of consumers' day to day experiences on the front lines of the market - at the supermarket shelf.

Keywords: governance, justice

Russell Sandberg, Cardiff University

Defining 'Religion': A Socio-Legal Approach

Law and Religion - Society, Religion and Law

A 'sociology of law on religion seeks to develop a multidisciplinary approach to the study of religion by synthesising materials and approaches from the sociology of religion, the sociology of law and law on religion (both state law and internal 'religious' law). This paper seeks to show the value of this approach by applying this innovative approach in relation to the major question of how 'religion' is defined. The paper questions whether a definition is necessary in relation to law and sociological studies of religion. It critically considers the relationship between 'religion and 'belief' both in international and domestic law and in sociological writings. The paper examines the various definitions and conceptions of religion currently found in law and questions how these can be understood sociologically. Definitions elucidated by classical and modern social theorists are also discussed in relation to how their insight can be used to shape the law. Considering both sociological and legal conceptions of religion, the paper will develop propositions concerning the important characteristics of religion and will assess whether a definition of 'religion' can be attempted. Based on this research, the paper will conclude by suggesting an agenda for the new discipline, the 'sociology of law on religion'.

Prakash Shah, Queen Mary, University of London

Punditry on immigration control and lawlessness

Immigration Law - Immigration law as an academic field

This paper explores further a concern earlier articulated by the writer (Shah, P. (2005): 'Introduction'. In: Shah, P. (ed) The challenge of asylum to legal systems London: Cavendish) that state power in the field of immigration control is exercised in more and more lawless ways. This paper explores how, as 'pundits' of immigration law we can better conceptualise, address and harness this dimension in the critique of immigration law. By pointing to particular areas of immigration control, the paper seeks to critique dominant understandings of lawlessness as the failure to be accountable to the state's own criteria of lawful behaviour, and widens the concept to include a concern for the socio-legal dimension of migrancy in the context of our supposedly post-colonial context of ethnic diversity and transnational communities. Centring inquiry upon the social-legal field it is argued helps to foreground migrant agency and allows it to act as a critique of state power.

Stephen Shute, Professor of Criminal Law and Criminal Justice, School of Law, University of Birmingham

Parole and Risk Assessment

Sentencing and Punishment

This paper discusses some of the ways that the parole system in England and Wales has improved over the years and some of the ways that risk assessment might be supported and refined. It expresses doubt that recent moves to reintroduce Parole Board member interviews for offenders serving determinate sentences of imprisonment, while at the same time denying these prisoners a proper parole hearing before the decision-making body, will enhance the reliability of risk assessments made by panels of the Board. The paper argues that a better approach would be to offer personal hearings to all prisoners who request them. The paper also calls for a change in the revocation system for offenders aged 18 to 21 years who have been released from custody on a notice of supervision under section 65 of the Criminal Justice Act 1991.

Dr. Charlotte Smith, University of Reading

Establishment and Human Rights in the English Constitution

Law and Religion - Church and State

This paper addresses the difficulties inherent in attempts to balance the presence of an Established Church and the modern human rights framework within the English constitution. It will argue that Establishment, which demands a place for religion in the public sphere, pulls in an opposing direction to that of the human rights framework, the general tendency of which is to remove religion into the private sphere. All too often, however, little attempt is made to address the potential conflict. The focus of this paper is upon the treatment of the Church of England within the current constitutional reform agenda generally, and more particularly its treatment under the Human Rights Act 1998. It seeks to explore the difficulties created in terms of the treatment of the Church of England by the non-documentary nature of the English constitution; and by the constitutional history and theological diversity of the Church of England. In doing so it will explore how these interact with the developing case law and jurisprudence of the European Court of Human Rights.Through an analysis of the decisions of the Court of Appeal and the House of Lords in the case of *Aston Cantlow* v *Wallbank* ([2001] EWCA Civ 713 and [2003] UKHL 37) this paper explores the consequences of the interaction of a constitutional unwillingness to address the potential conflict between the ideologies of Establishment and the human rights framework; the history and characteristics of the English constitution and the Church of England and its institutions; and the language and frameworks developed under the European Convention on Human Rights and implemented in domestic law by the Human Rights Act 1998.

Michelle Smith, Associate Lecturer, School of Law, Manchester Metropolitan University

The Effects of Solitary Confinement ('segregation' or 'solitary') upon Prisoners

Sentencing and Punishment

This paper examines the effects of solitary confinement on prisoners, drawing on a wide range of sources, which include historical texts, personal accounts and professional research studies. The findings overwhelmingly demonstrate the negative and often devastating effects on the health of inmates subjected to this arguably inhumane practice. Within prisons in England and Wales, 'segregation' is used primarily as a means to control disruptive prisoners and involves subjecting inmates to conditions of solitary confinement for approximately 23 hours per day with minimal

social contact and little or no access to collective activities. The practice operates within a complicated system of provisions, rules and regulations and in extreme cases, the period of segregation can be extended indefinitely. It will be argued that the rehabilitative ideal, which underpinned the initial introduction of the practice into Western penal policy has been replaced by an essentially punitive aim, effectively resulting in a 'punishment within a punishment'. The justification for and continued use of conditions of solitary confinement within prisons falls within the wider discussion of the conditions in which inmates are held and the issue of prisoners' rights as regards those conditions. Academic research into the development of prison policy advocates a human rights approach and recent developments towards a prisoners' rights jurisprudence have undoubtedly emerged through the application of international human rights law. In relation to the practice of segregation however, the case of Keenan v United Kingdom demonstrates the unacceptable time scale involved in successful litigation being translated into policy changes affecting the everyday lives of prisoners subjected to the regime.

Keywords: Punishment, Segregation, Prisoners' Rights

Bal Sokhi-Bulley, PhD Candidate, University of Nottingham School of Law

Governance or Government? Human Rights and the European Union

Governance II

The last five years have witnessed a multiplication of discourse on 'governance' in the context of the European Union. One aspect of the trend has been the so-called 'agencification' of the EU, whereby a number of regulatory agencies have been set up with a view to bettering particular policy areas. This paper examines the concept of governance in relation to the nascent Fundamental Rights Agency (FRA) through a Foucauldian lens. It suggests that the semantic separation between 'governance' and 'government' made in the Commission's White Paper on EU Governance and subsequent literature masks how this change in discourse has come about. Examining how reveals that the literal, Foucauldian meaning of government is very much what is at play in the human rights discourse of the Union, i.e. government as a question of power – government not in reference only 'to political structures … rather … the government of children, of souls, of communities'. As such, it is not governance but governmentality - which refers to a genealogical development of power relations - that describes the development of the Union's approach to human rights. What governmentality reveals is that human rights constitute representational practices; the power of 'government' has created a 'whole complex of knowledges' – the way in which we 'come to know' the EU as a moral advocator of human rights. The language of government/ance, of which the FRA is a recent and integral part, has allowed the EU to construct, or represent, an identity on the European and global stage (European governance/global governance) as a world power capable of exercising moral leadership through promotion of a 'credible human rights policy'. The implications of governance for EU credibility are explored by way of conclusion.

Keyword: governance

Maki Tanaka, Doctoral Student, Oxford University Centre for Socio-Legal Studies

Productive Networks of Power in Global Governance: The Construction of Agents and Actors in the Drafting Process for the Disability Rights Convention

Governance III

Governmentality research offers a useful starting point to de-naturalize the distinction between state and non-state actors and expose subtle power relations in discursive processes of global governance. Nevertheless, it has certain self-imposed limitations. Characteristically, the literature on governmentality refrains from identifying agents and actors due to the particular

constructionist approach Foucault and his faithful followers take. They distinguish governmentality research from rationalist empirical sociology that takes agents and actors as given and analyzes the consequences of their intentional actions. In contrast, governmentality research is interested in discursive practices through which actors are constructed and unintentionally become complicit in the pervasive operation of power. They do recognize the existence of human agency. Yet, their approach effectively reduces humans to the docile, faceless targets and instruments of government. Some researchers in international relations and international political economy replicate the dehumanized society of governmentality in a global scale. Michael Dillon, for example, regards the individual as the 'material' of networks and the 'conduit' of power at the intersection of biopolitics and security in global governance. Others take governmentality in spirit but follow rationalist social sciences in practice when they reinstate actors, such as international organizations, NGOs, and business, simply as sources of discursive practices in their description of globalization processes. This conference paper seeks to take a third way, reclaiming humans in global governmentality without collapsing into rationalist sociological approaches to global governance. For this purpose, I will begin with seminal works of Nikolas Rose and Peter Miller on governmentality and liberalism. Unlike other masterminds of governmentality, Rose and Miller portray humans as active agents in the process of government in advanced liberal democracies by building on Bruno Latour's constructionist sociology on the association of power. Similar to Foucault, Latour conceives of power 'as a consequence and not as a cause of collective action.' An individual impetus for collective action does not matter unless people buy into it. It is crucial that the impetus is spread through chains of actors, who respectively act upon it and, in so doing, modify it for their own purposes. Rose and Miller elaborate on the associational concept of power in describing the involvement of self-responsible actors in the practices of governing at a distance. Chains of actors enrolled to a governmental program translate knowledge accumulated at loci of calculation into discursive practices of government at local sites. The present conference paper seeks to combine governmentality research with constructionist empirical socio-legal research that dissects the process of constituting professional networks for global governance through the exchange and accumulation of symbolic capital. Then, it applies the integrated analytical approach to the case study of nongovernmental agents in the drafting of the Convention on the Rights of People with Disabilities.

Keywords: governance, networks

Dania Thomas. Lecturer, School of Law, Keele

‘Organisational Hybrids’: Native title corporations, gender and the limits of corporate contractualism

Governance V

This paper revisits the unsuccessful gender discrimination claims made in the Australian case Klimm and Ahmatt v Warringu Aboriginal and Torres Strait Islander Corporation, (1992) to reveal the limitations of the dominant theory of the firm in the law and economics literature: corporate contractualism. Cases like Klimm involve native title corporations (organisational hybrids), formed to promote the values, culture and identity of particular groupings within indigenous society. The claims analysed in Klimm arose from a dispute in which the general meeting of a native title corporation expelled two of its female members on the ground that they ‘[did not] have the service’s best interests at heart’ and because they spent ‘far too much time arguing and stirring up trouble in the community’. The women were the key organisers of a shelter providing accommodation and support for Aboriginal women subjected to domestic violence. Their expulsion was followed by the termination of their contract of employment with the corporation. For corporate contractualists, the gender discrimination claims made in cases like Klimm are suppressed as these are assumed to arise in a context in which no meaningful distinction can be made between the corporation as a contractual nexus and the social grouping

that comprises the corporation's membership. This case study reveals the limits of corporate contractualism premised on the view that corporations can be described entirely as 'disembedded' sets of market relations. This paper concludes by showing that all corporate obligations are not entirely contractual and that cases like Klimm reveal that social groups can be sources of other equally legitimate and important sources of obligations in market relations.

Keywords: governance, participation

Linda Tucker, Kingsford Legal Centre, Faculty of Law, University of New South Wales

Messing with their minds? When the law comes to life in clinical legal education

Legal Education

Clinical legal studies provide students with a compelling example of the interaction of legal needs with social, economic and cultural considerations. My experiences at Kingsford Legal Centre confirm the description of educative benefits of clinical legal studies as including the "opportunity to sensitise law students to socio-economic contexts of law with which they are unlikely to be familiar". While a socio-economic or political context hardly distinguishes our work from any other legal education and practice, it is clear that such overt identification exposes our work to particular scrutiny. This may be from students who are critical of our political standpoint, from other educators or from funding providers. This paper argues that, while immersion in the socio-economic context to the law, inherent in the community legal centre experience acts as a powerful educational tool and should withstand such scrutiny, we should be alive to the political, social, cultural and ideological challenges that arise - for both students and ourselves - when the law comes to life. This may be in the shape of the unsympathetic or downright unlikeable client, the unhelpful legal process, the unpopular law reform cause. The paper will first describe what we do in our clinic: taking instructions on advice nights and from ongoing clients; working on specific client files; undertaking research and compiling materials as part of policy work and dealing with the constant stream of callers seeking legal or other assistance. It will then discuss examples of the challenges and confrontations that arise from our day to day work and argue that, however unwelcome they may seem at the time, such challenges help sharpen our approach to educating the students as well as add invaluable depth and vitality to their legal education.

Sally Varnham, Lecturer, New Zealand International Campus

Keeping Them Connected: Restorative justice in Schools in Australia and New Zealand - lessons from the criminal justice system

Justice I

The traditional response of schools to school discipline is based on the retributive approach which has long characterized the criminal justice system. Research now indicates that this approach often fails the victim, the offender and the community. In the context of criminal offending, attention is increasingly being paid to the application of restorative practices. In New Zealand the restorative justice model has been operating in the area of youth offending since 1989. Restorative practices move the focus from punishing the offender to requiring them to take responsibility for their actions. Because of this focus they are not seen as a 'soft option', and there are many indications of their success. A strong argument for restorative justice comes from the words of Judge Fred McElrea, New Zealand District Court, a strong proponent of restorative justice(1997): 'By taking the culprit out of the neighbourhood or school community (by imprisonment, or expulsion/suspension) we think we have removed the problem. In fact it has usually been simply relocated in time and place — and in the process, it is often exacerbated.' Many schools are now applying the restorative justice model to school discipline. A variety of different practices are being employed to keep young people in school and

connected with the education process, while still not compromising school safety. This paper explores the use, in Australian and New Zealand schools, of restorative practices such as school community conferencing and peer mediation as alternatives to punishment-based school discipline.

Keyword: justice

Nicola White, Attorney-at-Law (New York)

Religious Rights & Abuses at Guantanamo Bay under International Law

Law and Religion – International Human Rights Perspectives

As the 'War Against Terrorism' rages on, Guantanamo Bay remains a 'legal black hole', where the detainees' fundamental human rights are continually stripped away and superseded by unilateral orders by the United States Executive. This paper discusses the role of religion at Guantanamo Bay through the lens of international law. This paper will examine the protected religious rights of the detainees at Guantanamo Bay emanating from the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), the Universal Declaration of Human Rights (1948), the International Covenant for Civil and Political Rights (1966) and the Geneva Conventions. The paper will outline incidents of alleged religious abuse by the United States Forces at Guantanmo Bay, including religiously motivated sexual abuse, and will examine whether such religious abuse can be categorized as a form of 'torture' and 'humiliating and degrading treatment', as defined under international law. Additionally, it is a well established principle of international human rights law that countries may not discriminate and deny individual rights based on ones religion. Against this principle, this paper will discuss whether the detainees at Guantanmo Bay are being discriminated against based on their religious identities and as a direct result; they are denied fundamental rights, including the right to a fair trial under international law. The seminal case of *Hamdan v Rumsfeld* will also be discussed.

Dr. Glenys Williams, Department of Law, University of Wales Aberystwyth

Refusing life-sustaining treatment and suicide: intention and identity

Medical Law and Ethics

It can be plausibly argued that a person who refuses life-sustaining treatment in the sure knowledge that she/he will die, is committing suicide. Looking at a number of "definitions" of suicide, show that in order to have "committed" suicide (and this concept of "committing" is in itself problematic) three requirements should be satisfied: that there should be a positive act (as opposed to an omission); that the suicidee must have caused her own death and thirdly, that the death was intended. Of the three, intention seems to be the key issue and yet the courts' analysis of intention is inconsistent and contradictory. In some cases, judges have simply concluded that refusal of treatment is not suicide by ignoring the patient's intention and assuming it is not suicidal. In other cases, the courts will look to the patient's reasons (i.e. motives) for choosing death. Alternatively, they have "demanded an unattainable level of certainty and understanding, or have held that knowledge of consequences has entitled them to intervene to prevent suicide, despite the patient's assertions that (s)he is not committing suicide." (Williams: 2006). This has arisen, to some extent, because of over reliance on traditional, criminal definitions of suicide and the elevation of the relevance of intention in end-of-life situations. Moreover, an analysis of UK and US cases involving three categories of persons (terminally ill patients, Jehovah's Witnesses and prisoners), demonstrates that the identity of the patient/suicidee also contributes towards this judicial inconsistency. While the policy reasons for the courts' denial of interpreting the refusal of life-sustaining treatment as suicide are evident,

there needs to be a more honest approach which acknowledges the relevance of motive, competence and situational factors.

Dr. Glenys Williams, University of Wales, Aberystwyth

Omissions, duty of care and section 5 Domestic Violence, Crime and Victims Act 2004

Becoming Legal I

Except for some statutory offences sometimes called 'failing' offences, there is no general liability for omissions in UK law. In fact, such liability only exists in the presence of a duty to act. The absence of a duty thus prevents endless liability for the consequences of behaviour. Some common law duties exist, for example, as a result of the relationship between the parties or where responsibility for another has been assumed, and some duties are imposed by statute. While most of these are well-established, it will be argued that recent case law and legislation have extended the concept of 'duty' to include a wider range of persons who would previously have been excluded from liability. For example s 5 Domestic Violence Crime and Victims Act 2004 creates an offence of causing or allowing the death of a vulnerable adult (i.e. a person can be liable for failing to take steps to protect the victim) where the offender was a member of the same household as the victim and had frequent contact with him. At first glance, the parameters of the offence seem clear, until it is seen that the guilty party does not have to live in the house, does not have to be present at the time of death, and need have no formal relationship with the victim. Similarly, in case law, the courts have shown uncertainty as to the basis of potential omissions liability by adopting conflicting formulae (continuing act; a prior dangerous act and foreseeable risk of injury) and have demonstrated – certainly in the 'drugs' cases (such as Khan and Sinclair) - that the parameters of any duty of care are unclear. Moreover, in the more recent case of Reeves v Commissioner of Police, they have extended the duty of police and prison authorities to preventing a prisoner in their custody from committing suicide (even though it could be – and was - argued that the deceased's voluntary act was a novus actus interveniens which broke the chain of causation).

Keyword: becoming legal

Carol Withey, The University of Greenwich

Female rape, an ongoing concern: strategies for improving reporting and conviction levels

Sexual Offences and Offending

This purpose of this paper is to explain and report on a project that I have instigated in order to begin to evaluate a conclusion I reached in 'Female rape, an ongoing concern: strategies for improving reporting and conviction levels', published in The Journal of Criminal Law in February 2007. The article examined the reasons behind the low rate of reported female rape and rape convictions The article drew attention to the fact that despite substantive and evidential changes in the law, despite practical measures taken to encourage the reporting rape, and despite measures taken to aid the prosecution process, reporting and conviction rates remain unacceptably low. My conclusion that rape myths continue to permeate society and continue to impact on these rates was unsurprising. With regard to tackling this problem I suggested that it is crucial to educate the younger generation regarding these myths, especially given the fact that Britain has such a high rate of sexual activity amongst young people. In addition, I feel it necessary to provide young people with legal information regarding sexual offences in order to highlight the serious side of possible sexual activity. At present sex education in schools is concerned with the biological and terminological nature of sexual activity, as opposed to the sociological or legal aspects. With this is mind I have instigated the 'Schools Project' at

Greenwich University. I am mentoring a group of students who have prepared two one hour sessions which they will deliver to children in a local school within the citizenship hour. The first week concentrates on rape, the second on other sexual offences. The sessions are designed to challenge misconceptions regarding sexual activity and provide crucial legal knowledge. Pupils will be given a questionnaire to return at a later stage, which will attempt to assess the impact the session had, particularly whether it would effect decisions the pupils make in the future regarding their own sexual activity. This is a pilot study designed to test the practicalities of delivering similar sessions in the future with a view to researching this area further.

Rebecca Wong and Joseph Savirimuthu

All or nothing: this is the question? The application of Art. 3(2) Data Protection Directive 95/46/EC to the internet

Information Technology and Cyberspace Law

The Data Protection Directive 95/46/EC (hereinafter the "Directive") was passed in 1995 to harmonise the national data protection laws within the European Community with the aim of protecting the fundamental rights and freedoms of individuals including their privacy as set out under Art. 1 of the Data Protection Directive. The rules governing the processing of personal data are deemed to be inapplicable in the two instances outlined by Art.3(2). Processing of personal data taking place as part of activities falling outside of Community law are excluded from the DPD. The Directive is also deemed to be inapplicable if the processing of personal data is undertaken by a natural person in the course of a purely personal or household activity. It is the second part of Art. 3(2) which is examined in more detail. The ruling by the European Court of Justice in Lindqvist provides us with a fresh opportunity to re-examine whether the policy justifications for the exclusion under Art 3(2) continue to remain relevant in the light of widespread use of new technologies such as blogs, podcasts and web pages for processing and distributing information. Greater clarity regarding the implication of new communication technologies for DPD policy is necessary if the laws on data protection are to evolve in a coherent and principled manner.

Keywords: Data Protection Directive 95/46/EC; internet, private purposes, blogs, podcasts

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A Comparative Analysis of Corporate Financial Governance in the UK and US

Governance IV

Corporate financial governance is to a large extent shaped by the nature of financial reporting regulations in the UK and the US. Though financial regulations in both jurisdictions emanate from a mix of statutes and best practices, the UK approach is driven largely by a principles-based approach in contrast to the rules-based US approach. This paper will examine and contrast the legal implications arising from their respective different approach through relevant case analysis. Insights from this work are expected to demonstrate how and why financial reporting regulations can contribute to an enhanced level of financial governance for the safeguard of investors' interest and capital market integrity.

Keywords: governance, risk

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